

EXHIBIT B

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1 Cawthorn v. Circosta et al, 5:22-cv-50-M

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3 (Proceedings held on March 4, 2022,
4 commencing at 10:28 a.m.)

10:28:08 5 THE COURT: If the clerk would please call
10:28:08 6 the case.

10:28:08 7 THE CLERK: Madison Cawthorn versus Damon
10:28:13 8 Circosta, Stella Anderson, Jeff Carmon, Stacy Eggers IV,
10:28:17 9 Tommy Tucker, and Karen Brinson Bell.

10:28:20 10 THE COURT: Counsel, please state your
10:28:21 11 appearance for the record.

10:28:23 12 MR. BOPP: Jim Bopp, attorney for plaintiff.

10:28:26 13 MR. STEED: Terence Steed for the State
10:28:29 14 Board.

10:28:30 15 THE COURT: Good morning, counsel.

10:28:36 16 All right. We've discussed the scope of this
10:28:38 17 hearing during the conference call where we talked about
10:28:42 18 what the Court was focused on. The issue before the
10:28:46 19 Court is whether North Carolina Board of Elections may
10:28:48 20 determine Representative Cawthorn's qualifications as a
10:28:51 21 candidate for the U.S. House of Representatives under a
10:28:54 22 North Carolina statute that permits challenges to his
10:28:55 23 candidacy, for various reasons but including pursuant to
10:29:02 24 14th Amendment Section 3. And the Court's narrow
10:29:06 25 question here in the Court's -- the question the Court is

10:29:08 1 focused on for purposes of argument is whether or not,
10:29:12 2 first, does the North Carolina Board of Elections
10:29:15 3 construe its statute to permit the Board to make such
10:29:20 4 determinations? That is, has the statute applied -- as
10:29:25 5 applied to Representative Cawthorn, do the Board claim
10:29:28 6 the authority to enforce Amendment 14 Section 3? Or
10:29:33 7 because if it's disclaimed that authority -- in the
10:29:37 8 Court's mind, the core question before the Court is
10:29:39 9 mooted. If it maintains that it continues to claim that
10:29:45 10 authority, then we have a clear application of some of
10:29:49 11 the issues of ripeness, standing, and mootness that the
10:29:53 12 Court has suggested may be applicable.

10:29:55 13 So I want to hear directly from the parties
10:29:57 14 first on the claim of authority to enforce 14th Amendment
10:30:02 15 Section 3. So I'd ask the Board of Elections first to
10:30:04 16 state to the Court the State's position regarding
10:30:07 17 enforcement of that portion of the statute, because it's
10:30:10 18 not the Court's intention to reach out beyond that
10:30:13 19 portion of the statute. So I'll hear from the Board of
10:30:17 20 Elections first on that core question of where are we on
10:30:21 21 the Board of Elections' intention to enforce Amendment 14
10:30:24 22 Section 3.

10:30:25 23 MR. STEED: Understood. Thank you, Your
10:30:26 24 Honor. Would you prefer I stand or --

10:30:27 25 THE COURT: Standing is best.

10:30:28 1 MR. STEED: Okay.

10:30:29 2 Your Honor, the position of the State of the
10:30:32 3 Board comes from the statutes itself. NCGS 163-127.2b,
10:30:39 4 it says the challenge must be made in a verified
10:30:42 5 affidavit by the challenger based on reasonable suspicion
10:30:45 6 or belief of the facts stated. The grounds for filing a
10:30:48 7 challenge are that the candidate does not meet the
10:30:51 8 constitutional or statutory qualifications -- sorry --
10:30:54 9 qualifications for office.

10:30:55 10 It's pretty plain right there that
10:30:58 11 constitutional qualifications are within the purview of
10:31:00 12 the State Board and they can hear these qualification
10:31:02 13 challenges.

10:31:03 14 THE COURT: And that's notwithstanding the
10:31:07 15 1872 Act?

10:31:08 16 MR. STEED: If you would like to go right
10:31:11 17 into the --

10:31:11 18 THE COURT: No, no. I'm just making sure
10:31:13 19 that -- I want to be -- that your position is that the
10:31:15 20 constitutional authority extends all the way out to
10:31:17 21 claims of insurrection and that that is where the Board
10:31:22 22 intends to permit the panel to focus its inquiry, because
10:31:27 23 that's the basis for the challenge.

10:31:29 24 MR. STEED: Yes. Our position is that the
10:31:31 25 1872 Act did not absolve all future insurrections or --

10:31:34 1 THE COURT: Okay.

10:31:35 2 MR. STEED: -- or acts of treason.

10:31:36 3 THE COURT: Okay. So I understand the
10:31:39 4 State's position. Does the plaintiff wish to be heard on
10:31:41 5 this? I think that resolves for the Court where we are
10:31:44 6 as to standing, ripeness, and mootness.

10:31:47 7 MR. BOPP: That's what I understood their
10:31:48 8 position to be.

10:31:49 9 THE COURT: Okay.

10:31:50 10 MR. BOPP: That the challenge made in the --
10:31:52 11 by the challengers can be heard and determined by the
10:31:55 12 panel and with subsequent appeals.

10:31:57 13 THE COURT: Okay. So I think we have
10:31:59 14 standing. We're ripe. The renewed challenge -- there
10:32:04 15 was an issue potentially of mootness given the actions of
10:32:08 16 redrawing the districts. But this Court now believes
10:32:11 17 that we are ripe; that is, there is a renewed challenge
10:32:15 18 with new challengers that have challenged Representative
10:32:18 19 Cawthorn on the same basis in his new district. He is a
10:32:22 20 candidate who has been challenged under the statute. So
10:32:25 21 if there are any ripeness issues, I'll hear those now.

10:32:29 22 MR. STEED: Your Honor, I would refer back to
10:32:31 23 our papers which laid out the ripeness issues. And the
10:32:36 24 only -- frankly, the setting that we were in when we
10:32:40 25 started was that it was stayed.

10:32:41 1 THE COURT: Right.

10:32:42 2 MR. STEED: We are now in that setting again
10:32:43 3 because of the petition to the Supreme Court. We can't
10:32:47 4 anticipate when that's gonna open back up. But if it
10:32:50 5 does before the meeting on Monday, we would move forward
10:32:52 6 with it under the statute.

10:32:53 7 THE COURT: Okay.

10:32:53 8 MR. STEED: But yeah.

10:32:56 9 THE COURT: That was the Court's
10:32:56 10 understanding. And for the same bases that I stated
10:32:59 11 earlier, I deem this to be ripe for adjudication today.
10:33:03 12 So let's move now to the substance of the issue, which I
10:33:06 13 will start with the plaintiff.

10:33:07 14 MR. BOPP: Which issue would you like me to
10:33:16 15 address first?

10:33:16 16 THE COURT: The Court has narrowed the trial
10:33:19 17 today to the question of whether North Carolina Board of
10:33:22 18 Elections -- everything else is preserved. Everything
10:33:25 19 is -- the pleadings are there. I understand them. The
10:33:27 20 issue I'm interested in oral argument on today is the
10:33:31 21 narrow issue of whether the North Carolina Board of
10:33:34 22 Elections has the authority to determine Representative
10:33:37 23 Cawthorn's qualifications as a candidate for the U.S.
10:33:39 24 House of Representatives under a North Carolina statute
10:33:41 25 that permits challenge to his candidacy; that is North

10:33:44 1 Carolina General Statute Section 163-127.1 et seq,
10:33:49 2 pursuant to the United States Constitution, that is in
10:33:52 3 particular Section 3 of the 14th Amendment, and whether
10:33:57 4 or not the Amnesty Act has shown by an action of
10:34:01 5 two-thirds of both houses of Congress that that may not
10:34:04 6 apply.

10:34:05 7 MR. BOPP: Well, Your Honor, we have made
10:34:07 8 three challenges under the Constitution and federal law
10:34:12 9 that would deny the North Carolina State Board of
10:34:19 10 Elections the authority to determine whether he is
10:34:25 11 disqualified under the Section 3 of the 14th Amendment.
10:34:31 12 We made three* separate challenges to that under
10:34:34 13 constitutional and federal law.

10:34:35 14 The first is that only Congress has the
10:34:37 15 authority to judge the qualifications of its members.
10:34:42 16 And the qualifications clause Article 1 Section 5 Clause
10:34:50 17 1 says, each house shall be the judge of the
10:34:55 18 qualifications of its own members.

10:34:58 19 You could not be -- could not be plainer,
10:35:01 20 more categorical, more exclusive, more definitive than
10:35:06 21 that, that they have the constitutional authority to do
10:35:09 22 it. Therefore, states are deprived of that
10:35:15 23 constitutional authority.

10:35:17 24 Now, that principle was affirmed by the U.S.
10:35:20 25 Supreme Court in 1972 in the *Roudebush versus Hartke

10:35:26 1 case where the Court said that recount procedures are
10:35:30 2 permissible under Article I Section 5 Clause 1 because
10:35:39 3 recount procedures do not, quote, frustrate the Senate's
10:35:42 4 ability to make an independent final judgment.

10:35:45 5 However, the authority that the North
10:35:49 6 Carolina State Election Board believes that it can assert
10:35:53 7 and implement is disqualifying, if they -- if the
10:35:58 8 findings are such and of course we don't concede that --
10:36:07 9 if the findings are such that he, quote, engaged in
10:36:10 10 insurrection or rebellion is therefore disqualified.

10:36:15 11 Now, if they would remove him from the ballot
10:36:19 12 on that basis, which they kind the authority to do *, you
10:36:24 13 would then have a primary where he would not be a
10:36:26 14 candidate. You would then have a general election that
10:36:29 15 he would not be a candidate. And so there would never be
10:36:34 16 a time where he would be presented to Congress as an
10:36:40 17 elected representative where they could judge the
10:36:44 18 qualifications of him, and you know, Section 3 is not
10:36:52 19 that you are disqualified from being a candidate for
10:36:55 20 Congress, which the -- what section 3 provides is that no
10:37:01 21 person shall be a senator or representative if they are
10:37:07 22 disqualified under Section 3.

10:37:10 23 So that is a determination that can only be
10:37:14 24 made and is made on the date that Congress reconvenes in
10:37:23 25 a new session and challenges can be brought to the

10:37:24 1 qualifications of a member.

10:37:28 2 If Representative Cawthorn is removed from
10:37:31 3 the ballot, that will never occur. And Congress will be
10:37:34 4 denied the authority, exclusively their own, of judging
10:37:39 5 the qualifications of Representative Cawthorn when
10:37:45 6 presented as an elected member of Congress.

10:37:48 7 So that is -- so that directly attacks
10:37:53 8 Congress's authority. It means something that is in
10:37:57 9 their exclusive authority will be prevented from being
10:38:02 10 presented by the actions of the State, and that's
10:38:06 11 unconstitutional.

10:38:07 12 Now, second challenge -- the next two
10:38:12 13 challenges are under federal law, of course the supremacy
10:38:20 14 clause, but federal law. And of course the
10:38:22 15 constitutional challenges that we amount to -- with
10:38:25 16 respect to Congress's exclusive authority, but also the
10:38:33 17 constitutional challenges we mount to the North Carolina
10:38:36 18 challenge statute which we believe violates both the
10:38:41 19 First Amendment and due process in two significant
10:38:43 20 respects. Can all be avoided by proper understanding and
10:38:49 21 application of the Amnesty Act of 1872.

10:38:56 22 Now, so first, a determination under Section
10:39:07 23 3 is impossible until Congress actually meets in new
10:39:13 24 session to seat newly elected members of Congress.
10:39:18 25 Because the language of the -- of the Section 3, it

10:39:26 1 provides disqualification. First, both retroactively and
10:39:41 2 prospectively. In other words, the language of Section 3
10:39:42 3 of the 14th Amendment is in the future perfect tense.
10:39:46 4 And thankfully I have people working for me that
10:39:49 5 understand the English language. And we make this point
10:39:52 6 in our brief, which means that it has both retroactive
10:40:00 7 effect, and that is it disqualified people who engaged in
10:40:05 8 the Civil War. But it has prospective effect, it would
10:40:11 9 disqualify people if they would meet the terms of the
10:40:16 10 section.

10:40:17 11 But critically is the final sentence to the
10:40:20 12 point I'm making here. It says, but Congress may by a
10:40:25 13 vote of two-thirds of each house remove such a
10:40:28 14 disability.

10:40:29 15 Congress has done that, there was a older law
10:40:34 16 review article that says perhaps thousands of times
10:40:38 17 because they were numerous petitions to remove disability
10:40:42 18 for individuals that had engaged in the Civil War on the
10:40:54 19 confederacy side, and that was one of the impetuses for
10:40:59 20 both the Amnesty Act of 1872 and the Amnesty Act of 1898
10:41:06 21 was to just deal with it categorically. And Congress has
10:41:12 22 this authority to remove the disability up until the
10:41:17 23 moment that Representative Cawthorn is seated as a newly
10:41:24 24 elected member of Congress next year.

10:41:27 25 So since Congress can do that at any time

10:41:33 1 from now or June or July or August, September, October,
10:41:38 2 November, December, even the beginning of January, how
10:41:43 3 can the North Carolina State Elections -- I mean, it
10:41:48 4 would be illegal under federal law, unconstitutional for
10:41:52 5 them to determine something that's impossible to
10:41:55 6 determine at this moment.

10:41:57 7 Now, that is much different, obviously, from
10:42:01 8 other examples of qualifications like age. Age can be
10:42:09 9 determined. It's an immutable characteristic. It can be
10:42:14 10 determined, when will someone become 30 or 25, be
10:42:21 11 eligible to be qualified to be a member of the House,
10:42:25 12 senate, or even the president. So those are events that
10:42:29 13 we know will happen, you know, birthdays will occur. And
10:42:33 14 if it occurs prior to again seating, you know, being
10:42:38 15 sworn in, you are qualified when you're sworn in, then
10:42:44 16 that can be -- we can look into the future and say well
10:42:48 17 this candidate is currently 24 but he'll be 25 before the
10:42:54 18 new Congress is seated and therefore be qualified at that
10:42:58 19 time.

10:42:59 20 So it's a much different kind of
10:43:03 21 determination. And then the Section 3 because it cannot
10:43:12 22 be determined, it's impossible to know, whether from now
10:43:16 23 to January Congress will act and remove this disability.
10:43:22 24 So he cannot be possibly disqualified at this moment
10:43:27 25 under federal law from being a candidate for office.

10:43:33 1 The final point is the Amnesty Act of 1872.
10:43:41 2 Now, the Amnesty Act of 1872 of course relieved the
10:43:49 3 political disability that was created by Section 3 from,
10:43:55 4 quote, all persons whosoever, end of of quote, within
10:44:02 5 applicable exceptions.

10:44:03 6 Now, as I already mentioned, to this analysis
10:44:07 7 also is important to understand that Section 3 had both
10:44:13 8 retroactive effect and prospective effect, something that
10:44:20 9 it becomes patently obvious that Congress understands and
10:44:26 10 when they act with respect to amnesty under Section 3,
10:44:32 11 they know what they're doing and what effect it has.

10:44:35 12 Now, now -- and of course to that point that
10:44:40 13 there's both retroactive and prospective, everybody is
10:44:44 14 agrees to that, that I know of. All parties agree. The
10:44:51 15 challengers agree, and I agree.

10:44:53 16 So that takes us to the Amnesty Act of 1872.
10:45:02 17 It removed all disability with no distinction between
10:45:08 18 retroactive and future effects. No distinction. It said
10:45:14 19 all -- the applicable words -- all political disabilities
10:45:19 20 imposed by the third section of the 14th Amendment are
10:45:25 21 hereby removed from all persons whatsoever.

10:45:29 22 There's no distinction made in the plain
10:45:33 23 language of the Amnesty Act of 1872. There's no
10:45:36 24 distinction made between retroactive and prospective. It
10:45:42 25 categorically removes from all persons whatsoever all

10:45:53 1 political disabilities imposed by Section 3, without
10:45:57 2 distinction to Section 3's retroactive and prospective
10:46:02 3 effect. So all of them are removed.

10:46:04 4 Now, there's an exception that comes into
10:46:06 5 play later where that amnesty is not granted either
10:46:14 6 prospectively or in the future for certain exceptions
10:46:20 7 such as officers in the judiciary, military, naval
10:46:24 8 service, et cetera. That comes into play in a minute.

10:46:27 9 Well, the point that I'm making about
10:46:35 10 retroactive or prospective effect of what the Amnesty Act
10:46:40 11 of 1872 had, and we argue that it is by its plain
10:46:47 12 language both retrospective and prospective, becomes
10:46:53 13 obvious in the Amnesty Act of 1898. Now, the Amnesty Act
10:47:01 14 of 1898 was necessary because remember there were
10:47:08 15 exceptions in the '72 Act for officers, minister, foreign
10:47:14 16 ministers, et cetera. And it was the apparent desire of
10:47:21 17 the Congress to remove the political disability that
10:47:26 18 still existed to those categories that were exempted
10:47:30 19 under the act of 1872. And they did that by saying that
10:47:38 20 the disability imposed by Section 3, those words are
10:47:45 21 identical to the 1872 Amnesty Act except the 1872 Amnesty
10:47:53 22 Act said political disability. This one says the
10:47:57 23 disability. I don't think that's a material change, has
10:48:02 24 anything to do with what we're talking about. Imposed by
10:48:06 25 Section 3.

10:48:07 1 Then they insert, which you don't have in
10:48:10 2 1872, "heretofore incurred." "Heretofore incurred" is
10:48:18 3 hereby removed. So Congress knew exactly what I think a
10:48:26 4 fair reading of the Section 3 is, at that applied
10:48:33 5 retroactively and prospectively and when they wanted to
10:48:37 6 exercise their authority to remove a disability that
10:48:42 7 could be incurred under Section 3, that they knew how to
10:48:48 8 do that. If they just wanted to do it retrospectively,
10:48:53 9 then they would say "heretofore incurred." If they
10:48:59 10 wanted to do it both retrospectively and prospectively,
10:49:03 11 they wouldn't say anything, because they knew its effect
10:49:07 12 and if they were gonna remove a disability, they could
10:49:11 13 choose. And in 1872 they chose to remove the disability
10:49:18 14 prospectively and retrospectively except for certain
10:49:23 15 categories. And in 1898, they removed the disability
10:49:28 16 from those exempted under the 19 -- 1872 Act.
10:49:36 17 Retrospectively. Heretofore incurred.

10:49:38 18 So what remains right now is after 1892, if
10:49:48 19 Section 3 is triggered by people engaging in an
10:49:54 20 insurrection or rebellion, then those same people
10:49:59 21 exempted in 1872 are liable now. Okay? Officers in the
10:50:06 22 military, et cetera. They have not been afforded -- they
10:50:11 23 were not afforded either in 1872 or in 1898 prospective
10:50:19 24 removal of the disability.

10:50:22 25 Representative Cawthorn is not in that

10:50:26 1 exception. That exception does not apply to members of
10:50:31 2 Congress other than the two Congresses that immediately
10:50:38 3 preceded the Civil War. And those are exempted. He was
10:50:42 4 not a member of either of those Congresses. So he is
10:50:48 5 categorically exempted -- he is categorically -- any
10:50:56 6 disability that arises under Section 3 has been removed
10:51:01 7 by the Act of 1872.

10:51:04 8 Now, I just have to say one further thing.
10:51:12 9 Representative Cawthorn adamantly denies that he engaged
10:51:17 10 in insurrection or rebellion against the United States
10:51:20 11 when he was on the floor of the United States Congress
10:51:24 12 doing his constitutional duties on January 6th. But I
10:51:30 13 know that's not before you to judge the merit of the
10:51:38 14 scurrilous allegation that he was comparable to people
10:51:42 15 who took up arms during the Civil War in which over
10:51:47 16 600,000 Americans died. That's not before you. But
10:51:51 17 whether constitutionally and legally such a dis-- a
10:51:57 18 removal of his candidacy can be made under Section 3, and
10:52:05 19 if you do happen to reach this, under the North Carolina
10:52:09 20 procedures, is constitutional and in accordance with
10:52:13 21 federal law is the question before you. And it's our
10:52:18 22 position that all we have to win is on one of these. Any
10:52:21 23 one of the five claims that we have made, then the
10:52:24 24 challenge is aborted. And the threat that the North
10:52:31 25 Carolina State Election Board people -- and, by the way,

10:52:33 1 I really appreciate their notices. They were very
10:52:37 2 candid, accurate, we agree with the notice that they
10:52:41 3 filed on the 2nd as far as this status and procedures and
10:52:45 4 all that. They've been very candid with the Court and
10:52:48 5 with us, and we appreciate that.

10:52:53 6 But they are prepared -- if they think this
10:52:55 7 is not stayed so that they can act, they are prepared as
10:52:59 8 they say in the last paragraph of their notice to go
10:53:01 9 forward, appoint a panel, have a decision, and to launch
10:53:05 10 that kind of investigation into the First Amendment
10:53:11 11 protected rights of Cawthorn to run for Congress. That's
10:53:16 12 the core of the First Amendment and the right of
10:53:20 13 association. And freely being able to do that without
10:53:24 14 substantial government restriction which, if you have
10:53:28 15 that under the First Amendment, it requires strict
10:53:33 16 scrutiny.

10:53:34 17 So without -- to have a substantial
10:53:36 18 interference with the right to run is a fundamental
10:53:40 19 violation of the First Amendment. And it is the
10:53:46 20 distraction of a key component to our free and democratic
10:53:51 21 elections. I mean, this is the first thing, you know,
10:53:54 22 people that want to manipulate elections do, is they only
10:53:58 23 let their people run. And then they win by 98 percent,
10:54:04 24 right? I mean, that's the first target. You don't have
10:54:09 25 to run campaigns if somebody can't run, right? Very easy

10:54:11 1 to win if only your people are on the ballot.

10:54:15 2 So this has to be understood as a fundamental
10:54:19 3 attack on free and democratic elections that can only be
10:54:24 4 justified in the most compelling circumstances. And they
10:54:30 5 are -- I mean, there's a nationwide campaign. It's in
10:54:34 6 our pleading. To do this all over the United States, to
10:54:38 7 disqualify at least one future potential presidential
10:54:45 8 candidate in all the states through these sort of
10:54:48 9 challenges. This is really a serious attack on our
10:54:52 10 democracy and they have to -- and so this Court should
10:54:58 11 keep in mind the important First Amendment values that
10:55:02 12 existed and the violation of the First Amendment that
10:55:05 13 really triggers the kind of scrutiny we are asking you to
10:55:09 14 employ. Thank you.

10:55:10 15 THE COURT: Thank you, counsel. All right.
10:55:18 16 I'll hear the response from the Board of Elections.

10:55:22 17 MR. STEED: Thank you, Your Honor. As you
10:55:23 18 requested, the State's argument will be focused primarily
10:55:25 19 on the Amnesty Act of 1872, but I would like to briefly
10:55:28 20 go back to how Mr. Bopp began his argument discussing
10:55:31 21 Article I Section 5.

10:55:33 22 He read it out and claimed that it was clear
10:55:37 23 that it was the exclusive authority and there was nothing
10:55:40 24 else that we could add to it. Except it doesn't actually
10:55:42 25 say it's the exclusive authority. It says it will be the

10:55:45 1 judge of the qualifications of members. It doesn't say
10:55:47 2 that it will be the judge of qualifications of
10:55:50 3 candidates. It is not quite so clear as he claimed it to
10:55:54 4 be.

10:55:57 5 He goes on to argue that because of the way
10:55:59 6 that this will function, that the -- that if this
10:56:04 7 proceeding were to carry out and Mr. -- the plaintiff
10:56:06 8 were to have a negative, adverse ruling and he appealed
10:56:10 9 it all the way through the Court of Appeals in North
10:56:12 10 Carolina and the Supreme Court, and the U.S. Supreme
10:56:14 11 Court, at that point he wouldn't then be able to go to
10:56:16 12 Congress which was the final independent authority. That
10:56:21 13 is not entirely accurate. Under U.S.C. 381-396 it allows
10:56:26 14 a candidate or member to challenge directly with the
10:56:28 15 House. He may bring this either as a candidate which he
10:56:33 16 is today, or as a member which he is today. Therefore,
10:56:37 17 under Roudebush, the State Board's procedure, no matter
10:56:41 18 how it gets carried out, even if all the way to the
10:56:43 19 Supreme Court of the United States, does not usurp
10:56:45 20 Congress's ability to still have an independent final
10:56:48 21 judgment on it.

10:56:48 22 Additionally, beyond arguments contained in
10:56:53 23 our briefing on count 3 about whether there's exclusive
10:56:55 24 authorities is invested in Congress only, I think it's
10:56:58 25 important to highlight that Term Limits rather than

10:57:01 1 Roudebush is the primary Supreme Court case that should
10:57:05 2 be applied here. In Term Limits the Supreme Court made
10:57:07 3 it clear that states cannot add qualifications that do
10:57:11 4 not appear in the Constitution. Term Limits does not say
10:57:15 5 that there can be no enforcement of qualifications. The
10:57:19 6 candidate challenge process here is enforcing -- would be
10:57:23 7 hearing a challenge based upon qualifications in the
10:57:26 8 Constitution. Nothing is adding to it. Because it falls
10:57:31 9 within the confines of Term Limits.

10:57:35 10 I think that's important because if the
10:57:37 11 Supreme Court had the opportunity to make a narrower
10:57:40 12 ruling in Term Limits, they could have done so but they
10:57:42 13 chose not to.

10:57:44 14 I also wanted to bring to the Court's
10:57:45 15 attention a different act that wasn't in our papers, that
10:57:48 16 was just found through the endless hours of legislative
10:57:52 17 history that I've been through in the last couple of
10:57:53 18 weeks. It's an act in 1868 passed by Congress that had
10:57:58 19 to do with bringing the southern states back into the
10:58:00 20 fold. Essentially what it was was first there was an act
10:58:03 21 that preceded it that told the states what they needed,
10:58:06 22 the bullet points that needed to be in their state
10:58:09 23 constitutions. And North Carolina duly ratified that
10:58:11 24 state constitution. Once they'd done that they passed
10:58:13 25 this act in 1868 that said state legislature needs to

10:58:19 1 ratify the 14th Amendment and once you've done that, and
10:58:22 2 you hold elections, you're duly qualified representatives
10:58:26 3 will be admitted. But, and I'm quoting, no person
10:58:30 4 prohibited from holding office under the United States or
10:58:33 5 under any state by Section 3 of the proposed amendment to
10:58:36 6 the Constitution shall be deemed eligible to any office
10:58:39 7 in either of the states unless relieved from disability
10:58:42 8 as provided in the amendment.

10:58:43 9 Now, the important part of what that act in
10:58:48 10 1868 is saying to the state of North Carolina is that it
10:58:51 11 illuminates Congress's understanding of Section 3
10:58:54 12 enforcement at the time that Section 3 was enacted and
10:58:58 13 several years before 1872 of the Amnesty Act. They are
10:59:02 14 telling North Carolina that it must take these steps to
10:59:05 15 ensure that no representative is elected to Congress that
10:59:08 16 would be disqualified because they won't be seated when
10:59:11 17 they get there.

10:59:12 18 It does not say elect your representatives,
10:59:15 19 send them here and we will be the judge of their
10:59:18 20 qualifications. It does not say you are authorized to
10:59:21 21 present disqualified persons under -- don't disqualify
10:59:24 22 people under Section 3, we will do that. No. It is a
10:59:29 23 contemporaneous understanding of the act by the same
10:59:33 24 legislatures who passed the amendment which says that the
10:59:37 25 state is supposed to enforce Section 3 by warning the

10:59:40 1 state not to send disqualified candidates. Otherwise
10:59:45 2 what's the point of that statement? How else is North
10:59:46 3 Carolina supposed to abide by that warning without
10:59:49 4 considering itself to have the authority to disqualify
10:59:52 5 candidates?

10:59:53 6 THE COURT: Counsel, is that precatory or
10:59:57 7 mandatory?

11:00:00 8 MR. STEED: I don't think it's mandatory.
11:00:02 9 But I think reading that act in 1868, it's saying it's a
11:00:06 10 warning. It's telling them if you send them we will
11:00:09 11 disqualify them. But it is also putting out there pretty
11:00:13 12 clearly that they shouldn't send them.

11:00:15 13 Turning back to the Amnesty Act of 1872,
11:00:22 14 plaintiff's proposed interpretation that all disabilities
11:00:26 15 are removed for all time contradicts the plain language
11:00:30 16 of the act which supports retroactive application only.
11:00:35 17 It violates the Constitution because it exceeds the
11:00:38 18 authority granted under Section 3 and the amendment
11:00:42 19 procedures under article 5. It results in absurd
11:00:45 20 interpretation because we must believe that the Congress
11:00:48 21 of 1872 intended to allow future insurrectionists to
11:00:53 22 remain eligible for office and it directly contradicts
11:00:56 23 both the legislative history and the subsequent acts of
11:00:59 24 Congress itself.

11:01:01 25 The plain language of the act is retroactive.

11:01:06 1 It says all political disabilities imposed are hereby
11:01:11 2 removed. Imposed. Removed. Past tense. It is talking
11:01:15 3 about disabilities that have already come into effect and
11:01:18 4 then removing them. It is not "to be imposed." It is
11:01:25 5 not "will be removed." It is imposed and removed. Past
11:01:30 6 tense.

11:01:32 7 When this is considered in the context of the
11:01:35 8 14th Amendment Section 3, it makes more sense because if
11:01:39 9 the required acts under Section 3 that create the
11:01:42 10 disability, taking the oath and subsequently engaging in
11:01:46 11 insurrection have not yet occurred, no disability exists
11:01:50 12 and there's nothing for the act to remove. It defies
11:01:54 13 logic that plaintiff would then argue that a disability
11:01:56 14 not yet imposed can be removed. Rather, a plain language
11:02:01 15 reading supports the removal of disabilities.

11:02:03 16 The next language that's interesting in there
11:02:09 17 is all persons whomsoever. And I think this is obvious
11:02:14 18 that all persons should be all living persons, not all
11:02:16 19 future as yet unborn persons. But this is also
11:02:21 20 consistent -- that reading is consistent with the past
11:02:24 21 tense nature of the actual statute which says imposed and
11:02:28 22 removed. And it does not -- it is all persons
11:02:34 23 whomsoever. It is not all persons whenever or all
11:02:36 24 persons forever.

11:02:39 25 And that expansive nature -- because it

11:02:42 1 certainly is -- all persons whomsoever is expansive but
11:02:45 2 it served a purpose for the Congress of 1872. At that
11:02:48 3 time, when they were debating this act, they had -- it
11:02:51 4 was presented side by side with a separate act with the
11:02:55 5 names of 16 thousand individuals seeking relief from
11:02:59 6 Congress under Section 3. What had happened was in those
11:03:05 7 short years after the implementation of Section 3,
11:03:08 8 committees had to be formed in both houses of Congress to
11:03:11 9 consider individual applications and individual acts of
11:03:16 10 amnesty. This led to the exact result that they were in
11:03:18 11 in 1872 when they wanted to make sure that when they
11:03:22 12 wrote, all persons whomsoever, they were making it clear
11:03:27 13 that everyone who had applied would be granted amnesty
11:03:30 14 based on their acts from the Civil War and all those who
11:03:32 15 had yet to apply but were disabled because of their acts
11:03:37 16 from the Civil War would also be granted amnesty. It was
11:03:40 17 Congress's intent to put a line under the Civil War,
11:03:45 18 except for specific leaders. That brings me to the
11:03:49 19 second half of the Amnesty Act.

11:03:50 20 It is a very specific exception for the
11:03:55 21 leaders most directly involved in pulling the country
11:03:58 22 into a Civil War saying that they get no amnesty. It
11:04:03 23 very clearly places the entire act within the context of
11:04:07 24 the Civil War.

11:04:12 25 I found that going through all this, it's

11:04:16 1 very easy to get bogged down in the history of 150 years
11:04:20 2 and what they intended and what they meant right after
11:04:22 3 the Civil War. So I think it actually helps to do an
11:04:26 4 example. So not that any of our audience would, but if
11:04:32 5 they -- if we imagine that our audience became disruptive
11:04:36 6 and Your Honor had to order them out of the courtroom for
11:04:38 7 disruptive behavior, we would all understand that to be
11:04:41 8 currently living people. If all persons were ordered out
11:04:43 9 we would understand it was currently living people
11:04:46 10 because they were -- how else could they be there, we're
11:04:50 11 preventing them from entering. If Your Honor were to
11:04:53 12 rescind that order by saying all persons from entering
11:04:56 13 are hereby permitted entry, we would all understand that
11:04:58 14 the people previously sent out, previously prevented are
11:05:02 15 now permitted entry. There would be no reasonable
11:05:05 16 interpretation that Your Honor was saying all persons in
11:05:09 17 the future are forever permitted to be disruptive in this
11:05:12 18 courtroom and cannot be removed. That would be absurd.
11:05:17 19 But we can even take it a little step further and we can
11:05:20 20 put it into the same sentence structure as the Amnesty
11:05:22 21 Act itself.

11:05:23 22 If Your Honor said all orders imposed
11:05:27 23 preventing entry to the courtroom as a result of
11:05:30 24 disruptive behavior are hereby removed as to all persons
11:05:33 25 whomsoever, except for that one person who started it,

11:05:38 1 even with the structure like that, there's no reasonable
11:05:40 2 interpretation that all persons forever may disrupt this
11:05:43 3 courtroom. In fact, by referencing the one person, it
11:05:49 4 would make it clear that the context was the prior
11:05:51 5 disruption and that's what it applied to.

11:05:53 6 We should not make the mistake of mistaking
11:05:59 7 purposely broad language aimed at reconciliation to past
11:06:03 8 enemies as somehow creating a future prospective
11:06:07 9 application.

11:06:10 10 Based on that reading of the plain language,
11:06:16 11 Your Honor, there's no way that it would be reasonable to
11:06:20 12 interpret this the way that the plaintiff is suggesting.
11:06:24 13 But at minimum, these arguments meet the necessary
11:06:26 14 threshold to push us into consideration of statutory
11:06:29 15 construction, canons, and legislative history. First and
11:06:35 16 foremost -- well, not the foremost, but the first is that
11:06:38 17 the Court's duty to avoid an absurd interpretation. My
11:06:43 18 example of the people outside the courtroom shows the
11:06:45 19 absurdity when it's taken out of the context of the Civil
11:06:47 20 War but we do need to do that.

11:06:49 21 In order to understand this, the plaintiff
11:06:52 22 proposes that the act creates an amnesty for all *times
11:06:54 23 for any future insurrectionists. If that is to be
11:06:57 24 understood to be true and that is to be understood to be
11:06:59 25 the intent of the Congress of 1872, it leads to the

11:07:04 1 absurd result that the same legislature who had just seen
11:07:08 2 the country torn apart by war intentionally repealed the
11:07:14 3 disqualification that prevented traitors from holding
11:07:17 4 office for all time. In doing so, those for and against
11:07:21 5 it never once mentioned in the entire legislative debate
11:07:23 6 that it was their intent to effectively repeal the 14th
11:07:27 7 Amendment or that it was their intent to apply
11:07:30 8 prospectively to future generations. If that is to be
11:07:34 9 believed, then we must believe that the Congress of 1872
11:07:39 10 sought to create a law that welcomed back, welcomed back
11:07:43 11 to Congress those insurrectionists, invited them to
11:07:46 12 commit a second Civil War but this time the disabilities
11:07:49 13 that appear in the Constitution would not apply. That is
11:07:52 14 absurd. And that cannot be the interpretation they
11:07:56 15 intended and it must be avoided.

11:07:57 16 The foremost argument under the statutory of
11:08:03 17 -- the statutory construction canon is the canon that the
11:08:09 18 Court should avoid an unconstitutional interpretation of
11:08:13 19 the act. In order to get to that argument you'd have to
11:08:15 20 go back to Section 3 itself. A plain reading of Section
11:08:18 21 3 demonstrates that the first sentence defines the
11:08:20 22 disability and when it's imposed. There can be no
11:08:24 23 dispute, and there hasn't been, we're in agreement. It's
11:08:28 24 prospective. It happens when they take an oath and then
11:08:31 25 subsequently engage in insurrection. So we're in

11:08:34 1 agreement on that.

11:08:35 2 If we look to the second sentence, that's
11:08:42 3 where we -- that's where the debate is happening here, is
11:08:44 4 Congress may vote by a vote -- Congress may by a vote of
11:08:48 5 two-thirds remove such disability. Even if we weren't
11:08:51 6 required to consider the whole section when reviewing
11:08:54 7 that sentence, the fact that it says such disability
11:08:57 8 requires us to return to the first sentence and look at
11:09:00 9 the how it's defined.

11:09:01 10 The disability is created and only comes into
11:09:05 11 existence if a person has already taken the oath of
11:09:10 12 office to support the Constitution and has already
11:09:14 13 engaged in insurrection in violation of that oath. Thus,
11:09:17 14 such disability only exists and can only be removed if
11:09:22 15 those two preexisting conditions are present.

11:09:25 16 The logical conclusion is that Section 3 does
11:09:28 17 not grant Congress the authority to remove a disability
11:09:32 18 not yet imposed that does not yet exist. Because they
11:09:37 19 don't grant that authority, plaintiff's interpretation
11:09:40 20 that it's future -- that it applies prospectively and
11:09:44 21 absolves all insurrections in the future cannot be
11:09:48 22 constitutional.

11:09:49 23 Additionally, it just on its face it violates
11:09:53 24 article 5. Article 5 has a procedure for amending the
11:09:56 25 Constitution and it does not include a singular act by

11:10:00 1 Congress.

11:10:00 2 THE COURT: Is your position that the 14th
11:10:03 3 Amendment violates Section 5?

11:10:05 4 MR. STEED: No --

11:10:06 5 THE COURT: It's in the 14th Amendment,
11:10:08 6 right? The authority to amend by two-thirds vote of both
11:10:11 7 houses is in the amendment itself. Is it your position
11:10:13 8 that that grant of authority to Congress violates the
11:10:17 9 Constitution?

11:10:18 10 MR. STEED: No. My position is that the
11:10:20 11 grant of authority is not so expansive as to wipe out the
11:10:24 12 entirety of the first sentence. It is only to be applied
11:10:29 13 retrospectively, that is the way it was considered in the
11:10:32 14 legislative history surrounding the 14th Amendment itself
11:10:34 15 and in the Amnesty Act of 1872. The Amnesty Act of 1898,
11:10:41 16 1919 when they disqualified all of that I'm gonna get to,
11:10:44 17 it's repeated frequently that that is the view that
11:10:47 18 Congress has had of the authority granted them.

11:10:50 19 So getting to the legislative history of the
11:10:52 20 Amnesty Act of 1872, the debate there is consumed with
11:10:57 21 the question of universal versus general:- can they
11:11:01 22 include the leaders or should they have the exception in
11:11:05 23 it? That is the primary focus of the debate alongside a
11:11:08 24 civil rights act that's added to the tail end of it but
11:11:11 25 ultimately does not come up for the vote. The amendment

11:11:14 1 to add that is left out. That is the bulk of the debate
11:11:18 2 for the 1872 act.

11:11:20 3 However, in my review, never once does
11:11:24 4 someone argue that they are absolving all future
11:11:26 5 disabilities for future insurrections. Never once do
11:11:29 6 they argue that they should be -- that they're repealing
11:11:32 7 Section 3. Never once is there an argument that if he
11:11:35 8 can effectively amend the Constitution through this
11:11:37 9 act or through Section 3. Rather, during those debates,
11:11:43 10 the limit of their constitutional authority was actually
11:11:45 11 considered. Senator Martin* discussing the context of
11:11:50 12 the passage of the 14th Amendment and how universal
11:11:53 13 amnesty to all without exceptions would contradict the
11:11:55 14 authority granted said, I believe that any proposition to
11:12:01 15 grant universal amnesty is a violation of the spirit of
11:12:04 16 the amendment, if not its letter. As was remarked by the
11:12:08 17 senator from New Jersey the other day it was not intended
11:12:11 18 to put into the power of Congress absolutely to abrogate
11:12:15 19 that section of the management but to put it in the power
11:12:17 20 of Congress to relieve the disability in any given case
11:12:20 21 where it might be thought proper to do so. Where the
11:12:23 22 merit or the condition of the applicant was such as to
11:12:25 23 entitle him to the favor of Congress, giving it the power
11:12:28 24 to do so by two-thirds vote in that case to relieve the
11:12:31 25 disability. But no man can read the debates which

11:12:36 1 occurred on the adoption of the amendment without coming
11:12:39 2 to the conclusion that the proposition to amnesty by
11:12:41 3 classes* was not within the meaning and intendment of
11:12:43 4 Congress at the time the amendment was passed.

11:12:45 5 Thus, the point is if those who passed the
11:12:49 6 Amnesty Act did not believe they had the constitutional
11:12:52 7 authority to grant universal amnesty, they surely did not
11:12:56 8 think they had the authority to grant amnesty for future
11:12:59 9 insurrections.

11:13:01 10 In reviewing that congressional order, I also
11:13:04 11 came across the word repeal a lot. But not in the
11:13:07 12 context of the act. Repeal is repeatedly used by the
11:13:11 13 Congress of 1872 when they are repealing something. It
11:13:14 14 appears in legislation throughout the year. That is to
11:13:18 15 say when this Congress set out to repeal something, they
11:13:22 16 said so.

11:13:25 17 THE COURT: Congress acting by two-thirds of
11:13:26 18 each house can't repeal an amendment, right? That
11:13:28 19 requires you to go through the process to amend.

11:13:31 20 MR. STEED: That would be the first step.

11:13:32 21 THE COURT: Section 5 argument.

11:13:33 22 MR. STEED: Right. That's the section 5
11:13:35 23 argument that's the first step.

11:13:35 24 THE COURT: Right. So they can't do that.
11:13:37 25 That's clearly not within their power so they wouldn't

11:13:40 1 use the word repeal but they do have the authority to
11:13:42 2 apply or not apply, right? They can remove such
11:13:45 3 disability.

11:13:45 4 MR. STEED: They can remove disabilities
11:13:46 5 imposed. Disabilities that exist.

11:13:49 6 THE COURT: I understand that's your
11:13:50 7 argument.

11:13:50 8 MR. STEED: Yes.

11:13:51 9 THE COURT: But Congress acting by two-thirds
11:13:54 10 of each house can't amend the Constitution. But they can
11:14:00 11 -- whatever -- and I understand your argument regarding
11:14:01 12 the scope of the power. But they can act under a power
11:14:05 13 granted to them by an amendment. So without repealing
11:14:11 14 it, right? You have the power to grant whatever statutes
11:14:14 15 are necessary and proper to bring forth all the -- all
11:14:18 16 these 14th Amendments right we have, but Congress can
11:14:22 17 repeal any of those even though the intent of the
11:14:24 18 Congress was that such statutes would be passed.
11:14:27 19 Congress can now repeal all of them if it chooses, right?

11:14:29 20 MR. STEED: Right -- you're saying the
11:14:31 21 general authority granted under section 5 of the 14th
11:14:33 22 Amendment saying that Congress should enact things to see
11:14:35 23 that it's carried out.

11:14:36 24 THE COURT: Right.

11:14:37 25 MR. STEED: Right, yes, so if there was a

11:14:38 1 general act that was passed that they could repeal that
11:14:42 2 or alter it in any way in the future.

11:14:44 3 THE COURT: Okay.

11:14:44 4 MR. STEED: Yes.

11:14:44 5 THE COURT: All right.

11:14:45 6 MR. STEED: I think that the issue I have,
11:14:47 7 Your Honor, with the concept of them being able to wipe
11:14:50 8 out all future disabilities is the absurdity. The
11:14:56 9 absurdity is that the act itself would be created. We'd
11:14:57 10 go through the effort to amend the Constitution and make
11:15:00 11 it retrospective and prospective and then that this act
11:15:05 12 in 1872, the argument that it's intended to be
11:15:09 13 prospective despite having retrospective language in it
11:15:12 14 and no where in the debate then talking about it being
11:15:16 15 prospective. That's why it reaches -- that's why it's an
11:15:20 16 absurd interpretation of the act.

11:15:22 17 And this is reenforced by the subsequent acts
11:15:27 18 of Congress. First, we have the Amnesty Act of 1898
11:15:30 19 which uses similar language, the disability imposed under
11:15:35 20 Section 3, heretofore incurred, is hereby removed. Now,
11:15:40 21 again, this uses retrospective language. The only
11:15:43 22 addition is the phrase heretofore incurred. And my
11:15:46 23 argument is not that that should be viewed as somehow
11:15:50 24 trying to distinguish themselves from 1872. It should be
11:15:53 25 reviewed as an acknowledgment by the 1898 Congress that

11:15:56 1 it had no authority to remove future disabilities not yet
11:15:59 2 imposed.

11:16:00 3 It makes it clear that they intended to grant
11:16:03 4 retrospective relief to former insurrectionists as a as a
11:16:06 5 result of their actions. But the absence of those words
11:16:10 6 27 years earlier in the 1872 act, should not be
11:16:13 7 misconstrued to reach an opposite conclusion that all
11:16:17 8 future disabilities imposed are now lifted.

11:16:19 9 And I think the strongest argument that
11:16:23 10 Congress certainly doesn't see it this way is the 1919
11:16:29 11 disqualification of Victor Berger by the House of
11:16:33 12 Representatives. The facts surrounding Berger's case and
11:16:35 13 what caused him to be considered an insurrectionist are
11:16:38 14 entirely irrelevant. The only thing that's relevant is
11:16:42 15 that Congress determined Section 3 remained in effect,
11:16:46 16 Section 3 could not be repealed by Congress alone, and
11:16:49 17 that no prior acts of Congress had repealed it *.

11:16:53 18 In response to an argument based on the
11:17:00 19 Amnesty Act of 1898, the committee hearing the challenge
11:17:03 20 to Berger considered the same theory before the Court
11:17:06 21 today and found it must be perfectly evident that
11:17:11 22 Congress has no power whatever to repeal a provision of
11:17:14 23 the Constitution by a mere statute. And that no portion
11:17:18 24 of the Constitution can be repealed except in the manner
11:17:21 25 prescribed by the Constitution itself.

11:17:22 1 While under the provisions of Section 3,
11:17:25 2 Congress was given power by a two-thirds vote of each
11:17:28 3 house to remove disabilities incurred under Section 3,
11:17:32 4 manifestly it could only remove disabilities incurred
11:17:35 5 previously to the passage of the act. And Congress in
11:17:39 6 the very nature of things would not have the power to
11:17:42 7 remove any future disabilities. This was plainly
11:17:45 8 recognized when the words heretofore incurred were placed
11:17:48 9 in the Amnesty Act itself.

11:17:50 10 So not only does that demonstrate the
11:17:54 11 legislative intent of the Amnesty Act of of 1898. It is
11:17:57 12 equally applicable to the 1872 Amnesty Act.

11:18:00 13 THE COURT: Can you tell me if that's
11:18:02 14 Congress's position? Can you tell me who passed that and
11:18:04 15 by what vote?

11:18:06 16 MR. STEED: That came from the committee
11:18:07 17 hearing the Berger --

11:18:08 18 THE COURT: Okay but it's not passed by
11:18:09 19 Congress, it never went to the floor...

11:18:12 20 MR. STEED: I don't know that that statement
11:18:13 21 went to the floor for approval but my understanding is
11:18:15 22 that the disqualification went to the floor for approval
11:18:18 23 since he was disqualified in 1919.

11:18:21 24 THE COURT: And he was disqualified on the
11:18:22 25 basis of a violation of the 14th Amendment Section 3.

11:18:28 1 MR. STEED: Yes. Like I said, the facts of
11:18:29 2 it aren't relevant and I'm not entirely --

11:18:31 3 THE COURT: Well, they are relevant, right?
11:18:33 4 What went to Congress -- did Congress claim --

11:18:37 5 MR. STEED: Okay.

11:18:37 6 THE COURT: -- his disqualification, that he
11:18:39 7 was being disqualified on the basis of a violation of
11:18:43 8 amendment 14 Section 3?

11:18:44 9 MR. STEED: Yes. What was -- what was the
11:18:47 10 underlying facts was that he had been a newspaper person
11:18:52 11 in Milwaukee. He was a socialist and he wrote several
11:18:55 12 editorials and owned the newspaper and the newspaper
11:18:58 13 wrote several editorials that argued against World War I.
11:19:00 14 And essentially that led to a whole line of indictments
11:19:03 15 and things that were eventually overturned by the Supreme
11:19:05 16 Court on other grounds, not necessarily related to the
11:19:07 17 merits.

11:19:08 18 But the point was that the grounds for
11:19:10 19 finding that he had taken an oath that he had then
11:19:13 20 engaged in insurrection were that he had previously Bora
11:19:18 21 Bora a member of Congress in 1912 and then insurrection
11:19:24 22 at a later date. Those two findings were the basis under
11:19:27 23 which the challenge was brought and the committee was set
11:19:30 24 up to hear the challenge.

11:19:31 25 So going back to where I was on the argument,

11:19:34 1 I would say that that review from the committee hearing
11:19:37 2 that challenge applies as equally to 1872 because under
11:19:42 3 Section 3 Congress has the constitutional authority to
11:19:46 4 remove disabilities but only disabilities incurred
11:19:48 5 previously to the passage of the act. So previous to
11:19:51 6 1872.

11:19:52 7 That's not the last act by Congress removing
11:20:00 8 disabilities. They also took it up 100 years after the
11:20:04 9 Civil War in 1975. It was taken up in the context of
11:20:08 10 granting amnesty to those who avoided the draft for the
11:20:11 11 Vietnam war and at the same time they decided to grant
11:20:16 12 restoration of rights or really what it was was granting
11:20:20 13 the -- removing the disabilities to Robert E. Lee and
11:20:26 14 Jefferson Davis.

11:20:27 15 Now the argument that neither the Amnesty Act
11:20:29 16 of 1872 or 1898 applied to anyone but those living at the
11:20:34 17 time is given further support by the fact that it was
11:20:36 18 taken up at all. Lee died in 1870 before the 1872 act or
11:20:41 19 the 1898 act and Davis died in 1889. If plaintiffs
11:20:46 20 preferred reading of persons to include all living and
11:20:49 21 nonliving persons forever were the correct reading, then
11:20:53 22 the Amnesty Act of 1898 would have already applied to
11:20:56 23 them and Congress would have had no reason to take this
11:20:59 24 up in 1975. But clearly Congress didn't see it that way
11:21:02 25 then in 1975. They didn't see it that way in 1919. And

11:21:06 1 there's no reason to believe that they saw it that way in
11:21:08 2 1872.

11:21:08 3 THE COURT: So is your position that
11:21:11 4 Jefferson Davis and Robert E. Lee were not subject to the
11:21:16 5 provisions at the time that the Amnesty Act of 1898 was
11:21:20 6 passed?

11:21:21 7 MR. STEED: I can't see any reason why the
11:21:24 8 Congress of 1975 would need to take it up --

11:21:28 9 THE COURT: Politics. They're trying to win
11:21:30 10 in the south. What do you mean, no reason?

11:21:32 11 MR. STEED: That's a good point. Certainly.
11:21:37 12 I just -- I understand. I understand that argument. And
11:21:40 13 that's a fair argument. And it's not one that I'd
11:21:43 14 honestly considered. I was looking at it from a purely
11:21:46 15 legal standpoint why take this up if you don't have a
11:21:49 16 reason.

11:21:49 17 THE COURT: And Congress does lots of things
11:21:51 18 that are never looked at from a purely legal standpoint,
11:21:53 19 right? They engage in politics. They're trying to win
11:21:57 20 votes in the south. That's the southern strategy at that
11:21:59 21 time. "We just pardoned Robert E. Lee and Jefferson
11:22:03 22 Davis, hooray, aren't we great, vote for us again."
11:22:06 23 Seems to me that if you read the 1898 act -- I might
11:22:09 24 understand it as other people but as to Lee and Davis,
11:22:13 25 there's no -- there's no possible argument that they had

11:22:16 1 not -- had a disability previously imposed that was then
11:22:19 2 lifted. Right? The only reason you do that is politics.

11:22:24 3 MR. STEED: That's fair, Your Honor. Unless
11:22:29 4 Your Honor has any further questions on the Amnesty Act
11:22:31 5 act claim --

11:22:32 6 THE COURT: I do want to come back to the --
11:22:47 7 amnesty for those who avoided the draft separate from Lee
11:22:53 8 and Davis because if there's a position that somebody ran
11:22:55 9 who was -- had taken an oath and therefore was subject to
11:22:59 10 the act, then dodged the draft, what is the size of that
11:23:03 11 category? Was anybody ever specifically -- was there
11:23:09 12 ever specifically applied to anybody that you found?

11:23:11 13 MR. STEED: No, Your Honor. I didn't find
11:23:12 14 that. I only brought that up because that was the
11:23:14 15 context in which my review of the 1978 passage for Lee
11:23:18 16 and Davis was brought up in that same context.

11:23:20 17 THE COURT: Fair enough. That to me would be
11:23:22 18 all right we actually have a category of people who did
11:23:24 19 not engage in insurrection during the Civil War, you
11:23:27 20 know, Lee and Davis for the reasons I discussed I
11:23:30 21 understand why that happened. But I was trying to figure
11:23:32 22 out do we have a human being who fits the category at
11:23:37 23 this time -- is it 1972 you said?

11:23:39 24 MR. STEED: I believe it was 1975.

11:23:41 25 THE COURT: 75.

11:23:42 1 MR. STEED: Yes, Your Honor. My only -- my
11:23:44 2 only understanding, and I could be wrong, I've been
11:23:46 3 trying to deal with the entire history of the
11:23:48 4 congressional record for a couple weeks, was that the
11:23:51 5 1990 instance of disqualifying Victor Berger by the U.S.
11:23:55 6 House of Representatives is the only disqualification
11:23:58 7 under Section 3 after the acts in question.

11:24:00 8 THE COURT: All right. Thank you.

11:24:05 9 MR. STEED: There was one point that I didn't
11:24:08 10 get to based on what he had said.

11:24:10 11 THE COURT: Feel free to make your record. I
11:24:12 12 understand that other people may look at this case in the
11:24:15 13 future. Make your record based on the arguments. As
11:24:18 14 long as it's within the scope of prior argument I'm fine.

11:24:20 15 MR. STEED: Well it fits -- it fits within
11:24:23 16 what he said. It also fits a little bit under count 1
11:24:26 17 because the claim is related to triggering a government
11:24:29 18 investigation. I just thought it was important to note
11:24:31 19 that the -- there is no government investigation. This
11:24:36 20 is -- that's -- it's not a criminal proceeding. It's not
11:24:40 21 a law enforcement officer infringing on plaintiff's
11:24:43 22 rights. If there's going to be an investigation and
11:24:46 23 presentation of evidence it's gonna come from third
11:24:48 24 parties who aren't here, the challengers. The line of
11:24:52 25 argument is troubling as applied to the State Board

11:24:54 1 because it's an administrative agency tasked by law with
11:24:59 2 carrying out these elections. It's important that it's
11:25:01 3 understood that they did not initiate this challenge.
11:25:04 4 They didn't initiate an investigation into plaintiff.
11:25:07 5 They're not seeking to bar plaintiff from the ballot.
11:25:10 6 And it's just -- they're an agency. And they are -- they
11:25:16 7 have a statutory obligation to process challenges when
11:25:19 8 they're brought by voters. And unless Your Honor has any
11:25:25 9 other questions, I don't have anything further.

11:25:26 10 THE COURT: Thank you, counsel.

11:25:27 11 MR. STEED: Thank you.

11:25:28 12 THE COURT: Mr. Bopp, I'll give you a
11:25:32 13 response.

11:25:33 14 MR. BOPP: Thank you, Your Honor. First,
11:25:39 15 there's no government investigation? They're going to
11:25:44 16 appoint a panel with state legal power to force people to
11:25:50 17 testify, to appear? This is a government impaneled,
11:25:59 18 legally impaneled government entity that will be
11:26:02 19 investigating the First Amendment rights of
11:26:06 20 Representative Cawthorn if permitted to continue. So the
11:26:11 21 course the First Amendment is directly applicable just
11:26:15 22 like and in the North Carolina case of Toby, an arrest
11:26:20 23 which cannot be done on mere suspicion, that's one of our
11:26:23 24 other challenges, has to be probable cause, but that was
11:26:28 25 that arrest triggered government investigation,

11:26:35 1 prosecution, whatever the case may be that follows from
11:26:37 2 that arrest.

11:26:39 3 So this is without doubt government action.
11:26:45 4 There's no way these challengers could subpoena
11:26:49 5 Representative Cawthorn for a deposition except that they
11:26:54 6 are before a government body with government power that
11:26:58 7 can give them that authority. That is the government.
11:27:02 8 It's just like a court. It's just like many other
11:27:07 9 adjudicatory agencies. It's no different.

11:27:11 10 Second, we are under really tight deadlines,
11:27:17 11 which is one of the troubling aspects of this. And
11:27:20 12 legislature tried to extend the deadlines that are
11:27:24 13 looming very quickly ahead of us. But that was not
11:27:29 14 accepted by the governor. So we have very tight
11:27:33 15 deadlines to resolve critical issues.

11:27:39 16 The North Carolina Election Board cannot
11:27:41 17 decide, is prohibited by North Carolina law to consider
11:27:46 18 any of the challenges that we have made. Any of them.
11:27:50 19 And he could be removed from the ballot. The primary --
11:27:55 20 and you know, yeah there's appeals. You can appeal to
11:27:58 21 the North Carolina State Election Board from the panel.
11:28:02 22 There's no deadline by the way for their decision as I
11:28:05 23 recall, correct me if I'm wrong. For their decision.
11:28:08 24 There's deadlines for the panel, et cetera.

11:28:11 25 And then there could be an appeal to the

11:28:14 1 North Carolina Court of Appeals. But we are talking
11:28:20 2 about irrevocable damage if he is removed from the ballot
11:28:27 3 and the primary election occurs. And that is looming.
11:28:32 4 Looming.

11:28:33 5 So so that counsels in my opinion for the
11:28:40 6 Court to exercise its authority on the merits to decide
11:28:43 7 the claims that we are presenting.

11:28:46 8 Now, state argued that when we're talking
11:28:53 9 about qualifications, Term Limits should apply, the U.S.
11:28:58 10 Term Limits case should apply, not Roudebush. U.S. Term
11:29:05 11 Limits case was limited to a new qualification. It was
11:29:09 12 Term Limits were imposed on members of Congress. And
11:29:14 13 they were disqualified from running once those Term
11:29:21 14 Limits had been fulfilled. They were disqualified from
11:29:23 15 running or being on the ballot in the if you are.
11:29:26 16 Supreme Court said no, that is a added qualification, you
11:29:31 17 know, extra to the Constitution and only the Constitution
11:29:34 18 provides for qualifications.

11:29:36 19 They of course didn't address who had the
11:29:40 20 authority to determine if there was a violation of the
11:29:46 21 Term Limits under state law because it wasn't before
11:29:51 22 them. The constitutionality of what the Court held it
11:29:57 23 was a qualification was what was before them and it
11:30:00 24 couldn't be imposed. An additional one could not be
11:30:03 25 imposed.

11:30:04 1 So we think -- we continue to argue that
11:30:06 2 Roudebush is the appropriate precedent.

11:30:11 3 Now, he has mentioned several, four or five
11:30:18 4 additional acts of Congress, legislative debates, and of
11:30:24 5 course none of that is in his brief, okay? So all I can
11:30:27 6 do, you know, at this point is based upon what he said is
11:30:35 7 to respond and I will try to do that on a few of the
11:30:37 8 points. But it is very difficult to have a appropriate
11:30:42 9 response, thoughtful response when this is the first time
11:30:48 10 we've heard three or four of the arguments he's made
11:30:52 11 basically on the history.

11:30:53 12 One of them is an 1868 act which provided the
11:30:58 13 conditions under which the former confederate states
11:31:04 14 would be admitted to the union and under what conditions.
11:31:06 15 And he said that there's one where it was kind of sounded
11:31:10 16 to me like precatory language about, you know, you better
11:31:14 17 obey the article 3 or your officers will be ineligible
11:31:24 18 for office. Now -- and that's what I heard. I hopefully
11:31:30 19 got it right. But ineligible for office is -- does not
11:31:33 20 say, as they keep going back to, being a candidate for
11:31:40 21 office. It doesn't say that the language that he quoted
11:31:45 22 just like other language that they have cited to, they
11:31:50 23 equate eligibility for office with candidacy for office.
11:31:58 24 Eligibility for office occurs when you stand up there to
11:32:02 25 take the oath. Candidacy occurs months and months

11:32:08 1 before.

11:32:09 2 So they were warning the southern states who
11:32:14 3 were admitted into the union that they had to comply with
11:32:20 4 Section 3 or we, the -- if it's a member of Congress, we,
11:32:25 5 the member -- the United States Congress, will not -- we
11:32:33 6 will disqualify them from taking office. Not that they
11:32:38 7 -- we are telling them, the states not to allow such a
11:32:44 8 person to be a candidate for office. They didn't say
11:32:49 9 that.

11:32:50 10 Now, secondly, they were also telling and
11:32:56 11 reminding the southern states that this provision doesn't
11:33:04 12 just apply to members of Congress. I mean, it applies to
11:33:11 13 -- and it doesn't just apply to federal office. It
11:33:14 14 applies to state office also. So the biggest application
11:33:19 15 of this warning would have been you better -- you need to
11:33:26 16 observe article 3 with respect to your own officers
11:33:31 17 because they are disqualified as well from state office.

11:33:35 18 Now, we're in a different situation. We're
11:33:41 19 talking about state elections. Because the -- I
11:33:46 20 understand it to be the case that under state
11:33:51 21 Constitutions, governmental bodies like the, you know,
11:33:55 22 like the election board here can judge the qualifications
11:34:00 23 of a candidate under state statutes. That power is
11:34:08 24 denied under the federal Constitution with respect to
11:34:12 25 candidates for Congress. So it's a much different

11:34:15 1 situation, not parallel, but I think they are reminding
11:34:21 2 the confederate states.

11:34:23 3 Now, in 1872, of course, regarding the
11:34:31 4 Amnesty Act of 1872, and of course there's several
11:34:35 5 points, first they like to talk about intent or the
11:34:41 6 spirit of the Amnesty Act of 1872 or, for that matter,
11:34:48 7 Section 3. As I understand the law is plain language is
11:34:59 8 what determines unless the plain language is sufficiently
11:35:05 9 ambiguous that legislative history is even considered.
11:35:10 10 And so of course in 1872 Congress was thinking about the
11:35:17 11 Civil War. Of course they were. They were thousands if
11:35:25 12 not hundreds of thousands of people -- well, certainly
11:35:28 13 thousands of people disqualified with a disability and a
11:35:34 14 potential for others. And surely -- and so obviously
11:35:42 15 they legislative*bodies are full of talk about the Civil
11:35:49 16 War. That's instructive I think in in many ways but most
11:35:52 17 importantly here what difference does that make. They
11:35:57 18 just got over a horrible Civil War. Of course they were
11:36:02 19 thinking about that. Not future insurrections or
11:36:07 20 rebellions which I'm sure they thought when they used
11:36:11 21 those words they were talking about something like the
11:36:13 22 Civil War. And so legislative -- the problem with
11:36:17 23 legislative history is one justice said is it's like
11:36:21 24 looking over a crowd and picking out your friends. You
11:36:27 25 know, picking out somebody who agrees with you. And we

11:36:31 1 had legislative history which was debate in a committee?
11:36:36 2 By one member? A statement by one member? I mean,
11:36:40 3 that's the problem with legislative history. That's the
11:36:43 4 problem that, you know, intent and spirit are not used to
11:36:48 5 contradict plain language.

11:36:51 6 So let's go back to the plain language. They
11:36:55 7 want to make a lot of the words in the Amnesty Act of
11:37:01 8 1872, all political disabilities imposed by the third
11:37:06 9 section, with focus on the word imposed. Their argument
11:37:12 10 is this is retrospective only because it used the word
11:37:19 11 imposed in terms of the removal of the disability.

11:37:26 12 Now, there's several problems with that.
11:37:29 13 First, what imposed means. If you look in the mere yam
11:37:36 14 Webster dictionary or you look in the free dictionary,
11:37:40 15 you find imposed is defined as quote, to establish, end
11:37:45 16 quote. Examples, to impose a new restriction, or to
11:37:54 17 impose a new tax. And of course Section 3 of the 14th
11:38:04 18 Amendment imposed in the same way you impose a new tax or
11:38:09 19 a new restriction, imposed a legal restriction on certain
11:38:14 20 people.

11:38:15 21 Now, the certain people is, is this just
11:38:21 22 retrospective or is this prospective? It's the -- their
11:38:27 23 focus is on Section 3 rather than Section 3's effect.
11:38:34 24 Okay? Section 3's effect is both retrospective and
11:38:39 25 prospective. So when they're dealing with an Amnesty Act

11:38:44 1 with respect to Section 3, they have to know and do know
11:38:48 2 and the evidence is absolutely they knew the difference
11:38:52 3 between retrospective and prospective. And then you look
11:38:55 4 at section -- the Amnesty Act of 1898, and you see this
11:39:03 5 is the same words -- the disability imposed by Section 3.
11:39:10 6 And if that only had retrospective effect, what in the
11:39:15 7 world was Congress doing when they followed that very
11:39:18 8 phrase up with, quote, heretofore incurred.

11:39:25 9 If imposed did the work of relieving
11:39:30 10 disability retrospectively only, not future, but only,
11:39:39 11 then what in the world were they saying when they said
11:39:42 12 heretofore incurred? That makes those words an
11:39:48 13 absurdity. At least surplusage. And in the context that
11:39:53 14 cannot be the case. They knew the difference between the
11:39:59 15 effect, if you will, of the now imposed Section 3
11:40:04 16 requirements and both retrospective and prospective and
11:40:09 17 they decided in 1898 to just do retrospective, in 1872
11:40:16 18 they decided to use language that applies to both
11:40:19 19 retrospective and prospective.

11:40:22 20 Now, Berger, Berger, the only Amnesty Act
11:40:32 21 considered by Congress in the Berger decision to exclude
11:40:37 22 an elected socialist member of Congress was the act of
11:40:44 23 1898. They did not consider and nowhere is the Amnesty
11:40:49 24 Act of 1872 mentioned. And of course as he said, and by
11:40:55 25 the way he kept going back and forth between the words

11:40:57 1 imposed and incurred, as if they mean the same thing and
11:41:01 2 they don't, and certainly incurred means the disability
11:41:07 3 has already arisen and is applicable to somebody. Right?
11:41:13 4 But if we're talking about future application of the
11:41:16 5 imposed requirement of Section 3, all right, the
11:41:22 6 heretofore incurred is nonsensical. Right? And it
11:41:28 7 obviously not applicable. But there was nothing in there
11:41:32 8 about the act of -- Amnesty Act of 1872.

11:41:36 9 And the legislative history supports the very
11:41:40 10 thing I'm saying. I mean, they were looking at the
11:41:46 11 Amnesty Act of 1898 and said that was retrospective. It
11:41:51 12 used the words heretofore incurred. So it couldn't have
11:41:55 13 relieved for the exceptions to the 72 act disability in
11:42:02 14 the future. And of course that's -- we agree with that
11:42:06 15 and that's of course what they say in the legislative
11:42:11 16 history.

11:42:12 17 Now, they also would like us to insert some
11:42:16 18 words in here. All right? And in the 1872 act, they
11:42:25 19 want us to insert the word living and the word all
11:42:30 20 persons whatsoever. That we are going to narrow person
11:42:37 21 to living persons at the time. All right? And that's
11:42:43 22 just -- person's brought enough to encompass and apply to
11:42:50 23 living and dead people in its common usage. And a
11:42:57 24 subdivision of that would be living and if they --
11:43:00 25 Congress wanted to narrow the application of the 1872 act

11:43:04 1 in the future, they could have said living.

11:43:09 2 Now, currently or actually it'd have to be
11:43:12 3 currently living, not all persons whatsoever, but all
11:43:15 4 currently living persons whatsoever. And of course
11:43:20 5 that's not what they did.

11:43:21 6 Now, you know, if Congress made a mistake and
11:43:30 7 they want you -- and they're arguing you should fix it.
11:43:34 8 In other words, if Congress wrote language by a statute
11:43:38 9 by its plain language *, you're to amend it. In other
11:43:42 10 words, you're to amend it. Now, Congress could have
11:43:45 11 fixed this any time. You know, they passed numerous
11:43:49 12 Amnesty Acts, some categorical like the 1872 and 1898.
11:43:54 13 And they could do that. So if they unintentionally made
11:44:00 14 the Amnesty Act of 1872 too broad, they can fix it. At
11:44:06 15 any time. And so there's a fix that doesn't involve you
11:44:13 16 amending acts of Congress because, you know, they're
11:44:19 17 arguing -- let's say you're convinced that it just did
11:44:23 18 too much and wasn't warranted --

11:44:25 19 THE COURT: Let's assume I'm not.

11:44:26 20 MR. BOPP: Huh?

11:44:27 21 THE COURT: Let's assume I'm not.

11:44:28 22 MR. BOPP: Okay. I assume you're not, very
11:44:32 23 much so.

11:44:34 24 Now, so Congress can fix this problem if it
11:44:38 25 is a problem.

11:44:40 1 Now, so that's really the best I can do
11:44:51 2 without -- based upon hearing the argument on several of
11:44:55 3 the points that they made. But I appreciate your -- the
11:44:59 4 opportunity to rebut and urge you to grant judgment,
11:45:05 5 declaratory judgment, injunction, on behalf of the
11:45:08 6 plaintiff. Thank you.

11:45:09 7 THE COURT: I'm gonna take a twenty-minute
11:45:10 8 recess. We'll come back. I know time is of the essence.
11:45:16 9 And we'll discuss what the Court's preliminary findings.
11:45:20 10 An ultimate written ruling will issue.

11 (Proceedings recessed at 11:45 a.m.)

11:54:18 12 (Proceedings recommenced at 12:02 p.m.)

11:54:18 13 THE COURT: All right. This matter is before
12:02:47 14 the Court on the question of whether or not the North
12:02:49 15 Carolina Board of Elections may determine Representative
12:02:51 16 Cawthorn's qualifications as a candidate for United
12:02:56 17 States House of Representatives under North Carolina
12:02:57 18 General Statute Sections 163-127.1, et seq. which permit
12:03:01 19 North Carolina -- a resident of his North Carolina
12:03:03 20 congressional district to permit -- sorry -- to challenge
12:03:05 21 his candidacy.

12:03:06 22 And in this case, such a challenge has been
12:03:09 23 lodged pursuant to United States Constitution Section 3
12:03:13 24 Amendment 14. The Court is going to enjoin that and find
12:03:17 25 that the State Board of Elections may not engage in a

12:03:28 1 determination of whether or not Representative Cawthorn
12:03:31 2 has violated Section 3 of the 14th Amendment because the
12:03:34 3 Amnesty Act of 1872 has removed that determination by
12:03:39 4 defining who qualifies for such a limitation in such a
12:03:44 5 way that the Board is not permitted to make that finding.
12:03:46 6 So this is a statutory determination. I'll talk about
12:03:50 7 the limitations. It's a statutory determination. It's a
12:03:52 8 very narrow injunction. The State Board of Elections
12:03:57 9 pursuant to the Court's interpretation of the 1872 Act is
12:04:00 10 enjoined from proceeding against him for violations of
12:04:04 11 Amendment 14 Section 3.

12:04:05 12 The Court does not rule on whether or not
12:04:07 13 there are time, place, and manner restrictions, whether
12:04:09 14 or not there are other qualifications which may be
12:04:14 15 enforced by the Board of Elections. It is only as to
12:04:17 16 this section. It's the Court's understanding that that
12:04:21 17 is the question that is squarely before the Court because
12:04:24 18 that is the objection that has been lodged to his
12:04:27 19 candidacy by multiple people that he is seeking to have
12:04:31 20 this Court enjoin. So it's a narrow ruling.

12:04:34 21 The Court finds that the plaintiff has
12:04:35 22 demonstrated an injury in fact of challenge -- new
12:04:38 23 challenges have been filed that will be heard with a
12:04:41 24 process that begins on March 7th.

12:04:43 25 And I want to say I'm incredibly grateful to

12:04:45 1 counsel for both parties. I think this has been well
12:04:48 2 argued and very ably litigated. And the counsel for the
12:04:51 3 Board of Elections has been scrupulously honest with this
12:04:56 4 Court at every stage of this proceedings. They could not
12:04:58 5 have done a better job in representing their client or in
12:05:02 6 squarely presenting the issues to the Court. And I want
12:05:04 7 to make that a part of this record, that I honestly have
12:05:08 8 not had a better experience in terms of scrupulous
12:05:15 9 honesty before this Court.

12:05:17 10 The Court finds that there is a credible
12:05:21 11 threat of future enforcement. This threat is not
12:05:24 12 imaginary, speculative, chimerical, or wholly
12:05:28 13 conjectural, so it's in keeping with the standards based
12:05:30 14 in Kenny versus Wilson from the Fourth Circuit.

12:05:32 15 Plaintiff has filed a notice of candidacy in
12:05:35 16 the United States House of Representatives for the
12:05:37 17 upcoming election. His candidacy has been challenged
12:05:38 18 under the state statute on the basis of the disability
12:05:41 19 set forth in Section 3 of the 14th Amendment. By
12:05:45 20 proceeding on the candidacy challenge on that basis, the
12:05:48 21 Court will violate the plain meaning of the 1872 Act
12:05:53 22 which reserves -- the Constitution reserves to Congress
12:05:55 23 the ability to remove the disability set forth in Section
12:05:57 24 3. Congress removed those disabilities by passing the
12:06:00 25 Amnesty Act of 1872. I'll come back to that in greater

12:06:03 1 detail*.

12:06:04 2 The plaintiff has filed his notice of
12:06:05 3 candidacy. He's subject to the challenge statute. The
12:06:07 4 challenge actually has been lodged against him, and he
12:06:10 5 has been compelled to prepare a defense to the challenge.
12:06:12 6 Althoughwhile the Board could have determined not to
12:06:13 7 enforce the statute which, from reading the remainder of
12:06:17 8 the statute is largely directed toward residency defects,
12:06:22 9 the Board has not and does not disavow enforcement of the
12:06:25 10 challenge. Instead, the Board asserts it will hear the
12:06:29 11 challenges if the stay has lifted.

12:06:30 12 The Fourth Circuit construed Susan B. Anthony
12:06:33 13 List to conclude that a threatened administrative inquiry
12:06:36 14 will not be treated as an ongoing First Amendment injury
12:06:39 15 sufficient to confer standing unless the administrative
12:06:41 16 process itself imposes some significant burden
12:06:44 17 independent of any ultimate sanction. That's in the case
12:06:47 18 of Abbott v. Pastides, 900 F.3d 160 at 179. This Court
12:06:54 19 finds that the circumstances here are more closely
12:06:57 20 analogous to those in Susan B. Anthony List than in
12:07:00 21 Abbott. It's a burden shifting statute. It requires
12:07:02 22 Representative Cawthorn to prove a negative in a highly
12:07:04 23 contested and highly political context. And the burden
12:07:07 24 of engaging after the shift in that proceeding is
12:07:11 25 sufficiently substantial for the Court to find that

12:07:14 1 standing is appropriate in this case.

12:07:15 2 The issue is ripe for ruling. The question
12:07:19 3 is is this fit for the issues of judicial decision and
12:07:22 4 the hardship to the parties of withholding court
12:07:26 5 consideration. Counsel for the plaintiff has made clear
12:07:28 6 that there will be immediate impact of having to proceed
12:07:31 7 with the state proceeding. And that timing of the
12:07:36 8 appellate proceedings that might follow where he might
12:07:39 9 gain, ultimately, the same relief are sufficiently later
12:07:43 10 in time that the impact on his candidacy is sufficiently
12:07:47 11 uncertain and sufficiently harmful that ripe -- ripeness
12:07:50 12 and standing come down to the same question, which is is
12:07:54 13 this justiciable? Is he currently being harmed? The
12:07:58 14 Court finds yes to both questions.

12:07:59 15 Abstention, pursuant to Younger versus
12:08:02 16 Harris, the Court finds the circumstances presented here
12:08:11 17 do not fall under any of the exceptional categories
12:08:14 18 noted. This Court ordinarily is required to exercise its
12:08:17 19 jurisdiction on cases and controversies brought to it,
12:08:20 20 and the Court does so. On rare occasions, the Court may
12:08:24 21 abstain. This is not one of them. This is not akin to a
12:08:28 22 criminal prosecution, was not initiated by the State in
12:08:31 23 its sovereign capacity, and did not begin with an
12:08:34 24 internal investigation that culminated in a filing of a
12:08:37 25 formal complaint or charges.

12:08:38 1 And again, counsel for the State Board of
12:08:41 2 Elections has been honest about the nature of its
12:08:44 3 proceeding. It's at an early stage. We don't have a
12:08:47 4 panel yet. There's no ongoing investigation, no
12:08:49 5 witnesses have yet been heard. By acting now the Court
12:08:51 6 will not interrupt an ongoing state proceeding in the
12:08:55 7 manner that triggers Younger abstention.

12:08:58 8 This proceeding, the proceeding in this court
12:09:01 9 is significantly more advanced than any Board of
12:09:04 10 Elections proceeding at this time. More briefing has
12:09:08 11 been done. More factual determination has been made.
12:09:11 12 The Court finds that Younger abstention is inappropriate.

12:09:15 13 The issue before the Court is narrow. I will
12:09:19 14 explicitly avoid ruling on whether the State Board may
12:09:23 15 review candidate qualifications on *other grounds,
12:09:24 16 including state statutes and/or the constitution. And
12:09:26 17 the injunction applies to congressional candidates who
12:09:31 18 are being challenged for potential violations of
12:09:34 19 Amendment 14 Section 3.

12:09:35 20 That's the scope of the injunction. I think
12:09:38 21 right now that is a category of one in this state.
12:09:43 22 Anything else is not currently a subject of the
12:09:47 23 injunction.

12:09:48 24 Generally, preliminary injunctions are
12:09:51 25 designed to preserve the status quo and prevent

12:09:56 1 irreparable harm during the pendency of a litigation.
12:09:57 2 The movant must demonstrate their suit's likelihood of
3 success on the merits, irreparable harm in the absence of
12:10:01 4 the requested relief, that the balance of equities tip in
12:10:02 5 their favor, and that issuing the requested preliminary
12:10:05 6 relief is in the public interest.

12:10:06 7 First, as to success on the merits, which has
12:10:11 8 been the principal focus of today's argument, which the
12:10:13 9 Court understood everything else that came in on the
12:10:15 10 pleadings -- it was unnecessary to have extensive oral
12:10:18 11 argument on the other issues.

12:10:19 12 Is Madison Cawthorn a person? Yes, he is.

12:10:25 13 Is he a person whomsoever? Yes, he is.

12:10:27 14 Is the disability that they seek to impose
12:10:29 15 against him a disability imposed by Amendment 14 Section
12:10:31 16 3? Yes, it is. Does the 1872 Act state that all
12:10:38 17 political disabilities imposed by the third section of
12:10:41 18 the 14th Article of the Amendments of the Constitution of
19 the United States are hereby removed from all persons
12:10:47 20 whomsoever? With some exceptions? Yes, it does.

12:10:48 21 Now, I understand the arguments that were
12:10:50 22 made by the Board of Elections regarding the fact that
12:10:53 23 that invites potentially future acts of insurrection to
12:10:58 24 be not punished under the circumstances of this
12:11:01 25 amendment. However, the amendment itself provides that

12:11:04 1 Congress may by a vote of two-thirds of each house remove
12:11:07 2 such disability. The fact that it's done so broadly is
12:11:10 3 within its power. The Court finds that the plain
12:11:12 4 language of the statute does so.

12:11:13 5 As counsel for plaintiff has noted, the fact
12:11:19 6 that they have removed that disability does not mean that
12:11:22 7 it may not be revived if Congress were to repeal the 1872
12:11:27 8 Act. It has that authority. Somebody may make an
12:11:30 9 argument that having once been removed, it can never be
12:11:34 10 reimposed. That's for another court for another time for
12:11:36 11 another day and does not affect this Court's ruling
12:11:38 12 today.

12:11:38 13 The plain language of Section 3 in the 1872
12:11:47 14 Act reveals that Congress has removed all political
12:11:49 15 disabilities imposed by the third section of the 14th
12:11:52 16 Article of the Constitution of the United States from all
12:11:53 17 persons whomsoever, which includes current members of
12:11:56 18 Congress like the plaintiff.

12:11:58 19 This is plain language interpretation at the
12:12:02 20 outset. We first and foremost strive to implement
12:12:05 21 Congressional intent by examining the plain language of
12:12:05 22 the statute. See United States versus Passaro, 577 F.3d
12:12:13 23 207 at 213.

12:12:14 24 The 1872 Act excepted certain persons, but it
12:12:23 25 is undisputed that the plaintiff does not fall within

12:12:26 1 those exceptions. I've heard the argument that the 1898
12:12:28 2 Act is retrospective and not prospective, so I believe
12:12:31 3 there is a rump of individuals who might be subject to
12:12:35 4 14th Amendment disqualification, but that is not this
12:12:38 5 plaintiff. And I reach -- I make no finding as to such
12:12:43 6 individuals. That's for a later day. There are
12:12:44 7 individuals who are excepted from the 1872 Act and not
12:12:50 8 prospectively covered by the 1898 Act. And I don't know
12:12:55 9 who those individuals might be at the appropriate time
12:12:58 10 but that is not this case.

12:12:59 11 The Court does have broad power to verify the
12:13:12 12 eligibility of candidates under Article 1 Section 4, the
12:13:15 13 elections clause, which provides that the time, places,
12:13:18 14 and manner of holding elections for senators and
12:13:19 15 representatives shall be prescribed in each state by the
12:13:21 16 legislature thereof; but the Congress may at any time by
12:13:24 17 law make or alter such regulations except as to the
12:13:27 18 places of choosing senators. The Court avoids by not
12:13:34 19 reaching any of the constitutional arguments any issue
12:13:37 20 with the scope of Article 1 Section 4 because this is a
12:13:41 21 statutory holding on the limitations under Article 4 --
12:13:45 22 Amendment 14 Section 3.

12:13:47 23 The Board has also argued it does not run
12:13:51 24 afoul of Article 1 Section 5, the qualifications clause.
12:13:54 25 I again make no finding in that regard because this is a

12:13:57 1 statutory holding.

12:13:58 2 Court concludes that the plaintiff has
12:14:00 3 demonstrated that he is likely to succeed on the merits
12:14:02 4 of his claim based on Article 1 Section 5 of the United
12:14:05 5 States Constitution and the 1872 Act.

12:14:10 6 As to irreparable harm, the Supreme Court has
12:14:13 7 determined that plaintiffs must demonstrate that
12:14:15 8 irreparable injury is likely in the absence of an
12:14:17 9 injunction. The Court has also ruled that the loss of
12:14:20 10 constitutional rights even for minimal periods of time
12:14:22 11 unquestionably constitutes irreparable injury. Thus,
12:14:25 12 where there exists a likely constitutional violation, the
12:14:29 13 irreparable harm factor is satisfied.

12:14:30 14 By its narrow holding today, the Court avoids
12:14:33 15 any potential constitutional injury to Mr. Cawthorn
12:14:37 16 because he will not be barred from appearing on the
12:14:39 17 ballot, and that irreparable harm will not come to pass.

12:14:42 18 The plaintiff does not seek money damages,
12:14:44 19 and the Court further finds that money cannot adequately
12:14:47 20 compensate the plaintiff if he is prohibited from running
12:14:49 21 for election based on the application of the state
12:14:53 22 statute. The Board has asserted and continues to assert
12:14:59 23 today that it has the authority to proceed on the
12:15:01 24 challenges pursuant to the state statute, and it intends
12:15:04 25 to do so once the stay is lifted. Thus, the plaintiff

12:15:07 1 has succeeded in showing the likelihood of irreparable
12:15:10 2 injury in the absence of a preliminary injunction.

12:15:12 3 The balance of equities and the public
12:15:15 4 interest both favor an injunction at this time. The
12:15:20 5 Court notes that the interest of the Board in proceeding
12:15:22 6 with the challenges against Representative Cawthorn is,
12:15:27 7 on one side of the equation, because the Court makes no
12:15:31 8 ruling of the application of the state statute except as
12:15:34 9 to whether it may be applied based on Section 3 of the
12:15:36 10 14th Amendment as currently challenged, the State's
12:15:40 11 interest in this proceeding is, relatively speaking,
12:15:42 12 narrow. The Court has -- the board may proceed as it has
12:15:47 13 in the past and determine the qualification of candidates
12:15:49 14 resolving challenges, but it may not make any
12:15:51 15 qualification determinations based on Section 3 of the
12:15:53 16 14th Amendment as to members of Congress.

12:15:55 17 On the other hand, if the Board proceeds and
12:15:57 18 the challenges are upheld, Representative Cawthorn will
12:16:00 19 be prohibited from running for election in the upcoming
12:16:02 20 primary North Carolina. The Court finds that the balance
12:16:03 21 of the equities tips in favor of injunction in this case.

12:16:05 22 As for the public interest, the public
12:16:09 23 certainly has interest in the enforcement of federal
12:16:11 24 statutes, the prevention of constitutional violations,
12:16:14 25 and in seeing its governmental institutions follow the

12:16:18 1 law. The Court also notes that we are at a national time
12:16:21 2 where interest in free and fair elections is at a peak.
12:16:26 3 This has been an issue of significant interests
12:16:31 4 nationwide, that we have free and fair access to the
12:16:34 5 ballot. The Court casts no aspersions against the Board
12:16:40 6 of Elections in this hard work in trying to make sure
12:16:43 7 that that continues to take place.

12:16:44 8 The Court notes there is a demonstrated risk
12:16:48 9 of candidacy challenges based on Section 3 from political
12:16:52 10 opponents, because that's precisely what has happened in
12:16:54 11 this case, and that the public interest in ensuring a
12:16:57 12 full and fair election increases when those -- where it's
12:17:00 13 not merely a risk but it is in fact come to pass.

12:17:02 14 Plaintiff's motion for preliminary injunction
12:17:07 15 is granted. The motion to dismiss is denied. It's
12:17:09 16 granted with respect to the plaintiff's fourth claim for
12:17:13 17 relief. In granting the plaintiff's motion, the Court
12:17:14 18 has explicitly avoided ruling on whether the Board may
12:17:18 19 determine the qualifications of political candidates
12:17:19 20 under its authority granted by state statute, the state
12:17:22 21 constitution, and Article I, Section 4, Clause 1 of the
12:17:24 22 United States Constitution as to the time, place, and
12:17:25 23 manner of holding elections.

12:17:27 24 Here, the Court rules simply that the Board
12:17:29 25 may not proceed under North Carolina General Statute

12:17:32 1 Sections 163.127-1 et seq. with the challenges lodged
12:17:36 2 against the plaintiff based on Section 3 of the 14th
12:17:39 3 Amendment of the Constitution.

12:17:41 4 Our federal courts are charged with
12:17:50 5 protecting the soap box, the ballot box, and the jury
12:17:55 6 box. And when those fail, that's when people proceed to
12:17:59 7 the ammunition box. It's an obligation to rule. I don't
12:18:04 8 take this obligation lightly, and I don't take the
12:18:07 9 decision that was made here lightly. I recognize that
12:18:10 10 I'm enjoining a state statute. But after careful
12:18:13 11 consideration, I have reached the conclusion that as to
12:18:16 12 this plaintiff and as to this challenge, the injunction
12:18:18 13 is appropriate. Thank you.

14 (Proceedings concluded at 12:18 p.m.)
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