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A BRIDGE TOO FAR: SECTION 3 AFTER TRUMP V. ANDERSON

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I. INTRODUCTION

After the 2020 presidential election, then-President Donald Trump engaged in a monthslong legal and social media campaign to undermine the legitimacy of the election.[1] On January 6, 2021, thousands of armed rioters attacked the U.S. Capitol in a failed attempt to stop Congress's certification of the 2020 presidential election.[2] In the fallout of the attack, Donald Trump was impeached by the House of Representatives for incitement of insurrection.[3] At the same time, political and legal commentators began speculating whether the Disqualification Clause of Section 3 of the Fourteenth Amendment would bar Donald Trump from seeking office again.[4] Donald Trump was eventually acquitted by the Senate[5] but the cloud of disqualification under Section 3 of the Fourteenth Amendment lingered after he left office.[6]

This would have been historically unprecedented. Beyond the initial flurry of litigation in the wake of the Civil War, the Disqualification Clause in Section 3 had only been used once since the end of Reconstruction to remove someone from federal office.[7 Previously derided as a ?forgotten?[8 and ?vestigial?[9 part of the Constitution, Section 3 received new life in the aftermath of January 6. Section 3 has been used as the foundation for lawsuits against officials in six states[10 and was explicitly cited by a court to justify removal from office of a county commissioner in New Mexico.[11 The clause's timeliness and relevance only grew since mid-2023 when two law professors, William Blaude and Michael Paulsen, alleged that the clause, by operation of law, automatically disqualified Donald Trump from seeking the presidency again.[12 Others disagree.[13

In late 2023, the threat of disqualification was realized when Donald Trump was disqualified from the Colorado presidential primary under Section 3 of the Fourteenth Amendment by the Colorado Supreme Court, acting under a Colorado state law that allowed voters to petition the secretary of state to keep constitutionally ineligible candidates off of the ballot.[14 The Supreme Court reversed that decision on March 4, 2024, holding that the States could not exercise discretionary judgment on the constitutional qualifications of presidential candidates.[15 But the Court then went further, broadening their ruling and holding that Section 3 is inoperative against would-be federal officeholders unless specifically given life by Congress.[16 And while the Court was unanimous in its holding that the States are powerless to enforce Section 3, the Court's disembowelment of that Section, reasoning that Section 5 enforcement legislation was ?critical? to Section 3's application, produced a much more controversial 5-4 result.[17 [1 H.R. Rep. No. 117-663, at 210-14 (2022). [2 Id. at 76-77.

[3 H.R. Res. 24, 117th Cong. (2021). [4 See Deepak Gupta & Brian Beutler, Opinion, Impeachment Isn't the Only Option Against Trump, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/opinion/Trump-impeachment-disqualification.html; see also Noah Feldman, Opinion, Trump's 2024 Hopes Just Crashed Into the 14th Amendment, Bloomberg (Jan. 11, 2021, 3:06 PM), https://www.bloomberg.com/view/articles/2021-01-11/trump-2024-president-may-be-ineligible-after-u-s-capitol-riot; see also Lyle Denniston, Is 14th Amendment Sec. 3 a Dead Letter?, Lyle Denniston L. News (Jan. 10, 2021), https://lyldenlawnews.com/2021/01/10/is-14th-amendment-sec-3-a-dead-letter/

[5 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021). [6 Roger Parloff, After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?, Lawfare (June 7, 2022, 1:32 PM), https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.

[7 Marcy Kahn, Ass'n of the Bar of the City of New York, Report by the Task Force on the Rule of Law on Section 3 of the Fourteenth Amendment to the United States Constitution ? The Disqualification Clause 3 (2022) [hereinafter NYC Bar Report. [8 Mark A. Graber, Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory, 62 St. Louis U. L.J. 639, 639-40 (2018).

[9 Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 87 (2021).

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[10 NYC Bar Report, supra Note 8, at 4-13.

[11 See New Mexico ex rel. White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, *67-69 (N.M. Dist. Ct. Sept. 6, 2022).

[12 See Isaac Chotiner, The Constitutional Case for Barring Trump from the Presidency, New Yorker (Aug. 23, 2023), https://www.newyorker.com/news/q-and-a/the-constitutional-case-for-barring-trump-from-the-presidency; see also Matt Ford, The Conservative Legal Roadmap to Disqualify Trump from Office, New Republic (Aug. 13, 2023), https://newrepublic.com/article/174977/baude-paulsen-trump-14th-amendment.

[13 Josh Blackman & Seth B. Tillman, Sweeping and Forcing the President into Section 3, 28 Tex. Rev. L. & Pol. (2024).

[14 Anderson v. Griswold, 2023 CO 63, ¶ 257, 543 P.3d 283 (Colo. 2023), rev'd sub nom Trump v. Anderson, 601 U.S. 100 (2024) (per curiam).

[15 Trump v. Anderson, 601 U.S. 100, 114-15 (2024) (per curiam). [16 Id. at 104-06.

[17] Id. at 117-18 (Barrett, J., concurring); see also, id. at 121 (Sotomayor, S., Kagan, E., and Jackson, JJ., concurring).

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