DATE FILED: November 27, 2023 7:24 PM
FILING ID: 2E1A6BCA9FBC6
CASE NUMBER: 2023SA300

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80202	
Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577	
In Re: **Petitioners-Appellees/Cross-Appellants:** **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**, v. **Respondent-Appellee:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** and **DONALD J. TRUMP.**	▲ **COURT USE ONLY** ▲
Attorney for Amicus Curiae Constitutional Law Professor Kurt Lash: David W. Illingworth II, Colo. Attorney #52718 ILLINGWORTH LAW LLC 1145 Ptarmigan Dr. Woodland Park, CO 80863 (405) 593-9136, dwillingworth@hotmail.com Professor Kurt T. Lash, University of Richmond School of Law 316 N. 27th St. Richmond Virginia, 23223 (626) 644-1864, klash@richmond.edu	Supreme Court Case Number: 2023SA00300
BRIEF OF AMICUS CURIAE PROFESSOR KURT T. LASH IN SUPPORT OF RESPONDENT-APPELLEE AND INTERVENORS-APPELLEES	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all relevant requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in those rules. Specifically, I certify that:

This amicus brief complies with the applicable word limit set out in C.A.R. 29(d) (4,750 word limit for amicus briefs filed in support of merits briefs). It contains 4,720 words.

I acknowledge that this brief may not be accepted if it does not comply with C.A.R. 28, 29, and 32.

s/ David W. Illingworth II
David W. Illingworth II, #52718

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Identity and Interest of Amicus Curiae

Kurt T. Lash is a professor at the University of Richmond School of Law. He teaches and writes about the history and original understanding of the Constitution. He has published multiple books on the history of the Fourteenth Amendment, including THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (Cambridge University Press, 2014) and, most recently, THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS (2 volumes) (University of Chicago Press, 2021). He has an interest in advancing an historically accurate judicial interpretation of the Fourteenth Amendment, including Section Three.

No party participated in preparing this brief. Professor Lash volunteered his time to prepare this brief with assistance from volunteer attorneys.

Summary of Argument

Section Three of the Fourteenth Amendment, when enforced under powers granted by Section Five, prevented the leaders of the recent rebellion from returning to Congress, holding any state level office, or receiving any appointment by Democrat President Andrew Johnson, absent congressional permission. Its focus was on rebellious disruption of state level decision-making and the potentially disruptive appointments by Andrew Johnson.

This much is clear. Much else is not. Section Three does not expressly cover the nationally elected office of President of the United States or address whether it can be enforced in the absence of congressional enforcement legislation. There are strong textual, structural, historical and commonsense reasons to conclude that Section Three does *not* include the office of President. Similar reasons suggest no person can be disqualified under Section Three in the absence of congressional enforcement legislation. At best, on these matters the text and available historical record are ambiguous.

Argument

I. TEXT, STRUCTURE, CONGRESSIONAL PRECEDENT AND HISTORICAL CONTEXT COLLECTIVELY SUPPORT AN INTERPRETATION OF SECTION THREE THAT EXCLUDES THE OFFICE OF PRESIDENT OF THE UNITED STATES.

A. THE COURT MUST DETERMINE WHETHER THE PRESIDENCY IS A "CIVIL OFFICE" "UNDER THE UNITED STATES."

> The relevant portion of Section Three of the Fourteenth Amendment declares: 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 . . .[1]

[1] U.S. Const., amend. XIV, Section Three.

The text does not expressly cover the position of President of the United States. That position is covered only if the framers and ratifiers understood the phrase "*any office, civil or military, under the United States*" impliedly included the office of the President. Put another way, the court must determine whether the President of the United States holds a "civil office" that is "under the United States."

Petitioners and supporting amici would have this court believe the issue turns on whether the President is an "officer" who holds an "office."[2] This is not correct. Such references are irrelevant to determining the meaning of this portion of Section Three. The question the court must resolve is whether the framers or ratifiers thought that the President holds a "*civil* office" "*under the United States*." This is a much more precise and historically difficult question. Thankfully, it is one that both Congress and legal authorities had authoritatively resolved by the time of the Fourteenth Amendment.

B. CONGRESSIONAL PRECEDENT AND CONSTITUTIONAL TREATISES AT THE TIME OF THE FOURTEENTH AMENDMENT INTERPRETED "CIVIL OFFICERS UNDER THE UNITED STATES" IN A MANNER THAT EXCLUDED THE PRESIDENT OF THE UNITED STATES.

[2] See Petitioner's Brief at 24-25; Const. Accountability Center ("CAC") amicus at 4; Graber Amicus at 10.

At the time of the Fourteenth Amendment, well known congressional precedent and the most respected legal treatise in the country both rejected the idea that the President of the United States was a "civil officer" "under the United States."

In 1799, the United States Senate had to determine whether a Senator fell within the meaning of the Impeachment Clause's reference to "The President, Vice President and all civil Officers of the United States."[3] In what became known as "Blount's Case," the Senate ruled that Senators were *not* "civil officers of the United States."[4] As James Asherton Bayard, Sr. explained, "it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."[5] This reading of the Impeachment Clause remains the standard reading to this day.[6]

In his influential COMMENTARIES ON THE CONSTITUTION, Joseph Story discussed Blount's Case and the constitutional meaning of "civil officer."[7]

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[3] Art. II, Section 4.
[4] See, Impeachment of William Blount, record at https://bit.ly/47bgOKK.
[5] Id. at p. 2258.
[6] See, Vik Amar and Akhil Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 115 (describing the Senate's ruling in Blount's Case as correct).
[7] See, Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 259 (1833) (3 volumes).

According to Story, in Blount's Case the early Senate had likely concluded that "civil officers of the United States" were those who "derived their appointment from and under the national government."[8] "In this view," Story explained, "the enumeration of the president and vice president, as impeachable officers, was *indispensable*; for they derive, or may derive, their office from a source paramount to the national government."[9] Story's analysis equally applies to Section Three: Had the framers meant to include the position of President, it would have been "indispensable" to expressly say so, since the President is not a "civil officer" "under the government of the United States."

The Framers of the Fourteenth Amendment accepted the authority of Story's Commentaries and they cited and quoted his work during congressional debates.[10] Members of the Thirty-Ninth Congress also were aware of Blount's Case. In the previous Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate,

[8] Id.
[9] Id. at 259-60.
[10] See, e.g., Speech of John Bingham, February 28, 1866, *in* 2 RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS 115 (2 vols) (Kurt Lash, ed., 2021).

and House of Representatives, and they who constitute the Government cannot be said to be under it."[11]

Given this long-standing precedent and the authoritative status of Story's Commentaries, it is reasonable to presume the framers drafted Section Three with the understanding that judges would rely on Story's Commentaries (and Blount's Case) in interpreting the meaning of "civil offices" "under the United States." Indeed, it would have been negligent of them not to do so.

This is true even though not every member of Congress agreed with Story. One month after Congress sent the amendment to the states, a four-member committee issued a report suggesting that Story's analysis of Blount's Case was "incautious." ("The Conkling Report").[12] Conceding Story might be correct in a "technical sense," the committee thought an "enlarged" view of the Constitution should include Senators as civil officers.[13] Nevertheless, the committee advised that Congress avoid the entire issue since "this is not, perhaps, a proper case in which to make precedent upon so vital a constitutional question."[14] Congress agreed and

[11] CG, 38th Cong., 1st sess. at 329.
[12] See Cong. Globe, 39th Cong., 1st Sess., at 3940.
[13] Id.
[14] Id. at 3940.

resolved the issue on grounds having nothing to do with Blount's Case and Story's view that the President was not a "civil officer under the United States."[15]

Amicus author Mark Graber is wrong, therefore, when he claims that the Conkling Report establishes that "the House of Representatives firmly rejected any constitutional distinction between the phrases "office under" and an "office of" as they were used in various constitutional provisions, including Section Three of the Fourteenth Amendment."[16] In fact, neither the Report nor the House of Representatives "rejected" anything. Instead, the House accepted the committee's recommendation that Congress avoid "mak[ing] precedent upon so vital a constitutional question."

In sum, before, during and after the Thirty Ninth Congress, Story's analysis of Blount's Case and "civil officers under the United States" remained the authoritative view.

C. CONGRESS CONSIDERED, BUT ULTIMATELY REJECTED, A DRAFT OF SECTION THREE THAT EXPRESSLY BARRED PERSONS FROM QUALIFYING FOR OR HOLDING THE OFFICE OF PRESIDENT OF THE UNITED STATES.

[15] Id. at 3942 (committee suggested resolution), and id. at 3943 (accepting the committee's recommendation).
[16] See, Graber Amicus at 13.

On February 19, 1866, Representative Samuel McKee submitted to the House of Representatives a proposed amendment which declared:

> No person shall be qualified[17] or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States . . ..[18]

McKee's proposal expressly named the office of President of the United States, expressly prohibited being "qualified" as well as "hold[ing]" the office, and expressly applied to both past and future rebellions (those "hereafter"). The final draft of Section Three, however, omitted McKee's reference to the office of President or Vice President, persons being "qualified" and future rebellions "hereafter." Newspapers across the country published McKee's original proposal.[19] Accordingly, the public knew that Congress had considered and rejected a draft that expressly disqualified persons from being qualified for, or holding the office of, the President of the United States.

Amici attempt to downplay the significance of McKee's draft, arguing that the Joint Committee never considered the draft and that Senator McKee himself

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[17] Newspapers read this term as meaning "nominated." See, Illustrated New Age (Philadelphia, Pennsylvania), February 20, 1866, p. 1 https://bit.ly/3qVis3z

[18] CG, 39, 1st, p. 919.

[19] See, e.g., Boston Daily Advertiser (Boston, Massachusetts), March 14, 1866, p. 4.

desired to have only "loyal" Americans "rule the country."[20] Both arguments miss the point. First, there is no doubt that the Joint Committee knew of McKee's draft. Committee members serving in the House would have been in the room when McKee presented his proposal and delivered a major speech explaining its content.[21] Second, and more importantly, the *public* (and future ratifiers) knew that Congress had received, and ultimately rejected, a draft that expressly addressed the office of President of the United States. This knowledge, when combined with the actual text and structure of Section Three (discussed below), provided the ratifiers an additional significant reason to presume the framers knew how to draft a clause that included the office of President but intentionally chose not to do so.

D. THE JOINT COMMITTEE DRAFT OF SECTION THREE PROTECTED THE PRESIDENCY BY PROTECTING THE ELECTORAL COLLEGE

On April 30, 1866, the Joint Committee submitted a five-sectioned Fourteenth Amendment. Section Three of that Amendment declared:

> Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.[22]

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[20] See, e.g., CAC amicus at 14 n.1; Graber amicus at 17.
[21] Cong. Globe., 39th Cong., 1st Sess. at 1162 (March 3, 1866).
[22] 2 RECONSTRUCTION AMENDMENTS at 156.

Instead guarding the presidency by disqualifying rebels from holding the office of President of the United States (as had McKee's prior draft), the Joint Committee guarded the presidency by disenfranchising rebels from voting for electors of the President of the United States. The final draft of Section Three adopted this same approach.

In the debates that followed, not a single member proposed altering the amendment to address the office of President of the United States. Instead, a number of Republicans insisted that the proposal did not adequately secure a trustworthy electoral college. Michigan Representative John Longyear, for example, complained that Section Three would be "easily evaded by appointing electors of President and Vice President through their legislatures, as South Carolina has always done."[23] Fellow Joint Committee member Jacob Howard agreed, noting that the current draft "would not prevent rebels from voting for state representatives or prevent state legislatures from choosing rebels as presidential electors."[24]

The final version of the Fourteenth Amendment addressed these complaints by prohibiting leading rebels from *serving* as presidential electors and giving

[23] Id. at 2537.
[24] Id. at 2768.

Congress the power "to enforce, by appropriate legislation, the provisions of this article."[25]

E. THE FINAL DRAFT OF SECTION THREE ALSO PROTECTED THE PRESIDENCY BY SECURING A TRUSTWORTHY ELECTORAL COLLEGE

The final draft of Section Three, in relevant section, declares:

> 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, . . .[26]

Like the Joint Committee draft, this final draft does not address the office of President of the United States. Also like the Joint Committee draft, the final draft focused on securing trustworthy presidential *electors*. Unlike the prior draft, which had prohibited rebels from voting for electors, this final version prohibited leading rebels from *serving* as presidential electors.

Had the framers of Section Three intended to include the President in the catch-all reference to "civil" officers "under the United States," they were remarkably negligent. Members knew about Blount's Case and they were well aware of broadly accepted authority of Story's Commentaries on matters of constitutional interpretation. Had they intended to include the office of President, they risked being

[25] U.S. Const. XIV amend., Section Five.
[26] U.S. Const. XIV amend., Section Three.

thwarted by any judge owning a copy of Story's Commentaries. More likely, the drafters were not negligent. They simply chose to protect the presidency through the device of a trustworthy electoral college.

1. A COMMONSENSE READING OF SECTION THREE INTUITIVELY SUGGESTS THAT THE GENERAL "CATCH-ALL" PROVISION DOES NOT INCLUDE THE HIGH POSITION OF PRESIDENT OF THE UNITED STATES.

Even those ratifiers unfamiliar with Blount's Case or Story's Commentaries could have reasonably read the text as excluding the position of President of the United States.

Section Three enumerates the apex political positions of Senator and Representatives, followed by a clause dealing with the electors of a third apex position, the President of the United States. These expressly enumerated positions are then followed by a general catch-all provision referring to "all offices, civil or military under the United States." This text and structure intuitively suggests that the framers expressly named every apex political position they intended to include and, thus, intentionally excluded the position of President. The legal term for this

commonsense reading of a legal text is *expressio unius est exclusio alterius*" ("the inclusion of one thing means the exclusion of another").[27]

This intuitive approach to reading legal texts led one of the most sophisticated lawyers in the Senate to conclude that Section Three excluded the office of the President. In an extended speech on the proposed Fourteenth Amendment, Senator and former United States Attorney General Reverdy Johnson remarked: "[former rebels] may be elected President or Vice President of the United States, and why did you omit to exclude them?"[28] Republican Senator Lot Morrill then interjected: "Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."[29] Johnson, who was in the middle of an extended speech, conceded, "[p]erhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was *misled* by noticing the specific exclusion in the case of Senators and Representatives."[30]

Petitioners claim the Johnson-Morrill exchange "reveal[s] a clear intent to cover the office of the presidency."[31] This is obviously hyperbole, as no single

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[27] See, Scalia, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW 25-26 (1997).
[28] CG, 39th, 1st sess., at 2899.
[29] Id.
[30] Id. (emphasis added)
[31] Petitioners Brief at 23.

exchange by two people who had nothing to do with drafting Section Three can establish the "clear intent" of both Houses of Congress.

But more importantly, petitioners miss the interpretive significance of the exchange. If the text and structure of Section Three "misled" the former Attorney General of the United States into thinking Section Three excluded the office of President of the United States, then ordinary *ratifiers* could have been just as easily "misled." Nor would the public have known about Morrill's "correction." Although multiple newspapers published substantial portions of the framing debates, no newspaper seems to have reported the Johnson-Morrill exchange. Thus, any ratifier who knew about Blount's Case, Story's Commentaries, or simply applied a commonsense approach to reading Section Three likely would have shared Johnson's initial view that the office of the President has been excluded.

2. NO RATIFIER DESCRIBED SECTION THREE AS DISQUALIFYING ANYONE FROM BEING PRESIDENT OF THE UNITED STATES.

Despite intense historical research by the parties in this case, and by multiple scholars who have investigated the issue for several years, no one has yet discovered a single example of a ratifier reading Section Three as including the office of President of the United States.

Petitioners point to scattered pieces of ratification period evidence which they claim support their reading of Section Three. The examples are few and none of them involve the ratifiers. Most do not even involve Section Three. For example, petitioners and some amici cite John Vlahoplus's article in which he claims to have discovered an 1866 newspaper article arguing that removing Section Three would "leave 'Robert E. Lee . . . as eligible to the Presidency as Lieut. General Grant.'"[32] In fact, the writer is *not* referring to Section Three, but is simply criticizing the south's belief that "a rebel is as worthy of honor as a Union soldier; that Robert E. Lee is as eligible to the Presidency as Lieut. General Grant."[33] Amici also cite an article in the GALLIPOLIS JOURNAL which they claim involves a discussion of Section Three's inclusion of the President of the United States.[34] It turns out the essay does not reference Section Three, but instead refers to an earlier draft.[35]

One final piece of evidence involves an essay in the MILWAUKEE DAILY JOURNAL which presumes that Jefferson Davis could be president if he received a

[32] See John Vlahoplus, *Insurrection, Disqualification, and the Presidency,* 13 Brit. J. Am. Legal Stud. 1, 7 n.37 (2023). See also, Petitioner's Brief at 39; CAC Amicus at 14.
[33] See Indianapolis Daily Journal, July 12, 1866, p. 2.
[34] See, Gallipolis Journal (Gallipolis, Ohio), Feb. 21, 1867. Cited by CAC Amicus at 14.
[35] See 2 RECONSTRUCTION AMENDMENTS, at 219 (quoted above).

"two-thirds vote of congress."[36] The fact that the only shred of (accurately described) historical evidence involves a single sentence in a Milwaukee newspaper simply illustrates the paucity of historical evidence supporting the petitioner's reading of Section Three.

Petitioners repeatedly insist that Section Three must be read to prevent rebels like Jefferson Davis from becoming President.[37] To the extent that anyone at the time seriously worried about Jefferson Davis, their concerns focused on possible disloyal votes in the electoral college or Davis's return to *Congress*. An 1868 newspaper essay, for example, called for the enforcement of Section Three in order to prevent electors in the State of Texas from casting their votes for "Jefferson Davis for President and Alexander Stephens for Vice President."[38] T. F. Withrow warned an Iowa gathering that Section Three was essential because, otherwise, "Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be." Others scoffed at even this possibility. Speaking in opposition to the Fourteenth Amendment, New Hampshire's T. J. Smith mocked Republican fears

[36] Milwaukee Daily Sentinel, *Shall We Have a Southern Ireland*? (July 3, 1867); Petitioner's Brief at 26.
[37] Petitioner's Brief at 4, 11, 15, 25, 26, 27, 52,
[38] Daily Austin Republican (Austin, Texas), September 1, 1868, p. 2.

"that unless this amendment is adopted, that same Jefferson Davis will get back into *Congress*[.]"[39]

No Reconstruction Republican was concerned about the country electing Jefferson Davis President of the United States, much less believed the Constitution must be amended to prevent such a possibility. The very idea was no more than a punchline to a joke.[40]

II. IT IS REASONABLE, NOT ABSURD, TO READ SECTION THREE AS PROTECTING THE PRESIDENCY BY SECURING A TRUSTWORTHY ELECTORAL COLLEGE.

Some scholars and the petitioner claim that it would be absurd to read Section Three as not disqualifying rebels from being elected President of the United States.[41] On the contrary, it would have been absurd for either Congress or the Country to add a non-existent problem to their already long list of issues requiring immediate constitutional attention.[42] Worse, such a solution would have needlessly disenfranchised the loyal electorate throughout the country. None of the problems facing the country in 1866 required such an antidemocratic solution.

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[39] Weekly Union (Manchester, New Hampshire), July 31, 1866, p. 2 (emphasis added).
[40] Tiffin Tribune, Speech of Hon. John A. Bingham, July 18, 1872 (Joke about "President" Davis eliciting "laughter").
[41] See, e.g., See William Baude and Michael Paulsen, *The Sweep and Force of Section Three*, 172 U. Penn. L. Rev. at 111; Pet. Brief at 30.
[42] See, RECONSTRUCTION AMENDMENTS, at 5-14.

The two major concerns driving the adoption of Section Three involved *state* level politics where former leading rebels might foment local resistance and the ill-considered pardons and appointments of Democrat President Andrew Johnson.[43] This is why Section Three focuses on presidential appointments (civil offices under the government of the United States) and decisions made at a state level (Senators, Representatives, electors, and state offices). When it came to guarding the national presidency, a reasonable strategy involved doing so by way of the electoral college.

One amicus insists that the framers could not presume the "loyalty" of the electoral college and cites, as supposed proof, the participation of former confederate soldiers in Georgia's 1868 slate of presidential electors.[44] Their "proof" is a non-sequitur. Unless the argument is that former soldiers could never again be loyal to the United States, their participation in southern politics proves nothing at all.

In fact, moderate Republicans believed that many participants in the rebellion had either been coerced into supporting the Confederacy or would become loyal American once leading rebels had been removed from political power. As Senator

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[43] See, e.g., Benjamin F. Butler, New York Tribune (New York, New York), November 26, 1866, p. 8 ("I charge Andrew Johnson with improperly, wickedly and corruptly using and abusing the constitutional power of pardons for offenses against the United States, and in order to bring traitors and Rebels into places of honor, trust and profit under the Government of the United States").

[44] See Graber Amicus at 18.

Daniel Clark explained during the Section Three debates, "I much prefer that you should take the leaders of the rebellion, the heads of it, and say to them, 'You never shall have anything to do with this Government,' and let those who have moved in humble spheres return to their loyalty and to the Government."[45] During those same debates, Senator William Windom declared that "if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the *loyal* men of the South will control it."[46]

Securing a trustworthy electoral college required a combination of Section Three and Section Five. As Thaddeus Stevens noted in regard to the Joint Committee's draft of Section Three, "it will not execute itself."[47] When Congress passed the final version of Section Three, Stevens warned "I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition precedent."[48]

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[45] CG, 39th, 1st Sess. at 2771.
[46] CG 39th Cong. 1st Sess. at 3170
[47] Cong. Globe, 39th Cong., 1st sess., at 2544. Mark Graber incorrectly claims Steven's prior statement "you must legislate to carry out many parts of it" referred to Section Three. See Graber Amicus at 8 fn. 19. Graber omits the full quote which shows that Stevens at that point was referring to the Fourteenth Amendment as a whole, not to Section Three: "I say if this *amendment* prevails you must legislate to carry out many parts of it." Id. One of those "parts" was Section Three.
[48] CG, 39th, 1st. at 3148.

Congress accepted Steven's advice. In 1867, Congress passed the Reconstruction Acts which guaranteed black participation in the establishment of new state governments and the appointment of new presidential electors.[49] Those newly appointed, and primarily Republican, electors went on to provide the votes necessary to elect former Union General Ulysses S. Grant president of the United States in the elections of 1868.[50] As New York Governor Reuben E. Fenton explained just months before the official ratification of the Fourteenth Amendment, the Republican strategy of focusing on the electoral college had worked:

> It is well known that there was a large body of Union electors distributed throughout the South consisting of those who were never in sympathy with the rebellion, and those who, though numbered with the insurgents, were ready to accept the results of war and return to their old allegiance. . . . There was also a large body of men, composing two fifths of the whole population, born on the same soil, equally true to the Government, and equally powerless because they were disfranchised. If these two classes were allowed to act together in the use of the rights of our common manhood, it will be seen that the only obstacle was peaceably removed; as together, they outnumbered the rebel electors who prevented the work of reconstruction.[51]

III. BOTH FRAMERS AND MEMBERS OF RATIFYING ASSEMBLIES INSISTED THAT ENFORCING SECTION THREE REQUIRED ENABLING LEGISLATION

[49] See RECONSTRUCTION AMENDMENTS, at 388, 391.
[50] See Eric Foner, RECONSTRUCTION 343 (revised ed. 2014).
[51] See, Commercial Advertiser (New York, New York), January 7, 1868, p. 4.

As the election of 1868 illustrates, Republicans understood that Section Three required congressional enforcement. This is clear from Thaddeus Stevens repeated declarations that Section Three "will not execute itself" and that it required "proper enabling acts." (cited above)

There were two particular reasons why Section Three could not be enforced without enabling legislation. First, as Stevens noted, it could not possibly *work* absent such legislation. The framers knew this. Secondly, it would not be constitutionally appropriate to disqualify anyone prior to a judgment by an impartial tribunal. As Thomas Chalfant noted during the Pennsylvania Ratification Debates, although it was *possible* to read Section Three so that "no legal conviction is required before the disqualification attaches," such prior restraint would be absurd. [52]Instead, "you will say, and say properly, that in order to make this section of any effect whatever, the guilt must be established. I grant it."[53] Chalfant insisted Congress would have to create a politically neutral tribunal.[54] Throughout his extended remarks, Chalfant presumed that every ratifier in the room agreed with him that that

[52] Appendix, Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (Harrisburg 1867), at LXXX. Digitized copy on file with author.
[53] Id. (emphasis added)
[54] See, Kurt Lash, *The Meaning and Ambiguity of Section Three* 45 (SSRN, forthcoming).

no person could properly be disqualified under Section Three prior to an adjudication by a legislatively established tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise.

Soon after the ratification of the Fourteenth Amendment, Congress passed an Enforcement Act that specifically included provisions enforcing the restrictions of Section Three.[55] In his remarks on the proposed bill, Lyman Trumbull explained that such legislation was necessary because Section Three "provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution."[56]

IV. CONCLUSION

Text, structure, congressional precedent, commonsense interpretation, and politically strategic considerations all support a reading of Section Three which guards the Presidency by way of the electoral college and not by disqualifying any person from seeking the office of President of the United States. It is equally reasonable to read the text as requiring the prior enactment of enforcement legislation. At best, the text remains ambiguous on all these matters.

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[55] Act of May 31, 1870, 16 Stat. 140, 143.
[56] The Crisis (Columbus, Ohio), May 5, 1869, p. 2 (reporting on the debates of April 8, 1869).

The court below correctly rejected petitioners' claims to the contrary and should be affirmed.

Respectfully submitted 27th day of November 2023,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of November 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

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