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Efforts by Courts or State Officials to Bar Members of Congress from Running for Re-Election or Being Seated Are Unconstitutional

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KEY TAKEAWAYS

It is unconstitutional to disqualify, due to January 6, Members of Congress running for reelection from state ballots under Section 3 of the 14th Amendment.

The disqualification clause of Section 3 of the 14th Amendment was removed by two-thirds vote of Congress, as specified in Section 3 itself.

Objections by Members to certify the electoral votes of certain states were made under the Electoral Count Act and are also not grounds for disqualification.

Neither courts, state election officials, nor Congress have the constitutional authority to disqualify Members of Congress from state ballots (or to prevent them from serving in Congress if they win re-election) based on a claim that the candidates engaged in an "insurrection" on January 6, 2021.

Not only has no individual—and no Member of Congress—been charged with engaging in an insurrection by federal prosecutors, but the Amnesty Act of 1872, as well as another law passed by Congress in 1898, effectively eliminated the bar in Section 3 of the Fourteenth Amendment on "insurrectionists" serving in Congress. That amendment cannot be used to disqualify any current or future Members of Congress from office. Furthermore, neither Congress nor state authorities can add a qualification—such as requiring that a candidate not have participated in

the events of January 6—to the qualifications contained in the Constitution to be a Member of Congress.

Finally, objections filed or supported by Members to the certification of the electoral votes of certain states were made under the Electoral Count Act and are also not grounds for disqualification.

The Issue

Marc Elias is a prominent lawyer for many Democratic candidates and the former general counsel of the 2016 Hillary Clinton presidential campaign. He has threatened to file litigation in an attempt to use the Fourteenth Amendment to disqualify "members of Congress who engaged in insurrection or rebellion against the United States" on January 6 when what started out as a peaceful protest in Washington regarding the 2020 election results turned into a riot at the Capitol.[1]

North Carolina. Several voters in North Carolina have filed a challenge with the North Carolina State Board of Elections against the candidacy of Representative Madison Cawthorn (R), seeking to have him disqualified from the ballot. Cawthorn is running for re-election to the House of Representatives in the 13th Congressional District of North Carolina. The challenge claims that Cawthorn engaged in an insurrection on January 6 and therefore does not meet the constitutional qualifications to be a Member of Congress under Section 3 of the Fourteenth Amendment and a North Carolina statute.[2]

Wisconsin. A lawsuit has been filed in Wisconsin in federal court against Senator Ron Johnson (R) and Representatives Tom Tiffany (R) and Scott Fitzgerald (R), claiming they "are no longer qualified" to seek re-election under Section 3 of the Fourteenth Amendment.[3] In addition to claiming they participated in an "insurrection" by supporting the protesters on January 6, the lawsuit claims that the legislators engaged in insurrection for supporting an objection that was filed in the joint session of Congress against the counting of Arizona's electoral votes.

Georgia. The same type of challenge that was filed in North Carolina has been filed in Georgia with the Secretary of State. It claims that Representative Marjorie Taylor Green (R) is ineligible to run for re-election under Section 3 because she supposedly "voluntarily aided and engaged in an insurrection to obstruct the peaceful transfer of presidential power" on January 6.[4]

It should be noted that not a single protestor arrested for criminal trespassing, assaulting police officers, and other actions at the Capitol on

January 6, 2021, has been charged under the insurrection and rebellion statute, 18 U.S.C. § 2383.[5] That provision of federal law states:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

Additionally, not a single individual who was a Member of Congress on January 6 has been arrested, charged, or indicted for any actions taken on that day.

Representative Cawthorn filed a lawsuit on January 31, 2022, in the Eastern District of North Carolina, requesting a preliminary injunction against the challenge and the North Carolina State Board of Elections.[6] On March 4, a federal judge granted the injunction, preventing any further effort by the board to disqualify Cawthorn from the ballot. The court concluded that the state board does not have the authority to determine whether Representative Cawthorn violated Section 3 of the Fourteenth Amendment because Congress removed the disqualifications contained in Section 3 when it passed the Amnesty Act of 1872 and the subsequent Amnesty Act of 1898 by the requisite two-thirds vote as also outlined in Section 3 ("But Congress may by a vote of two-thirds of each House, remove such disability.").[7]

Relevant Constitutional and Statutory Provisions

Fourteenth Amendment. The Fourteenth Amendment was ratified on July 9, 1868, three years after the end of the Civil War or the "War of Rebellion," as it is sometimes referred.[8] Section 3 of the amendment was apparently spurred by the fact that when the 39th Congress convened in December 1865, many Republicans were "infuriated" that some of the elected Senators and Representatives "ready to take their seats" included "unrepentant rebels" such as "the Confederate Vice President, two Confederate Senators, four Confederate Congressmen, and several military officers of the Confederate Army."[9]

Section 3 provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as

> a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. **But Congress may by a vote of two-thirds of each House, remove such a disability.**[10]

The last sentence in Section 3 giving Congress the authority to "remove" the disability imposed by the amendment is unique. While seven amendments have language giving Congress the "power to enforce" each amendment "by appropriate legislation," only the Fourteenth Amendment has language giving Congress the power to specifically void the provisions of one section of the amendment.[11]

As Professor Paul Moreno of Hillsdale College, a constitutional scholar, says, the "disqualification of former rebels for federal and state office was the most controversial of the sections of the Fourteenth Amendment."[12] But those same rebels had "reneged on the oath" they had taken to support the United States and the Constitution; moreover, many of them "led the resistance to the passage of Reconstruction legislation and had supported the imposition of the onerous Black Code on the freedmen."[13]

The original version of the Fourteenth Amendment that passed the House of Representatives would have disqualified all persons who had "voluntarily adhered to the late insurrection, giving it aid and comfort" from *voting* until 1870, but that language was changed by the Senate to disqualify prior government officials from holding office and eliminated the prohibition on voting, as well as the time limit. The House then approved the amended Senate version with the two-thirds majority vote necessary for a constitutional amendment under Article V.[14]

Amnesty Acts of 1872 and 1898. Four years after the Fourteenth Amendment's ratification, Congress exercised its power under Section 3 and passed the Amnesty Act of 1872 with the required two-thirds vote in each House.[15] The Act provided

> [t]hat all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval services of the United States, heads of departments, and foreign ministers of the United States.[16]

There was no language in the Amnesty Act specifically referring to the Civil War or the War of Rebellion that would have limited the removal of the disqualifications in Section 3 only to individuals who were part of that insurrection and preserved those disqualifications for future potential cases. Thus, with the exception of Senators and Representatives who were in Congress between 1859 and 1863 (the 36th and 37th Congresses) and government officials who had been in the executive branch and the military of the Union before joining the Confederacy, all disqualifications contained in Section 3 were permanently removed from the amendment.

In 1898, even these remaining exceptions were removed "as a gesture of national unity during the Spanish American War" when Congress passed another amnesty act, again with the two-thirds majority required in both Houses of Congress.[17] That law stated that "the disability imposed by section 3 of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed."[18] There was no language preserving any of the disqualifications for future cases.

This made it possible for former Confederate General Joseph Wheeler, an 1859 West Point graduate who commanded the cavalry of the Confederate Army in the Chickamauga, Chattanooga, and Atlanta campaigns, to be given command of a U.S. cavalry detachment that fought in the battles of Las Guasimas and San Juan Hill in Cuba during the Spanish–American War.[19]

In its response to Representative Cawthorn's motion for a preliminary injunction, the North Carolina State Board of Elections asserted that the Amnesty Act of 1872 was only a "one-time waiver of Section 3" and that Congress could not with a "mere statute...repeal the U.S. Constitution."[20] The board cited as authority a report by the Congressional Research Service (CRS) and a House of Representatives committee report on its refusal in 1919 to seat a candidate elected in Wisconsin. The federal court found the board's assertion "neither binding nor persuasive."[21]

The 2015 CRS report claims that the amnesty acts passed by Congress provided an amnesty from Section 3 but only "towards those who, up until the time of the adoption of that legislation, may have been disqualified for public office."[22] But the plain language of the Amnesty Act of 1872 has no such limitation and contains no language saying it only applies to individuals who engaged in insurrection or rebellion *prior* to the passage of the Act. Instead, it says that the "political disabilities" in Section 3 of the Fourth Amendment "are hereby removed from all persons whomsoever," with certain exceptions, none of which apply anymore due to the passage of time and their removal in a subsequent act of Congress.[23]

The Wisconsin case cited by the state board involved Victor Berger, a socialist and pacifist who had previously served in Congress and was re-elected in 1918. He was the editor of the *Milwaukee Leader* and worked actively to promote resistance to the draft and prevent the United States from entering World War I through editorials, pamphlets, and his work with the Socialist Party and its platform.

Berger (and several other Socialist Party members) was prosecuted under the Espionage Act for these activities and found guilty in the midst of the "Red Scare" and "nationalist fervor of World War I,"[24] which included individuals like former President Teddy Roosevelt claiming Berger was guilty of "treason" for his public opposition to the war.[25] The U.S. Supreme Court overturned his conviction in 1921 due to the bias of the trial judge.[26]

In 1919, the House of Representatives voted to prevent Berger from being seated for seeking to "hinder and embarrass the government in the prosecution of the war" in supposed violation of the insurrection language of Section 3. The committee that investigated the challenge to Berger claimed that the amnesty laws passed by Congress were ineffective to void Section 3. Congress, said the committee, "has no power whatever to repeal a provision of the Constitution by mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself."[27]

Under normal circumstances, the committee would have been correct. Article V lays out the process for amending the Constitution, which requires that an amendment be proposed either by Congress with the support of two-thirds of the Members of both the House of Representatives and the Senate or by a constitutional convention called by two-thirds of the state legislatures, followed by subsequent ratification by three-quarters of the states. However, this assertion by the committee (and the North Carolina State Board of Elections) ignores the fact that the Fourteenth Amendment itself specifically provided Congress with the ability to remove the disability contained in Section 3, thus providing an alternative method from Article V for essentially amending a part of that specific amendment.

That method, albeit unusual, was also part of the amendment that was ratified by the requisite number of states, and neither the state board nor the House committee in 1919 has claimed, nor could they claim, that the Fourteenth Amendment was not properly proposed and ratified in accordance with Article V. Therefore, their claims have no merit.[28]

There seems little room for dispute about the effect of the Amnesty Act of 1872 and its permanent elimination of the disqualifications of Section 3 of the Fourteenth Amendment. When it became law, the Ulysses S. Grant Administration dismissed indictments it had brought to enforce Section 3

under the First Ku Klux Klan Act (the Enforcement Act of 1870) against the state attorney general and three state supreme court justices in Tennessee who were former Confederate officials.[29] The Amnesty Act is not ambiguous; its plain language removes "all political disabilities imposed" by Section 3 with only certain exceptions.

As Professor Moreno points out, "[d]espite being written in a particular historical context," the Amnesty Act is still valid law and even today "would apply in the case of government officers who may participate in insurrection or rebellion."[30] Similarly, congressional action in 1898 removed the remaining disqualifications in Section 3, so there is no ability by any judge or state official to use Section 3 against any sitting or future Member of Congress. Congress, as contemplated by Section 3 itself, removed the disability.

As the federal court in North Carolina concluded:

> The plain language of these [amnesty] statutes, first removing the disability from "all persons whomsoever" *except* those listed in the statute and, second, removing the disability from the excepted persons, demonstrates that the disability set forth in Section 3 can apply to no current member of Congress.[31]

The Qualifications Clauses. There are several other constitutional provisions relevant to efforts by state officials or courts to disqualify any elected Members of Congress from serving.

Article I lists the qualifications required of Representatives and Senators in the U.S. Congress (the "Qualifications Clauses"). To be a Representative, you must be at least 25 years old; have been a citizen of the U.S. for at least seven years; and be an "Inhabitant" of the state in which you are running for election "when elected."[32] To be a Senator, you must be at least 30 years old; have been a U.S. citizen for at least nine years; and be an "Inhabitant" of the state in which you are running for election "when elected."[33]

Supreme Court precedent provides that no state can impose any additional qualifications on any candidate running for election to the U.S. Senate or House of Representatives above and beyond those in the Qualifications Clauses of the Constitution, such as candidates being forced to prove their innocence regarding any claims that they were involved in the events of January 6. The Supreme Court made this clear in 1995 in *U.S. Term Limits, Inc. v. Thornton*.[34]

Thornton involved an amendment to the Arkansas state constitution that prohibited "the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate."[35]

The Arkansas state supreme court held that the amendment violated the Qualifications Clauses of Article I of the U.S. Constitution, rejecting the claim that it was just a "ballot access" measure,[36] and the U.S. Supreme Court affirmed that decision.

The Supreme Court concluded that there were two issues involved in the Arkansas amendment: (1) "whether the Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution"; and (2) "if the Constitution does so forbid, whether the fact that [the Arkansas amendment] is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance."[37]

The Court relied in part on an earlier decision, *Powell v. McCormack*,[38] in which the Court held that the power granted to each House of Congress under Article I, Section 5 to judge the "Qualifications of its own Members"[39] does not include the power to impose additional qualifications "other than those set forth in the text of the Constitution."[40]

In *Powell*, the House of Representatives voted to exclude and not seat Adam Clayton Powell, Jr, who had been re-elected in 1966 in the 18th Congressional District of New York, based on claims of financial improprieties when he was chairman of the Committee on Education and Labor.[41] The Court focused on the difference, which it deemed to be critically important, between exclusion (refusing to seat an elected candidate) and expulsion (expelling a sitting Member of Congress).[42]

With respect to the former, the Court concluded that Congress could not refuse to seat a candidate like Powell by imposing additional qualifications beyond those contained in Article 1. The Court stated that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution."[43]

On the other hand, once a Member has been seated, the Constitution provides that each House may "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[44] The Court noted, however, that on "several occasions the House has debated whether a member can be expelled for actions taken during a prior Congress," and cited prior instances in which the House concluded that it "will not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense."[45]

In concluding that—just like Congress—states also cannot impose additional qualifications for a Member of Congress, the Court in *Thornton* listed a long line of federal and state court decisions holding that states could not impose additional qualifications such as a direct residency requirement, loyalty oaths, or a restriction on convicted felons serving—in addition to term limits.[46]

The Tenth Amendment, which Arkansas argued gave it the right to impose terms limits, is also of no avail. That amendment states that the "powers not delegated to" the federal government by the Constitution, "nor prohibited by it to the States, are reserved to the States, respectively, or to the people."[47] But "[t]he power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States," said the Court.[48] The justices cited the renowned Justice Joseph Story, who said, "No state can say, that it has reserved, what it never possessed."[49] And the states never possessed the right to set the "qualifications for service in Congress" since "no such right existed before the Constitution was ratified."[50]

Section 3 of the Fourteenth Amendment is briefly mentioned in a footnote of the *Thornton* decision regarding the fact that "it has been argued" that this provision, as well as several others in the Constitution, are "not less a 'qualification' within the meaning of Art. I." But the Court said it had "no need to resolve" the question of whether this additional provision is (or was) a "qualification" since "those additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution." Those who would point to this footnote as showing that the disqualifications of Section 3 are still in effect are wrong since there is no discussion whatsoever by the Court of the amnesty acts that removed the disqualifications and no claim by the Court that these provisions are still applicable.[51]

The Elections Clause. Arkansas argued that even if the Constitution prevents a state from adding additional qualifications, simply preventing a candidate from being on the ballot "is a permissible exercise of state power to regulate the 'Times, Places and Manner of holding Elections'" as provided in Article I of the Constitution.[52] But the Supreme Court rejected that argument, too, a holding directly relevant to the challenges filed against Representatives Cawthorn and Green to prevent his name from being listed on the ballot in the next election.

The Court concluded that dressing up term limits as a ballot access measure was "an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly."[53] Arkansas claimed that it was merely regulating the "Manner" of elections for Congress under Article I, section 4, cl. 1 (the Elections Clause). This provision states:

> The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

The Court disagreed. It pointed out that a "necessary consequence" of Arkansas's argument would be that "Congress itself would have the power to 'make or alter' a measure such as [the Arkansas term limits amendment]."[54] The Court said it was "unfathomable" that "the Framers would have approved of such a result" since it would mean that Congress would have "the authority to set its own qualifications." That "would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance."[55] The Court concluded:

> Petitioners would have us believe, however, that even as the Framers carefully circumscribed congressional power to set qualifications, they intended to allow Congress [and the states] to achieve the same result by simply formulating the regulation as a ballot access restriction under the Election Clause. We refuse to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental safeguard.[56]

The Court noted that "the Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office."[57] James Madison himself made this point during the discussion of the Elections Clause at the Constitutional Convention, when he said that the Elections Clause was intended to cover "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district."[58]

Alexander Hamilton made a similar point in *The Federalist* No. 60 in which he "expressly distinguished the broad power to set qualifications from the limited authority under the Elections Clause."[59] Citing Hamilton, the Court said, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[60]

During the ratification debates over the Constitution, supporters made similar observations, such as "[t]he power over the manner only enable them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way."[61] This is a particularly relevant statement given that it was made at the North Carolina ratification convention, the same state whose board of elections is reviewing the challenge to Representative Cawthorn's name being on the ballot for the next congressional election based on an unproven, inflammatory claim that he took part in an

"insurrection." That is clearly a qualification issue that is being disingenuously reframed as a procedural issue to try to fit it within the scope of the Elections Clause.

That deceptive reframing is also obvious from the numerous prior court decisions on what constitute procedural regulations within the Election Clause. In 1932, the Supreme Court outlined that the authority of the states under the Elections Clause is to provide a "complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of votes, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[62]

More than 90 years later, the Supreme Court in *Thornton* noted the many decisions that it has issued that show the difference between procedural regulations that are within the power of the states and attempts to change the qualifications needed to be a Member of Congress, which are not. The provisions that were found constitutional, said the Court, were those that "regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position."[63]

Any attempts by officials or courts to refuse to allow a candidate's name to be listed on the ballot because of his or her alleged participation in "insurrection" clearly fail this test. This is a substantive, qualitative issue, not a procedural one. In any event, the applicable North Carolina statute under which a challenge has been filed to Cawthorn's candidacy specifically states that such challenges are to be based on the challenger claiming that the candidate does not meet the "qualifications" for the office. Thus, the statute clearly cannot be used to apply an additional qualification to anyone running for the U.S. Senate or House of Representatives beyond those contained in Article I.

Electoral Count Act of 1887

The objection that was filed to the counting of Arizona's (and Pennsylvania's) electoral votes and the subsequent votes on the objections in each house of Congress were done in full compliance with, and under the process outlined in, the Electoral Count Act of 1887.[64] The Electoral Count Act provides that an objection can be filed jointly by a Senator and a Representative "in writing, and shall state clearly and concisely, and without argument, the ground thereof." Upon such an objection being made, the joint session for the counting of electoral votes is temporarily suspended while the Senate

and House of Representatives debate and vote on the objection. If the objection is voted down, the counting resumes, which is exactly what happened on January 6, 2021.[65]

The law specifically gives Congress the ability to "reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified."[66] It seems obvious that when Senator Johnson and Representatives Oshkosh and Tiffany, along with other Members of Congress, acted in accordance with a federal statute to raise objections to the electoral votes from certain states, they cannot be accused of engaging in "insurrection."

Such a meritless legal claim raises a serious question under Rule 11 of the Federal Rules of Civil Procedure of whether the lawyers who filed the lawsuit in Wisconsin should be sanctioned for filing a claim that is not "warranted by existing law or by a nonfrivolous argument"—and may have been filed for an "improper purpose, such as to harass."[67]

Conclusion

The effort to have Members of Congress who are running for re-election barred from having their names on ballots or not being seated if they win their election based on claims that they participated in an "insurrection" on January 6, 2021, is unconstitutional. Neither courts, state election officials, nor Congress have the constitutional authority to disqualify Members of Congress from state ballots or to prevent them from serving in Congress if they win re-election based on the disqualification conditions of Section 3 of the Fourteenth Amendment. Those disqualifications were permanently eliminated by Congress in amnesty acts that are still in force today.

Supreme Court precedent makes clear that such an additional qualification to be a Member of Congress—no participation in the events of January 6—cannot be imposed by either Congress or the states. And it cannot be disguised as a mere procedural rule to bring it within the Elections Clause of the Constitution.

While each House could attempt to expel an elected Member who has been seated based on claims that the Member participated in an insurrection, it could only do so with a two-thirds vote of approval, which seems politically unlikely. Moreover, such a proceeding would have to disregard prior precedent holding that Members should not be punished for actions taken during a prior congressional session.

Finally, no Member of Congress who was acting in accordance with the Electoral Count Act when he or she supported, filed, or voted on an

objection to the count of electoral votes from a particular state can credibly be accused of having engaged in an "insurrection."

All of these efforts and threats are a desperate attempt to gain political advantage through patently unconstitutional actions. They are a waste of time and resources and should be dismissed as such.

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Endnotes

1. Ameer Benno, *2022 Desperation: Dem Lawyer Marc Elias Threatens Lawsuits to Disqualify GOP House Members,* LEGAL INSURRECTION (Jan. 5, 2022).
2. *In re* Challenge to the Constitutional Qualifications of Rep. Madison Cawthorn, Before the North Carolina Board of Elections, "Notice of Candidacy Challenge." The North Carolina statute is N.C. GEN. STAT. §§ 163–127.2(b). It allows a challenge to be filed against a candidate "based on a reasonable suspicion" that the candidate "does not meet the constitutional or statutory qualifications for the office, including residency."
3. Scott Bauer, *Lawsuit Accuses 3 Wisconsin GOP Congressmen of Insurrection*, ASSOCIATED PRESS, Mar. 11, 2022; Stench v. Johnson, Case No. 2:22–00305 (E.D. Wisc.), https://llgmke.com/wp-content/uploads/2022/03/Dkt.-1-Complaint-MBC-filed-3-10-22.pdf.
4. Katie Brumback, *Georgia Voters Challenge Marjorie Taylor Greene's Eligibility to Run for Reelection*, ASSOCIATED PRESS, Mar. 25, 2022.
5. Aruna Viswanatha, *First Jan. 6 U.S. Capitol Riot Defendant Fighting Charges Goes on Trial*, WALL STREET J., Feb. 27, 2022.
6. Plaintiff's Verified Complaint for Declaratory and Injunctive Relief, Cawthorn v. Circosta, U.S. Dist. Ct. for the Eastern District of North Carolina, Case No. 5–22–00050.
7. Tal Axelrod, *Federal Judge Halts Challenge to Madison Cawthorn's Candidacy*, THE HILL (Mar. 4, 2022); Cawthorn v. Circosta, 2022 WL 738073 (E.D.N.C. 2022).
8. *See* THE HERITAGE GUIDE TO THE CONSTITUTION (David F. Forte & Matthew Spalding, eds., 2014), https://www.heritage.org/constitution/#!/amendments/14/citizenship-privileges-and-immunities-due-process-equal-protection-apportionment-disqualification-for-rebellion-debts-incurred-during-rebellion. *See also* THE WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Library of Congress 1895), https://www.loc.gov/item/03003452/.
9. Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 91 (July 6, 2021) (citing EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 107–109 (Solomons & Chapman, 1875)).
10. U.S. Const. amend. 14, § 3 (emphasis added).
11. The Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments all have language stating: "The Congress shall have power to enforce this article by appropriate legislation."
12. Paul Moreno, *Disqualification for Rebellion*, in THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 8.
13. *Id.*
14. James A. Rawley, *The General Amnesty Act of 1872: A Note*, 47 MISS. VALLEY HIST. R. 480, 480–81 (Dec. 1960).
15. "With remarkably little discussion the bill, H.R. 2761, passed the House without a recorded vote—'Two thirds voting in favor thereof.' On May 21, 1872, the Senate approved the same bill by a vote of 38 yeas and only 2 nays." *Id.* at 482 (citations omitted).
16. U.S. Stat. at Large, 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142.
17. Magliocca, *supra* note 9, *at* 88.
18. Amnesty Act of June 6, 1898, ch. 389, 30 Stat. 432.
19. *Joseph Wheeler*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Joseph-Wheeler.
20. State Board Defendants' Response to Plaintiff's Motion for Preliminary Injunction, *Cawthorn v Circosta*, Case No. 5–22–00050 (Feb. 7, 2022), at 28.
21. Cawthorn v. Circosta, 2022 WL 738073.
22. JACK MASKELL, QUALIFICATIONS OF MEMBERS OF CONGRESS, CONG. RSCH. SERV., R41946, at 18 (Jan. 15, 2015), https://sgp.fas.org/crs/misc/R41946.pdf.
23. It may seem unusual (and unique) for Congress and the states to approve a constitutional amendment containing a provision that says a portion of that amendment can be nullified by a vote of Congress. Some might speculate that this may have been the result of poor draftsmanship or a lack of foresight, and that, similarly, the subsequent amnesty acts were also carelessly drafted. But the Civil War itself was unusual and unique, a tragic historical event that the writers and supporters of the amendment may have thought could not possibly ever happen again given the tremendous loss of life it caused in a still relatively young nation. If it was Congress's intent to preserve the option of excluding a future insurrectionist, then the amnesty acts were carelessly drafted. It seems more likely, though, that Congress did exactly what it intended to do—permanently remove the disqualifications of Section 3. In any event, such speculation is irrelevant since the text of the Fourteenth Amendment clearly gave Congress the authority to permanently remove the disqualifications of Section 3, and the text of the two amnesty acts did exactly that.
24. Maskell *supra* note 22, at 20, fn. 106.
25. Clarence Cannon, 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE U.S. 52–53 (1935).
26. Berger v. U.S., 235 U.S. 22 (1921). The bias included the trial judge saying that "one must have a very judicial mind indeed not to be prejudiced against the German–Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country." *Id.* at 28–29.
27. Cannon, *supra* note 25, at 55.

28. In an interesting historical note on political persistence, Berger was re-elected by the voters of Wisconsin in 1920, despite being excluded by the House in 1919. The House again refused to seat him. When Berger won the election of 1922, after his conviction was overturned by the Supreme Court, he was finally seated in the House without objection. Maskell, *supra* note 22, at 20.
29. Magliocca, *supra* note 9, at 108–10 (citations omitted).
30. Paul Moreno, *Disqualification for Rebellion*, in The Heritage Guide to the Constitution.
31. Cawthorn v. Circosta, 2022 WL 738073 (emphasis in original).
32. U.S. Const. art. I, § 2, cl. 2.
33. U.S. Const. art. I, § 3, cl. 3.
34. 514 U.S. 779 (1995).
35. *Thornton*, 514 U.S. at 783.
36. U.S. Term Limits, Inc. v. Hill, 316 Ark. 251 (1994).
37. *Thornton*, 514 U.S. at 787–88.
38. Powell v. McCormack, 395 U.S. 486 (1969).
39. U.S. Const. art. 1, § 5. This provision states that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."
40. *Thornton*, 514 U.S. at 787–88.
41. *Powell*, 395 U.S. at 489–90.
42. *Id.* at 508.
43. *Powell*, 395 U.S. at 550.
44. U.S. Const, art. 1, § 5, cl. 2.
45. *Powell*, 395 U.S. at 508–9 (citations omitted).
46. *Thornton*, 514 U.S. at 798–99 (citations omitted).
47. U.S. Const. amend. X.
48. *Thornton*, 514 U.S. at 802.
49. *Id.* (citing Joseph Story, 1 Commentaries on the Constitution § 627, at 289, https://www.lonang.com/wp-content/download/Story-CommentariesUSConstitution.pdf).
50. *Id.* at 803.
51. *Thornton*, 514 U.S. at 926, n. 2.
52. *Id.* at 828.
53. *Id.* at 829.
54. *Thornton*, 514 U.S. at 832.
55. *Id.*
56. *Id.*
57. *Id.* at 832–33.
58. *Id.* at 833 (citing 2 Records of the Federal Convention of 1787 240 (M. Farrand ed. 1911)).
59. The Federalist No. 60 (Alexander Hamilton).
60. *Thornton*, 514 U.S. 833–34.
61. *Id.* (citing 4 Elliot's Debates 71 (Steele statement at North Carolina ratifying convention) (emphasis in original)).
62. Smiley v. Holm, 285 U.S. 355, 366 (1932).
63. *Thornton*, 514 U.S. at 834–35.
64. 3 U.S.C. § 15.
65. Karen Yourish, Larry Buchanan, and Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. Times, Jan. 7, 2021.
66. 3 U.S.C. § 15.
67. Fed. R. Civ. P. 11(b)(1) and (2).