

SUPREME COURT, STATE OF COLORADO 2 East 14 th Avenue, Denver, CO 80202		DATE FILED: November 27, 2023 1:13 PM FILING ID: 5DE684C1AED0C CASE NUMBER: 2023SA300
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
<i>Attorneys for Amicus Curiae</i> Professor Seth Barrett Tillman: THE REISCH LAW FIRM, LLC R. Scott Reisch, #26892 Jessica L. Hays, #53905 1490 W. 121 st Avenue, Suite 202 Denver, CO 80234 (303) 291-0555		Supreme Court Case No: 2023SA00300
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REQUEST FOR ORAL ARGUMENT MOTION OF <i>AMICUS CURIAE</i> PROFESSOR SETH BARRETT TILLMAN IN SUPPORT OF INTERVENOR-APPELLANT/CROSS-APPELLEE DONALD J. TRUMP		

INTRODUCTION

On November 21, 2023, this Court ordered that oral argument in this case will be held on December 6, 2023. Oral argument was limited to one hour per side. The court further ordered that:

Amicus curiae may not participate in oral argument without permission of the Court and consent of the party supported by amicus curiae. Any motion for participation must be made within seven days of this order, comply with the requirements of C.A.R. 29(g), and describe how amicus curiae and the party it supports propose to allocate their time. The Court will not extend the length of oral argument to accommodate participation by amicus curiae.

In a separate motion, *Amicus* Professor Seth Barrett Tillman sought leave to file an amicus brief in the above-captioned case, *Anderson v. Griswold*, 2023SA00300.

In this motion, pursuant to C.A.R. 29(g) and C.A.R. 34(a), Professor Seth Barrett Tillman respectfully requests this Court's leave to participate in oral argument in the above-captioned case, *Anderson v. Griswold*, 2023SA00300. Professor Tillman requests ten minutes of argument time to address two questions: whether Section 3 is self-executing and whether the President is an “Officer of the United States” for purposes of Section 3’s triggering or jurisdictional clause. Intervenor-Appellant/Cross-Appellee Donald J. Trump has consented to Professor Tillman’s participation and has agreed to cede ten minutes. Professor Tillman’s counsel, Attorney Josh Blackman, who would present oral argument, will promptly seek admission *pro hac vice*.

INTEREST OF *AMICUS CURIAE*

Professor Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University School of Law and Criminology, Ireland / Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. Professor Tillman’s *curriculum vitae* is attached as Exhibit A.

Amicus submits his motion to bring to the Court’s attention two primary arguments. First, Section 3 requires federal enforcement legislation. Under Chief Justice Chase’s decision in *Griffin’s Case* (1869), state law cannot provide a cause of action to remove a candidate from the ballot. Professor Tillman co-authored an article concluding that Section 3 is not self-executing.¹

Second, Professor Tillman’s argument will show that the phrase “Officer of the United States,” as that language is used in the Constitution of 1788 and in Section 3, does not encompass the presidency. Tillman is one of a very small handful of academics who has written extensively on the Constitution’s “office”- and “officer”-language. Since 2008, Tillman has consistently written that the phrase “Officer of the United States” does not encompass the presidency. Professor Tillman has authored and co-authored many articles over the past fifteen years on the “office”- and “officer”-language in the Constitution of 1788.² Tillman has also authored and

¹ Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forth. 2024), <https://ssrn.com/abstract=4568771>.

² This footnote includes only a sampling of Professor Tillman’s relevant publications. See Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. Pa. L. Rev. PENNumbra 134 (2008); Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 Duke J. Const. L. & Pub. Pol’y 107 (2009); Seth Barrett Tillman, Opening Statement, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 Nw. U. L. Rev. 399 (2012) ; Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180 (2013); Seth Barrett Tillman, *Originalism & The Scope of the Constitution’s Disqualification Clause*, 33 Quinnipiac L. Rev. 59 (2014); Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5(1) Br. J. Am. Leg. Studies 95 (2016) (peer

co-authored publications on or concerning the “office”- and “officer”-language in Section 3 of the Fourteenth Amendment.³

No party participated in preparing this brief.

Attorney Josh Blackman, who would present oral argument, has co-authored many of these articles with Professor Tillman. Blackman’s *curriculum vitae* is attached as Exhibit B.

THE STANDARD

C.A.R. 29(g) provides:

An amicus curiae may participate in oral argument only with the court’s permission, which will be granted only for extraordinary reasons. A motion to participate in oral argument must state that the supported party does not object and will share its allotted time with amicus.

reviewed); Seth Barrett Tillman, *The Foreign Emoluments Clause—Where the Bodies are Buried: “Idiosyncratic” Legal Positions*, 59 S. Tex. L. Rev. 237 (2017); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. Tex. L. Rev. 309 (2021); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. Tex. L. Rev. 321 (2022); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution: Part III, The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, S. Tex. L. Rev. 349 (2023); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The ‘Office . . . under the United States’ Drafting Convention*, 62 S. Tex. L. Rev. 455 (2023); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part V: The Elector Incompatibility, Impeachment Disqualification, Foreign Emoluments, and Incompatibility Clauses*, 63 S. Tex. L. Rev. (forth. 2024); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part VI: The Ineligibility Clause*, 63 S. Tex. L. Rev. (forth. 2024).

³ See Seth Barrett Tillman & Josh Blackman, *Is the President an ‘officer of the United States’ for Purposes of Section 3 of the Fourteenth Amendment*, 15 NYU J. of Law & Lib. 1 (2021); Seth Barrett Tillman & Josh Blackman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. Ill. L. Rev. Online 190 (2021); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forth. 2024), <https://ssrn.com/abstract=4568771>; see also Seth Barrett Tillman, *Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Reconciliation* 1–110 (2012), <https://ssrn.com/abstract=1970909>.

This Court has granted leave for *amici curiae* to participate in oral argument over the decades.⁴ A recent example is illustrative. In *Carousel Farms Metropolitan District v. Woodcrest Homes, Inc.*, the Institute for Justice (IJ) as *amicus curiae* requested ten minutes of oral argument time to address the Takings Clause of the Fifth Amendment. The Respondent had consented to IJ’s “participation and . . . agreed to cede ten minutes.”⁵ IJ provided “good reason” for participation in the case, including experience and expertise in the Takings Clause of the Fifth Amendment. The motion also explained that Petitioner “devoted considerable time to responding to” IJ’s position. The Colorado Supreme Court granted IJ’s request.⁶

⁴ See, e.g., *Denver Pub. Co. v. Bd. of Cnty. Comm’rs of Cnty. of Arapahoe*, 121 P.3d 190, 194 n.4 (Colo. 2005) (“Upon invitation by the Court for Amicus Briefs, the American Civil Liberties Union (ACLU) filed an Amicus Brief” and “during oral argument the ACLU supported the position taken in the court below.”); *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 519 n.5 (Colo. 1995) (“Counsel for amicus curiae Colorado Ski Country USA represented at oral argument”); *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1241 n.1 (Colo. 1987) (“The Colorado Trial Lawyers Association, the Product Liability Advisory Council, Inc. and the Motor Vehicle Manufacturers Association of the United States, Inc. were granted leave to file briefs and participate in oral argument before this court.”); *Bolles v. People*, 541 P.2d 80, 81 (Colo. 1975) (“The American Civil Liberties Union filed a brief as Amicus Curiae and participated in the oral argument”); *People ex rel. Dunbar v. White*, 355 P.2d 963, 964 (Colo. 1960) (“Amici Curiae have filed a brief and participated in oral argument.”).

⁵ <https://perma.cc/NYH4-KKU> (reproducing brief).

⁶ <https://perma.cc/7CB8-HY62> (reproducing order of court).

CITATIONS TO PROFESSOR TILLMAN’S SCHOLARSHIP IN THE RECORD

In the proceedings below, Professor Tillman’s publications were cited by the parties and their expert witnesses:

- Colorado Republican State Central Committee’s Motion to Dismiss (9/22/23) at 12
- Respondent Donald J. Trump’s Motion to Dismiss (9/29/23) at 8, 9, 10, 14
- Petitioners’ Opposition to Intervenor Trump’s Third Motion To Dismiss (10/6/23) at 10, 11, 13, 27, 28, 29, 30
- Expert Report of Professor Gerard N. Magliocca (10/15/23) at 33
- Respondent Donald J. Trump’s Reply in Support of Motion to Dismiss (10/16/23) at 24, 30, 31, 38, 39, 47, 49
- Expert Report of Robert J. Delahunty (10/27/23) at 12, 17, 30, 34, 37, 39, 42, 56

The District Court’s October 25, 2023 order cited Professor Tillman’s scholarship in its discussion of whether Section 3 is self-executing:

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues “Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing Plaintiffs to bring such a claim in court.” Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response . . . This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions. Intervenor Trump argues there is “[a]mple precedent” supporting Blackman and Tillman’s conclusion that Section Three was not self-executing. But the

only precedent cited is *In re Griffin*, 11 F. Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit.

During the hearing on November 3, 2023, counselor for Petitioners acknowledged that “Blackman and Tillman have written extensively on the subject of whether the President is an officer of the United States under Section 3 of the Fourteenth Amendment” Transcript at 117. And two days earlier, Professor Magliocca, the expert witness for Petitioners expressed “mutual admiration” and “mutual respect” for Blackman and Tillman. Transcript at 77.

The District Court’s November 17, 2023 final order did not cite Professor Tillman’s scholarship. However, paragraphs 311 to 315—the core holding of the case—rely on arguments advanced by the Intervenors, who in turn relied on Professor Tillman’s scholarship.

Professor Tillman’s scholarship has also been cited by the parties in Section 3 litigation in more than a dozen states, including Arizona, California, Connecticut, Delaware, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, New York, Virginia, and West Virginia.⁷

ANALYSIS

Petitioners seek to invoke Section 3 of the Fourteenth Amendment to remove a leading presidential candidate from the primary ballot, from the general election ballot, and, perhaps, from consideration during the Joint Session of Congress on January 6, 2025.

The District Court rejected justiciability and jurisdictional defenses, held that Colorado law provides the necessary cause of action to enforce Section 3, and made

⁷ *Amicus* can provide the Court with a complete list of citations upon request.

a factual finding that President Trump engaged in insurrection. However, the District Court stopped just short of removing Trump from the ballot because the presidency is not an “Officer of the United States.”

This appeal includes two pure questions of federal law. First, does Section 3 require federal enforcement legislation? And second, is the Presidency an “Officer of the United States”? Looking forward, whichever way this Court rules, the non-prevailing party will appeal to the U.S. Supreme Court, and that Court may hear the appeal. And both of these pure questions of federal law would be appealed. If Section 3 requires federal enforcement legislation, then the precise contours of Colorado law, or the law of any other state, become irrelevant. If so, then this litigation, and litigation in other states, will come to a halt. And if the presidency is not an “Officer of the United States,” then any future efforts by the states or Congress to disqualify Trump would be foreclosed.

These are the two issues that *Amicus* proposes to present at oral argument. And extraordinary cause exists to support *Amicus*’s participation in oral argument. Professor Tillman is one of the foremost experts on the meaning of the phrase “officers of the United States,” and on the Constitution’s other references to “office” and “officer.” While many attorneys and *Amici* have come to this topic only in the wake of January 6, 2021 or, as early as 2016, Tillman’s scholarly record stretches back more than fifteen years. Tillman’s scholarship is regularly cited by advocates on both sides of the aisle.⁸ Moreover, Professor Tillman has expertise in federal court

⁸ See, e.g., Brief for the Appellee Democratic National Committee at 25, *Souraya Faas v. Hillary Clinton*, No. 17-11381 (11th Cir. Aug. 4, 2017) (filed by Thomas & Locicero PL & Perkins Coie LLP), 2017 WL 3492561 (citing Seth Barrett Tillman, Secretary Clinton Can Relax Because Section 2071 Disqualification Does Not Apply To The Presidency: A Response to Michael B. Mukasey and Cause of Action (Sept. 22, 2015), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650328>).

practice in the 19th century, and has carefully studied the caselaw, literature, and other jurisprudence about the enforcement of Section 3.

Blackman, who has co-authored many articles with Professor Tillman on Section 3 and the Constitution’s “office”- and “officer”-language, is prepared to answer the Court’s questions on these issues. Specifically, Blackman can address the following questions, which are directly implicated by the District Court’s ruling, and any other related questions the Court wishes to ask:

- What is the impact of Chief Justice Chase’s opinion in *Griffin’s Case* 11 F. Cas. 7 (C.C.D. Va. 1869) on Colorado election law?
- Has *Griffin’s Case* liquidated the meaning of Section 3?
- Can Chief Justice Chase’s decision in *Griffin’s Case* be reconciled with his decision in the *Case of Jefferson Davis*?
- Would the Framers of the Fourteenth Amendment have empowered and entrusted the States to enforce Section 3?
- In the Constitution of 1788, did the phrase “Officers of the United States” include the President?
- Is there a difference between an “Office,” “Officer,” an “Officer of the United States,” and an “Office . . . under the United States”?
- Would it be *absurd* to rule that the President is not an “Officer of the United States” for purposes of Section 3?⁹

⁹ *Amicus* brings to the Court’s attention a possible clarification on this point. Page 20 of Petitioner’s Brief includes this citation: See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819) (rejecting reading of the Constitution that would have resulted in “so gross an absurdity [it could not] be imputed to the framers of the constitution”). This quotation comes not from Chief Justice Marshall’s majority opinion, but from a summary of the argument advanced by the Attorney General. *Id.* at 352–355 (“The Attorney-General, for the plaintiff in error, argued . . . Nor is it

- Does the Democracy Canon support the District Court’s ruling that the President is not an “Officer of the United States”?

The fact that the District Court and the parties considered Professor Tillman’s scholarship at some length on the questions listed above, and other related questions, indicates that Tillman’s views and scholarship should be explored at oral argument.

CONCLUSION

WHEREFORE, for the reasons stated above, Professor Tillman respectfully requests that this Court grant him leave to participate in oral argument as amicus curiae under C.A.R. 29(g) and C.A.R. 34(a).

required, that the power of establishing such a moneyed corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution, so strict and literal, would render every law which could be passed by congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted, tending to the same object, though not equally well adapted to attain it. *As the inevitable consequence of giving this very restricted sense to the word ‘necessary,’ would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected.*” (emphasis added)).

Respectfully submitted on November 27, 2023.

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*Admission Pending

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2023, a true and correct copy of the foregoing **Request for Oral Argument Motion of *Amicus Curiae* Professor Seth Barrett Tillman in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump** was served on the following via CCE e-service:

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