STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY,
NORAH MURPHY and WILLIAM NOWLING,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as
Secretary of State,

Defendant.

No. 23-000137-MZ

HON. JAMES ROBERT REDFORD

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DEFENDANT SECRETARY OF STATE'S MEMORANDUM OF LAW PURSUANT TO THE COURT'S OCTOBER 9, 2023, SCHEDULING ORDER ORDERING DEFENDANT TO ADDRESS SPECIFIC QUESTIONS

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On September 29, 2023, Plaintiffs Robert LaBrant, Andrew Bradway, Noah Murphy, and William Nowling filed the instant Complaint against Defendant Secretary of State Jocelyn Benson. In Count I of their complaint, Plaintiffs request that the Court enter a declaratory judgment declaring that former President Donald Trump is ineligible to be placed on Michigan's presidential primary or general election ballot because he is disqualified under § 3 of the Fourteenth Amendment. (Comp, ¶¶ 316-319.) In Count II, Plaintiffs request that the Court enjoin the Secretary from placing Mr. Trump on Michigan's presidential or general election ballots. (*Id*., ¶¶ 320-322.)

A similar case was filed by Robert Davis on September 15, 2023. See *Davis v Benson*, Court of Claims Case No. 23-000128.

On October 9, 2023, this Court entered an expedited scheduling order in both cases. The Court stated that it was expediting the instant case along with the *Davis* case, No. 23-00028-MZ. Defendant understands the Court's order to require responses in both cases by October 16, 2023.

In response to Plaintiffs' complaint, Defendant Benson has filed an answer. However, in the Court's scheduling order, it ordered Defendant to respond to six specific questions. Consistent with that order Secretary Benson submits the instant memorandum of law.

ARGUMENT

I. Secretary Benson's responses to the questions posed by the Court in its October 9, 2023, scheduling order.

The Court ordered Defendant Benson to address six specific questions relating to § 3 of the Fourteenth Amendment, including whether the Secretary is authorized to disqualify a candidate for President under that section. Because the Secretary has no authority to make such a determination, she has no official position as to the outcome of the related constitutional

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questions. Her responses to the questions below, other than to the first question, therefore, do not advance an affirmative position.

A. Whether Defendant has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue.

Although the Court's question refers to a "candidate" generally, the Secretary will address this question as if directed to candidates for the Office of President.

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id*.

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 USC 1.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch

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officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a*. . . . [Emphasis added.]

And under subsection 614a(2), the chairpersons for the major political parties in Michigan file a list of candidates with the Secretary after she issues her list:

> Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.[1] MCL 168.615a ("Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.") (emphasis added). The winning candidates for each party are then certified by the Board of State Canvassers. MCL 168.616a. However, the names

[1] A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2).

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of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") But no language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91, 168.131, 168.161, 168.281, and has required these candidates to file "affidavit[s] of identity," which include a statement that a candidate "meets the constitutional and statutory qualifications for the office sought," MCL 168.558(1)-(2).[2] Candidates who fail to complete a certificate identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement,

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[2] There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

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likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.").

There simply is no statute in the Michigan Election Law that imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature's drafting choice strongly suggests that the Secretary has neither the duty nor the authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) ("[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). And while the Secretary has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan's ballots, is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency,* 509 Mich

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673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

It has been suggested that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they "swear (or affirm) that [they] will support the Constitution of the United States," obligates the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a candidate for the Office of President from appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

The Secretary will certainly comply with any order entered by this Court or another that declares Mr. Trump eligible or ineligible to appear as a candidate for President on Michigan's ballots by reason of the Fourteenth Amendment. And in doing so, the Secretary will uphold the oath she took to support both the US Constitution and the Michigan Constitution.

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For these reasons, the Secretary does not have an affirmative, legal duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot prior to a court's review of that constitutional question.

B. Whether § 3 of the Fourteenth Amendment applies to the offices of President and Vice President and to candidates for those offices?

Section 3 of the Fourteenth Amendment 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 disability. [US Const, Am XIV, § 3 (emphasis added).]

Again, the Secretary takes no position with respect to whether Mr. Trump should appear as a candidate in Michigan's presidential primary or general election, or whether he should be precluded from doing so under the Fourteenth Amendment.

The Court's question raises two, inter-related questions—does the office of President constitute "any office" "under the United States" from which a person may be disqualified from holding based on his engaging in insurrection. And was Mr. Trump "an officer of the United States" who previously took an oath to support the US Constitution for purposes of § 3 when he previously held the office of President. In a separate question, this Court also asked whether there were any state or federal cases interpreting or applying § 3 to candidates for office or persons serving in an office, including any cases currently involving Mr. Trump as potential presidential candidate.

Addressing this second question first, there are numerous cases pending throughout the United States in which the movants seek to disqualify Mr. Trump under § 3 of the Fourteenth

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Amendment.[3] A list of known cases is attached as Exhibit 1. Upon information and belief, none of the cases have yet resulted in a substantive determination by a court regarding the application of § 3 to Mr. Trump.[4] And several have been dismissed for lack of standing. (Exhibit 1, Case list.) As far as cases applying § 3 to other candidates, there are a few cases of recent vintage in which several candidates were challenged on that basis.

In *Hansen v Finchem*, the court determined that the plaintiffs could not use a state statute allowing challenges to candidates based upon their qualifications for office to disqualify the candidates under § 3 because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz May 9, 2022).

In *Rowan v Greene*, the Georgia Secretary of State affirmed an administrative hearing officer's determination that the plaintiffs failed to provide sufficient proof that Representative Marjorie Taylor Greene was not qualified to seek and hold public office. See No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022). See also *Greene v Raffensperger*, 599 F Supp 3d 1283, 1320 (ND Ga 2022) (refusing to enjoin the state proceedings where Greene failed to demonstrate that states were prohibited from enforcing § 3), *Greene v Sec'y of State for Georgia*, 52 F 4th 907, 909-910 (CA 11, 2022) (remanding for dismissal of case as moot).

In *Griffin v New Mexico ex rel White*, a quo warranto proceeding, a state court judge determined that § 3 applied to a county commissioner convicted of a crime in relation to the

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[3] Most of the cases have been filed by John Anthony Castro, a purported presidential candidate from Texas. Castro filed a complaint against Secretary Benson and Donald J. Trump in the Court of Claims on August 31, 2023. See *Castro v Benson, et al*, Case No. 23-000122, however, the complaint has not been served.

[4] Cases worth monitoring currently include *Growe v Simon*, Minnesota Supreme Court Case No. A23-1354, and *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577. See Exhibit 1.

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events on January 6, 2021, and the commissioner was removed from office. See No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept 6, 2022). The commissioner's appeal to the New Mexico Supreme Court was denied. *Griffin v New Mexico, ex rel White*, No. S-1-SC-39571 (NM Feb 16, 2023).

And in *Cawthorn v Circosta*, voters filed a challenge with the North Carolina State Board of Elections seeking to disqualify Representative Madison Cawthorne from the 2022 primary ballot, and Cawthorne filed suit in federal court seeking to bar the state board from considering the issue. 590 F Supp 3d 873, 891 (ED NC 2022). The District Court held that the 1872 Amnesty Act supported enjoining the state proceedings. *Id*. at 890-892. The Fourth Circuit Court of Appeals reversed, and no further litigation occurred as Cawthorne lost in the primary. *Cawthorn v Amalfi*, 35 F4th 245 (CA 4, 2022).

Given the dearth of cases, reference to recent law review articles may assist the Court.

In a 2021 article, the authors opine that the President of the United States is not an "officer of the United States" whose prior taking of an oath will trigger the disqualification from holding a covered office under § 3. See Josh Blackman & Seth Barrett Tillman, Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?, 15 NYU J L & Liberty 1 (2021), attached as Exhibit 2. In summary of what is a complex argument, the authors argue that the terms "officer of the United States" and "[o]ffice . . . under the United States" should be presumed to have different meanings in § 3 since the Framers used different wording within the same section. *Id*. at 7-10. They argue that the history of the Framers use of this different terminology in different sections of the Constitution, supports a presumption that "these phrases refer to different positions." *Id*. at 9. And that "the better inference . . . is that the President and Vice President are not 'Officers of the United States.'" *Id.* at 10.

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> All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office ... under the United States" in Section 3 of the Fourteenth Amendment. [*Id.*]

The authors go on to expressly argue that the President is not an "officer of the United States" for purposes of the various provisions that use that language, including § 3, that there is no compelling evidence that the Framers intended something different in § 3, and that various cases and authorities support that conclusion. *Id*. at 21-33. The article then discounts various past authorities and arguments that suggest or reach different conclusions. *Id*. at 34-50. In their conclusion, the authors note that they chose not to resolve whether the President is an "office . . . under the United States," but that if the President is not an "officer of the United States," it "ends the case" for purposes of the application of § 3. *Id*. at 54.

Conversely, in a 2023 article, the authors reject the analysis in the Blackman and Tillman article that the President is not an "officer of the United States," and further conclude that the President is an "officer . . . under the United States" for purposes of both clauses in § 3. See William Baude & Michael Stokes Paulson, The Sweep and Force of Section Three, 172 U PA L REV ___ (forthcoming 2024), attached as Exhibit 3. These authors argue that the provisions of § 3 should be read:

> in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one. . . . Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside. [*Id*. at p 105 (footnote omitted).]

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The authors further argue that the list of disqualification triggering offices in § 3 ("officer . . . of the United States") closely tracks the listing of offices in the Constitution's oath provisions, see art VI, cl 3, art II, § 1, cl 8, and that the list of offices from which a person is disqualified from ("offices . . . under the United States") builds on that list. *Id*. at 105-106. "Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application." *Id*. at 106. And "if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions[.]" *Id.* The argue that § 3's "project of office-listing" was to simply provide a comprehensive list of positions in both clauses. *Id.*

The authors reject the analysis of Blackman and Tillman as a technical and non-natural reading of the text that ultimately results in the implausible consequence that an insurrectionist President could hold the office of President, but that his prior holding of that office would not trigger disqualification. *Id*. at 108-109. They further note that a "variant" of that argument was refuted during congressional debates on § 3. (*Id*. at 110-111.)

There are certainly additional, relevant articles available, Defendant chose these as two recent competing viewpoints. It is also likely that the cases pending regarding Mr. Trump, see Exhibit 1, will result in additional discussions of whether § 3 applies to the Office pf President.

C. Whether § 3 precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3, or both.

Defendant Benson understands this question as asking whether § 3 is a qualification for seeking office, or whether it is a prohibition to holding office if elected, or whether it functions as both. Again, § 3 provides, in part, that "[n]o Person shall be a Senator or Representative in

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Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States[.]" (Emphasis added.)

This issue does not appear to have been the subject of significant litigation yet or academic discussion. But in the Arizona case discussed above in I.B, the Arizona Supreme Court held in its brief opinion that the state statute allowing candidate challenges could not be used to advance a claim under § 3 because its "scope is limited to challenges based upon 'qualifications . . . as prescribed by law.'" *Hansen*, 2022 WL 1468157 at * 1. The statute did not apply, the court reasoned, because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. *Id.*

But in the Fourth Circuit's opinion in *Cawthorn*, also noted above in I.B, the Court stated in a footnote that it was "assuming without deciding" that the "disability" imposed by § 3 is a "qualification" for purposes of article I, § 5 of the US Constitution, 35 F4th at 257 n7, which provides that "Each House shall be the judge of . . . the qualifications of its own members[.]" US Const, art I, § 5. In the text the Fourth Circuit cited *Powell v McCormack*, 395 US 486 (1969), in which the US Supreme Court made a passing reference to § 3 but stated in a footnote that it was *not* deciding whether § 3 and other constitutional provisions properly constituted "qualifications." *Id.* at 520 n 41. See also *US Term Limits, Inc v Thornton*, 514 US 779, 788 n 2 (1995) (citing *Powell* and likewise not deciding the issue).

Also, in *Greene*, the District Court discussed the state's important regulatory interests in ensuring that only qualified candidates appear on the ballot and appeared to treat the disqualification component of § 3 as a qualification. 599 F Supp 3d at 1311-1312, 1316 ("On the current record, it appears that the Challenge Statute imposes minimal burdens through its process of ensuring that only candidates who meet the Constitution's minimum threshold requirements

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appear on the ballot — including candidates who are not disqualified by Section 3 of the Fourteenth Amendment.")

One author has discussed the possible timing of challenges to federal-office candidates under § 3, including the President, describing possible pre-election, post-election/pre-inauguration, and post-assumption of office challenges. See Myles S. Lynch, Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment, 30 Wm & Mary Bill Rts J 153, 189-194 (2021).[5]

It is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 functions as a qualification for seeking office or a prohibition from ultimately holding office.

D. Whether § 3 is self-executing.

The question of whether § 3 is self-executing appears to have proponents on both sides. Authors Baude and Paulson in their article, discussed above in I.B., argue that § 3 functions as an automatic, legal disqualification whenever its' conditions for disqualification are met, and thus needs no implementing legislation by Congress. (Exhibit 3, p 17.) They note that the federal Constitution is the supreme law of the land, and states what the law is. (*Id.*) "Section Three's language is language of automatic legal effect: '*No person shall be*' directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be." (*Id.*, pp 17-18.) The authors observe that this language is consistent with other self-executing "disqualification" sections, such as those in article I and article II, § 1, cl 5's requirement that *"*[n]o person . . . shall be eligible*"* to be President who does not meet the age

[5] The Baude and Paulson article includes a discussion of the mode of enforcing § 3. See Exhibit 3, pp 22-35.

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requirement. (*Id*., p 18.) As well as other provisions, like the Thirteenth Amendment (abolishing slavery) and other sections of the Fourteenth Amendment, such as the Equal Protection Clause. (*Id*., pp 18-19.)

The authors recognize that Congress *can* enact legislation to enforce § 3, as it has in the past, but Congress need not do so where § 3 "was effective all along." (*Id*., p 19-20.) They further contrast § 3's language with other provisions like the Constitution's impeachment provisions, which require implementation, whereas § 3 does not. (*Id*., pp 20-21.) For these reasons, they conclude that § 3 "has legal force already," meaning it is self-executing. (*Id*., p 22.)

Blackman and Tillman, in a new article, advance a contrary view. See Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3, 28 TEX REV L & POL (forthcoming 2024).[6] Again, in summary of what is a complex argument, they argue that whether § 3 is self-executing ultimately depends on the manner enforcement is sought. (*Id*., pp 18-20.) They note that many Article I qualification-type provisions have gone unenforced, whether at the federal or state level, which undermines Baude's and Paulson's argument that such provisions are self-executing without legislation intervention, and by extension their argument that § 3 is as well. (*Id*., pp 25-37.) Turning to the Fourteenth Amendment, Blackman and Tillman acknowledge that § 1, which includes the due process and equal protection clauses, is generally considered self-executing. (*Id*., pp 38-39.) But they say "the better question is in what fashion is Section 1 self-executing?" (*Id*. at p 39.) The authors argue, citing various precedents, that while a defensive ("shield") use of the constitutional constraints found in the

[6] An abstract of the lengthy article as well as a download is available online at Sweeping and Forcing the President into Section 3 by Josh Blackman, Seth Barrett Tillman :: SSRN.

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Fourteenth Amendment is always permissible, the offensive ("sword") use of the Fourteenth Amendment's limitations, including those in § 3, is not. (*Id*. at pp 39-53.) Thus, in their view, § 3 would be not self-executing if used as a sword to disqualify a candidate.[7]

Secretary Benson is aware of only one recent case that has touched on whether § 3 is self-executing. In *Hansen*, the Arizona Supreme Court did not use the words self-executing, but it noted "that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'), which suggests that ARS § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates." 2022 WL 1468157, at *1. As above, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 is self-executing.

E. Whether the 1872 Amnesty Act applies to the instant case.

In 1872, Congress enacted legislation related to § 3, which provides:

> [A]ll 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 service of the United States, heads of departments, and foreign ministers of the United States. [Act of May 22, 1872, ch. 193, 17 Stat 142 (1872).]

And in 1898, Congress removed the disabilities from the previously excepted persons in the 1872 Act by enacting another law, providing that "the disability imposed by section three of

[7] Both Baude and Paulson and Blackman and Tillman spend time in their respective articles discussing the ramifications of US Supreme Court Justice Salmon Chase's decision as a circuit justice in *In re Griffin*, 11 F Cas 7 (CCD Va 1869), in which he determined § 3 required enabling legislation. For an additional viewpoint on this subject, the Court may wish to review Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const Comment 87, 100-108 (Spring 2021).

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the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432.

In *Cawthorn*, discussed previously, the District Court agreed with Representative Cawthorn that the 1872 Act permanently removed the disabilities stated in § 3. *Cawthorne,* 590 F Supp 3d at 890. "The 1872 Act, by its plain language, removed '*all political disabilities* imposed by the third section of the fourteenth article of amendments of the Constitution of the United States *from all persons whomsoever.'* " *Id*. at 891 (emphasis in original). The court observed that Congress could have used language that clarified the act only applied to persons currently subject to § 3 but did not do so. *Id*. The District Court therefore enjoined any further proceedings against Cawthorne.

But the Fourth Circuit reversed the District Court.

That Court concluded that the District Court erred "in construing the Act as a sweeping removal of all future Fourteenth Amendment disabilities." *Cawthorn*, 35 F.4th at 257. The Court determined that the lower court had read the Act incorrectly in that it did not prospectively relieve persons from disabilities in the future but was rather "'backward-looking'" because the language it employed ("imposed" and "removed") was in the "past tense." *Id*. at 258 (citations omitted). "Here, Congress employed the past-tense version, indicating its intent to lift only those disabilities that had by then been 'imposed.'" *Id*., citing *Costello v INS*, 376 US 120, 123–24 (1964) (referring to the past participle in "have been" as a "use of the past tense" (quotation marks omitted)). The Court went on to conclude that this construction was consistent with the Act's history and context in dealing with "the hordes of former Confederates seeking forgiveness." *Id*. at 259 (citation omitted). The Court thus reversed and vacated the injunction and remanded for further proceedings. *Id*. at 261.

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The District Court in New Mexico in the *Griffin* case agreed with the Fourth Circuit's analysis concerning the 1872 Act. See *Griffin*, 2022 WL 2132042 at * 2. And in a decision preceding the Fourth Circuit's decision, the Georgia District Court in the *Greene* case rejected the District Court's analysis in *Cawthorn.* See *Greene*, 599 F Supp 3d at 1315 ("Suffice it to say, the Court is skeptical. It seems much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under Section 3 had already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future.")

Again, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of the 1872 Act.

Respectfully submitted,

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PROOF OF SERVICE

Heather S. Meingast certifies that on October 16, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

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