No. 22-1251

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MADISON CAWTHORN,

Plaintiff-Appellee,

v.

MR. DAMON CIRCOSTA, *et al*.,

Defendants-Appellants,

BARBARA LYNN AMALFI, *et al*.,

Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-INTERVENORS-APPELLANTS' MOTION FOR EMERGENCY STAY

Elizabeth B. Wydra
Brianne J. Gorod
Praveen Fernandes
Charlotte Schwartz
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that Section Three of the Fourteenth Amendment applies as robustly as its text and history require, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 6, 2021, a crowd of thousands violently breached the Capitol in a bid to prevent Congress from certifying the results of the 2020 presidential election. This unprecedented attack resulted in five deaths, at least 140 assaults, and the most significant destruction of the Capitol complex since the War of 1812. *The Attack: The Jan. 6 Siege of the U.S. Capitol Was Neither a Spontaneous Act Nor an Isolated Event*, Wash. Post (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactivee/2021/jan-6-insurrection-capitol/. The attack followed months of efforts by former president Trump and some of his most fervent supporters in Congress to undermine the integrity of the election and organize a mass demonstration to prevent certification of the results. Hunter Walker, *Jan. 6 Protest Organizers Say They Participated in 'Dozens' of Planning Meetings with Members*

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

of Congress and White House Staff, Rolling Stone (Oct. 24, 2021), https://www.rollingstone.com/politics/politics-news/exclusive-jan-6-organizers-met-congress-white-house-1245289/.

Representative Cawthorn was among those lawmakers who helped to plan the January 6 rally. *Id.* According to two of the rally organizers, Cawthorn's office participated in "dozens" of planning meetings, *id*., and in advance of the rally, Cawthorn publicly promoted it, tweeting that it was "time to fight" because "the future of this Republic" was at stake. Madison Cawthorn (@CawthornforNC), Twitter (Jan. 4, 2021, 5:57 PM), https://twitter.com/cawthornfornc/status/1346229219584602112?lang=en. On the day of the rally, Cawthorn spoke to the crowd and praised it for having "some fight in it." *"This Crowd has Some Fight in It": N.C. Rep. Spoke at Rally Before Attack at Capitol*, Spectrum Local News (Jan. 7, 2021), https://spectrumlocalnews.com/nc/charlotte/politics/2021/01/07/nc-rep—madison-cawthorn-spoke-at-rally-before-capitol-attacked.

Based on his participation in these events, several registered North Carolina voters have challenged Cawthorn's candidacy for federal office, alleging that he is disqualified under Section Three of the Fourteenth Amendment. Ratified in the wake of the Civil War, that provision disqualifies from any state or federal office those who "having previously taken an oath . . . to support the Constitution of the

United States" then "engaged in insurrection or rebellion against the same, or g[ave] aid or comfort to enemies thereof." U.S. Const. amend. XIV, § 3. That disqualification can be removed, but only by "a vote of two-thirds of each House." *Id.*

Section Three of the Fourteenth Amendment was written in the immediate aftermath of the Confederate rebellion, but its reach is not limited to those individuals who supported the Confederacy. Its text applies broadly to any "insurrection or rebellion" against the United States, U.S. Const. amend. XIV, § 3, in recognition of the dangers posed by allowing individuals who have attempted to overthrow their own government to hold office in it. Indeed, the drafters of the Fourteenth Amendment rejected a version of the amendment that would have explicitly limited its application to the former Confederacy, *see* Cong. Globe, 39th Cong., 1st Sess. 2460 (1866), and in the debates over the Fourteenth Amendment, at least one member pointed to two historical examples, the Whiskey rebellion and the Burr trial, as comparable instances of insurrection authorizing the government to "expel from its councils such as have participated in treasonable designs," *id.* at 2534 (Rep. Eckley).

According to the North Carolina voters who have challenged Cawthorn's eligibility to hold office, Cawthorn's actions in connection with the January 6 rally constitute "insurrection or rebellion" against the government, and Cawthorn is

therefore disqualified from serving under Section Three. Comp. 18, *In re challenge to the Constitutional Qualifications of Rep. Madison Cawthorn* (N.C. State Board of Elections filed March 2, 2022).

In an effort to stop the state proceedings designed to adjudicate the merits of the North Carolina voters' allegations, Cawthorn filed this lawsuit, seeking shelter in an 1872 statute that removed Section Three disqualification from certain former Confederates. He argues that this statute not only gave amnesty to those who had already incurred Section Three disqualification, but also to all potential future insurrectionists. Cawthorn PI Mem. 21-24, ECF Doc. No. 2-1. The district court agreed.

This argument is at odds with both the plain text and history of the statute. The 1872 Act, which provides that "all political disabilities imposed by" Section Three "are hereby removed," uses the past tense, thereby indicating that it only applies to Section Three disqualifications that were already "imposed." 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142. And the history of the statute confirms the plain meaning of the text. Before the 1872 Act was passed, Congress had been passing private bills to relieve former Confederates of Section Three disqualification. Rather than pass a statute with a long list of names, Congress elected to use a general phrase to identify those former Confederates it was relieving of disqualification. It was not a statute designed to grant amnesty to potential future

insurrectionists.

And notably in 1919, when a Congressman facing Section Three disqualification raised the type of argument Cawthorn makes today, Congress concluded that Section Three disqualifications cannot be lifted prospectively, and it determined that Section Three barred that Congressman from serving as a Member of Congress. 6 Cannon's Precedents of the United States House of Representatives § 56 (1935) (hereinafter "Cannon's Precedents).

In summary, Cawthorn's efforts to evade accountability for his role in the January 6 attack is at odds with the text and history of the statute on which he relies. And his argument, if accepted, would mean that this critical constitutional provision is currently without effect. This Court should reject that argument.

ARGUMENT

I. The Text and History of the 1872 Amnesty Act Make Clear That It Was Passed to Grant Immunity Retrospectively to Certain Former Confederates, Not to Grant Immunity Prospectively to All Future Insurrectionists.

Cawthorn argues that he is not disqualified from holding office under Section Three because he was granted amnesty by a statute enacted in 1872. The Amnesty Act of 1872 "removed" "all political disabilities imposed by the third section of the fourteenth amendment to the Constitution," except for a few of the most prominent Confederate leaders. An Act to Remove Political Disabilities Imposed by the Fourteenth Article of the Amendments of the Constitution of the United States, Ch.

193, 17 Stat. 142 (1872).

Cawthorn's reading of the statute is at odds with the plain meaning of its text, which uses the past tense to indicate that it only removed those Section Three disqualifications that had already been "imposed" at the time the statute was enacted. 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142. The Supreme Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). And whereas the present tense "include[s] the future as well as the present," *id.* (quotation marks omitted), the use of the past tense indicates that a statute applies to pre-enactment conduct, *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019).

The history of the 1872 Amnesty Act is consistent with the plain meaning of its text. As early as 1868, the same year the Fourteenth Amendment was ratified, the Republican Party raised the possibility of removing Section Three disqualifications "imposed upon the late rebels" for those who "honestly co-operate[d]" in Reconstruction as "the spirit of disloyalty" purportedly died out. National Party Platforms 70 (Kirk H. Porter ed., 1924). But instead of preserving the prospect of relief from Section Three disqualification as an incentive for cooperation, Congress acquiesced to political pressure and quickly began passing private bills to remove Section Three disabilities from thousands of people who

had fought for or helped the Confederacy. *See, e.g.*, Private Act of December 14, 1869, Ch. 1, 16 Stat. 607, 607-13.

Congress's decision to remove Section Three disqualifications through the use of private bills raised a number of problems. First, this approach was criticized as an obvious vehicle for political favoritism. Early on, Senator Charles R. Buckalew complained that this process was "partial and unfair," as members of Congress would just "pass around the State, pick out their prominent, active, useful political friends," who were then "passed here upon the ground that the convention has recommended them." Cong. Globe, 40th Cong., 2nd Sess., 3181 (1868) (Sen. Buckalew). Senator Buckalew proposed that Congress should instead enact "a bill which removed disabilities as a general rule, leaving some particular exceptions." *Id.*

Second, some worried that relieving Section Three disabilities from some but not others only fueled "a white terror campaign in the South." Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 113 (2021). While some members of Congress strongly opposed giving amnesty to those former Confederates as "an attempt to pay a premium for disloyalty," Cong. Globe, 42nd Cong., 1st Sess. 102 (1871) (Rep. Eliot), others argued that continuing to enforce Section Three disqualifications for those remaining Confederates still subject to it was only exacerbating political violence in the South, *see, e.g.*, *id.* at 63

(Rep. Farnsworth) ("I believe that the continuance of these disqualification, instead of quieting matters in the South, only stirs up strife.").

As pressure to relieve former Confederates of Section Three disqualification grew over time, the enormous number of requests for amnesty "soon overwhelmed Congress and led to calls for general Section Three amnesty legislation." Magliocca, *supra*, at 112. Members of Congress complained that they had been "annoyed during the last three years to an almost unparalleled extent" by individual applications for amnesty and begged Congress to finally just "dispos[e] of the whole subject at once." Cong. Globe 42nd Cong., 1st Sess. 62 (1871) (Rep. Beck). One of the last private bills that the House considered originally contained some "sixteen or seventeen thousand names," and was then amended to include "some twenty-five more pages of additional names." Cong. Globe, 42nd Cong., 2nd Sess. 3381-82 (1872) (Rep. Butler).

Notably, as members kept adding names to the list, one member proposed adding the words "and all other persons" to the bill. *Id.* at 3382 (Rep. Perry). The sponsor of the bill rejected that proposal out of hand precisely because it suggested that amnesty would be extended to those who had not yet incurred Section Three disqualification, quipping that he "did not want to be amnestied" himself. *Id.* at 3382 (Rep. Butler). That remark elicited laughter on the House floor, *see id.*, underscoring that the argument that Cawthorn is now advancing—that Congress is empowered to

grant Section Three amnesty prospectively—was not taken seriously even at the time of the Act's passage.

But rather than take up yet another bill consisting mostly of an extraordinarily long list of names, the Judiciary Committee proposed "a general amnesty bill instead," which became the 1872 Amnesty Act. *Id.* at 3381 (Rep. Butler). In other words, the 1872 Act was merely a replacement for another in a long line of extraordinarily lengthy bills naming individual Confederates.

The campaign materials of Republicans and Democrats from that year's presidential election also indicate that both parties understood the 1872 Amnesty Act to apply only to former Confederates. The Republican party platform celebrated the fact that they had passed a bill "extending amnesty to those *lately in rebellion*." National Platforms, *supra*, at 84 (emphasis added). The Democrats demanded that Congress go even further and eliminate the exceptions contained in the 1872 Act, but even their imagination did not extend beyond "disabilities imposed *on account of the Rebellion*." *Id.* at 77 (emphasis added).

In summary, nothing in the text or history of the 1872 Amnesty Act supports the conclusion that it granted immunity prospectively to all future insurrectionists, thereby leaving Section Three without any practical effect.

II. Congress Has Previously Concluded that Section Three Disqualifications Cannot Be Removed Prospectively.

Subsequent action by Congress further demonstrates its understanding that Section Three disqualifications cannot be removed prospectively. In 1919, the House investigated whether Victor L. Berger, who had been convicted of violating the Espionage Act of 1917, was disqualified from serving as a Member of Congress under Section Three. Jack Maskell, Cong. Rsch. Serv., Qualifications of Members of Congress 19-20 (2015).

Before the special committee investigating his case, Berger argued that Section Three had been "entirely repealed by an Act of Congress." Cannon's Precedents § 56. Instead of pointing to the 1872 Act, Berger argued that an amnesty act passed in 1898 forever nullified Section Three. *Id.* The 1898 statute removed Section Three disqualification for those few remaining Confederates subject to the exceptions from the 1872 statute, stating that "the disability imposed by section three of the fourteenth amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, Ch. 389, 30 Stat. 432. In defending his position against the contention that Congress cannot repeal a constitutional amendment by statute, Berger argued, much like Cawthorn does now, that Section Three allows for its own repeal by giving Congress the power to lift its disqualification by a two-thirds vote of both Houses of Congress. 1 *Hearings Before the Special Comm. Appointed Under the Auth. of H. Res. No. 6*

Concerning the Right of Victor L. Berger to be Sworn in As a Member of the Sixty-Sixth Cong., 66th Cong. 32 (1919) (Henry F. Cochems, Counsel for Victor L. Berger).

The House rejected that argument outright. After acknowledging that Section Three authorizes Congress to remove Section Three disqualifications, it concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898] act, and Congress in the very nature of things would not have the power to remove any future disabilities." Cannon's Precedents § 56. In other words, the 1898 Act could not prospectively remove Section Three disqualifications because Congress was not empowered to do so.

Cawthorn downplays the importance of the Berger case on the grounds that it concerned the 1898 Amnesty Act, which he argues is distinguishable from the 1872 Act because it uses the words "heretofore incurred." Cawthorn PI Mem. 22, ECF Doc. No. 2-1. But this ignores the fact that the House's conclusion about the effect of the 1898 Act was based primarily on its understanding of the scope of Section Three, which it determined only empowers Congress to lift the disqualification retrospectively. Cannon's Precedents § 56. While the House also looked to the words "heretofore incurred" in the 1898 statute, it pointed to that phrase as further evidence of Congress's understanding that Section Three disqualifications can only be removed after they have been incurred. *Id.*

(concluding that Congress "plainly recognized" the limited scope of Section Three "when the words 'heretofore incurred' were placed in the [1898] act itself").

* * *

Section Three of the Fourteenth Amendment is an important mechanism for holding public officials accountable when they violate their oaths of office, and Cawthorn's arguments thus provide no basis for denying North Carolina voters the opportunity to hold Cawthorn accountable for the tragic events of January 6th.

CONCLUSION

For the foregoing reasons, the motion for emergency stay should be granted.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
Praveen Fernandes
Charlotte Schwartz
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: March 11, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 2,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amici curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 11th day of March, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 11, 2022.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 11th day of March, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae