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Legal Sidebar

Disqualification of a Candidate for the Presidency, Part II: Examining Section 3 of the Fourteenth Amendment as It Applies to Ballot Access

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On February 8, 2024, the U.S. Supreme Court is set to hear oral arguments in *Trump v. Anderson*, a challenge to the Colorado Supreme Court's decision that former President Donald Trump is disqualified from future office under Section 3 of the Fourteenth Amendment (Section 3). The Supreme Court stated that the question presented in this case is whether the Colorado Supreme Court erred in ordering President Trump excluded from the 2024 presidential primary ballot.

Numerous other lawsuits and administrative actions across the country have sought or are seeking to prevent former President Trump from appearing on state ballots for the upcoming presidential elections. In particular, the lawsuits, filed in both state and federal courts, are requesting that various secretaries of state exclude the former President from the states' ballots for the upcoming presidential primary and general elections. Other challengers are asking state secretaries of state to deny Mr. Trump ballot access under their respective state laws. Challengers allege that Mr. Trump's efforts to impede the congressional certification of the 2020 electoral college vote by, among other things, urging his supporters to march to the U.S. Capitol on January 6, 2021, amount to "engag[ing] in insurrection" within the meaning of Section 3. Challengers contend that the former President is therefore disqualified as a candidate for the presidency.

Many of the lawsuits challenging former President Trump's ability to be placed on state ballots have been dismissed by courts on jurisdictional grounds without reaching the merits of the constitutional claims. On December 19, 2023, the Colorado Supreme Court became the first court to hold that former President Trump is ineligible to appear on the ballot because he is constitutionally disqualified from holding the office of the President, and the court directed the Colorado secretary of state to exclude the former President's name from the state's 2024 presidential primary ballot. After the Supreme Court agreed to review the case, the Colorado secretary of state announced that Mr. Trump would be listed on the primary ballot but said the Supreme Court's decision may determine whether votes cast for him are ultimately counted. In a similar case, the secretary of state of Maine determined on December 28, 2023, that Mr.

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Trump is ineligible to appear on Maine's presidential primary election ballot, and Mr. Trump has appealed that determination to the Maine Superior Court.

This Legal Sidebar is Part 2 in a two-part series examining how Section 3 of the Fourteenth Amendment applies to ballot access by a presidential candidate. It discusses the eligibility requirements for a candidate to be placed on the ballot for the presidency and the application of Section 3 to the 2024 presidential elections. Part 1 focuses on the meaning of Section 3 as it applies to the presidency, including a discussion of the recent case disqualifying Mr. Trump from the ballot in Colorado, *Anderson v. Griswold*. For further background on Section 3, including whether it requires implementing legislation from Congress to take effect, see this Legal Sidebar and this Legal Sidebar.

Justiciability of Lawsuits Challenging Ballot Access

The Supreme Court has held that federal courts must address jurisdiction as a "threshold matter" when evaluating a lawsuit. The issue of standing, which involves a showing that a court has jurisdiction to hear the matter, requires the party seeking relief from the court to demonstrate that he has a "personal stake" in the outcome. This concept is established under Article III, which limits the federal courts to exercise their judicial power only in "cases" or "controversies." In federal courts, a litigant bears the burden of establishing standing by demonstrating three elements: (1) an "injury-in-fact," which is "an invasion of a legally protected interest" that is "(a) concrete and particularized, and (b) actual or imminent not conjectural or hypothetical"; (2) that the injury is traceable to the alleged acts of the defendant being challenged; and (3) that the injury is likely redressable by a favorable judicial decision.

Other justiciability doctrines also inform a court's decision to hear a case, including determining whether a claim is ripe for adjudication or, conversely, whether the dispute has been rendered moot. Even if standing and justiciability requirements are otherwise met, courts may decline to hear cases for prudential or other reasons. For example, the political question doctrine directs courts to forbear from resolving questions when doing so would require them to make policy decisions, exercise discretion beyond their competency, or encroach on powers constitutionally vested in the legislative or executive branches.

In one of the first cases challenging Mr. Trump's candidacy, the U.S. District Court for the District of Columbia did not reach the merits of the plaintiff's argument that the Federal Election Commission (FEC) should reject Mr. Trump's statement of candidacy for the presidency because of "his alleged involvement in the events of January 6, 2021, at the U.S. Capitol." The district court decided that the plaintiff failed to establish standing. Specifically, the court found that the plaintiff, "an FEC-registered 2024 Republican primary presidential candidate," did not establish that he had standing to sue, because, assuming without deciding that he had a viable injury-in-fact, he failed to establish the remaining elements—that the injury was traceable to the FEC and was redressable by the court. Other federal courts determining whether Mr. Trump is eligible to run in the 2024 presidential elections have also determined that the plaintiffs lacked standing and, at least in one case, decided that the plaintiff's claim appeared to raise a nonjusticiable political question.

For cases brought in state courts, a state's laws establish the elements that must be met to demonstrate standing. As the Supreme Court discussed in *Asarco Inc. v. Kadish*, "the constraints of Article III do not apply to state courts, and accordingly, the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution.... " For example, the Minnesota Supreme Court concluded that the petitioners have "standing and that their claims are ripe as to the issue of whether former President Trump should be excluded from the 2024 Republican presidential nomination primary."

Eligibility to Be Placed on the Ballot for the Presidency

Federal elections are primarily administered according to state laws. Article I, Section 4, clause 1, of the U.S. Constitution, known as the Elections Clause, gives the states the initial and principal authority to administer "the times, places and manner of" congressional elections within their jurisdictions. For presidential elections, a parallel constitutional provision, known as the Electors Clause in Article II, Section 1, clause 2, provides that "[e]ach state shall appoint" electors for President and Vice President "in such Manner as the Legislature thereof may direct." In addition, the Qualifications Clause of the Constitution in Article II, Section 1, clause 5, requires the President to be a natural-born citizen, at least thirty-five years of age, and a resident of the United States for at least fourteen years.

Under these constitutional authorities, states have enacted varying laws that specify prerequisites for presidential candidates to appear on election ballots, which are known as ballot access requirements. Generally, states enact ballot access requirements to prevent ballot overcrowding, voter confusion, and election fraud and to facilitate election administration. While recognizing that ballot access laws affect voters' "basic constitutional rights," the Supreme Court has determined that states "have an interest, if not a duty, to protect the integrity of [their] political processes from frivolous or fraudulent candidacies."

Select State Court Decisions on Trump's Ballot Access

Dozens of lawsuits have been brought in federal and state courts that allege that Mr. Trump is constitutionally disqualified from holding the office of the President and seek to prevent his name from appearing on 2024 presidential primary or general election ballots. Several of these lawsuits have been dismissed either voluntarily by the plaintiffs or by reviewing courts on standing or justiciability grounds, without reaching the merits of the constitutional claims. Several lawsuits, however, remain pending.

A few state supreme courts have issued rulings on legal challenges to the former President's eligibility to be on the states' election ballots. The Minnesota Supreme Court dismissed a legal challenge to Mr. Trump's placement on the state's presidential primary ballot while allowing the plaintiffs to potentially bring suit at a later date regarding Mr. Trump's placement on the general election ballot. Likewise, the Michigan Supreme Court denied review of the dismissal of a challenge to Mr. Trump's placement on the primary ballot on ripeness grounds. The Colorado Supreme Court, in contrast, held that the former President was disqualified from again holding the office of the President under Section 3 of the Fourteenth Amendment, and it directed that his name be omitted from the state's presidential primary and general election ballots.

Because these judicial decisions turn on the application of both state and federal law, only some aspects could be appealed to the U.S. Supreme Court. While the Supreme Court may review these decisions to the extent they concern questions of federal law, including as to the meaning of the Disqualification Clause or whether a state election law comports with constitutional requirements, the state courts are the final arbiters on the meaning of laws enacted by their states, including those allowing plaintiffs to bring suit in state court.

Minnesota: *Growe v. Simon*

In this case, the petitioners filed a petition under Minnesota law seeking an order declaring Mr. Trump disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment and directing the Minnesota secretary of state to exclude Mr. Trump from the ballot for the presidential nomination primary and general election. On November 8, 2023, the Minnesota Supreme Court dismissed the case.

After concluding that the petitioners had standing and that their claim as to whether Mr. Trump should be excluded from the ballot for the *primary* election was ripe, the court determined that the claim for excluding him from the *general* election ballot was neither ripe nor likely to occur. Under Minnesota statute, individuals are allowed to petition the court seeking "the correction of ... errors, omissions, or wrongful acts which have occurred or are about to occur" in the election process. The court held that there is no error "to correct here as to the presidential primary election," finding that there is "no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office." The court dismissed the petition without prejudice, which allows the petitioners to bring another claim regarding the general election at a later date.

Colorado: *Anderson v. Griswold*

In *Anderson v. Griswold*, several Colorado voters petitioned the court to direct the Colorado secretary of state to prevent Mr. Trump from appearing on the primary or any subsequent ballot as a candidate for President in 2024. The former President moved to transfer the case to federal court, which was denied. He and the Colorado State Republican Central Committee moved to dismiss the case on a number of grounds, including that the secretary of state "does not have authority to preclude the placement of Defendant Trump on Colorado's ballot pursuant to U.S. Const. amend. XIV, Sec. 3" under relevant state statutes. On October 20, 2023, the district court judge, in an omnibus ruling, discussed the legal framework pertinent to Colorado ballot access law and held that "C.R.S. § 1-1-113 is the exclusive vehicle for ... challenges" to a candidate's qualification to hold office under the Constitution.

On November 17, 2023, a state district court held that then-President Trump engaged in an insurrection as defined under Section 3 but determined that Section 3 does not apply to Mr. Trump, therefore declining the petition to bar Mr. Trump's name from appearing on the ballot. The plaintiffs and Mr. Trump appealed to the Colorado Supreme Court.

On December 19, 2023, by a 4-3 vote, the Colorado Supreme Court partially affirmed and partially reversed the district court. The court held that former President Trump is disqualified under Section 3 from again holding the office of President.

Before reaching the merits in this case, the Colorado Supreme Court held that Sections 1-4-1204 and 1-1-113 of the Colorado election code permit plaintiffs to challenge Mr. Trump's status as a candidate based on Section 3. According to the court, a state has the constitutional authority to evaluate presidential qualifications so long as its legislature has statutorily provided for such authority. Quoting future Justice Neil Gorsuch in an opinion written when he was a judge on the U.S. Court of Appeals for the Tenth Circuit, the court observed that it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process [that] permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." Further, the court concluded that the electors in this case properly stated a claim under Colorado law and that, notwithstanding "the expedited procedures" of Section 1-1-113, the law "provides sufficient due process for evaluating whether a candidate satisfies the [requisite] constitutional qualifications." The court also held that Section 3 is self-executing and does not require Congress to enact implementing legislation and that the political question doctrine does not preclude judicial review of a candidate's qualifications for office under Section 3.

Turning to the merits, the court held that Section 3 applies in this case because, based on a textual analysis of Section 3, the President is an officer of the United States and the presidency constitutes an office under the United States. The court also determined that the district court did not err in determining that President Trump committed an insurrection. (For further discussion of the Colorado court's analysis of the merits, see Part 1 of this Sidebar.)

Three justices each wrote separate dissents, with two justices arguing that Section 1-1-113 of the Colorado election code does not provide for adequate due process. Specifically, Colorado Chief Justice Brian Boatright criticized the electors' claim for being made "without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process." In addition, Colorado Justice Carlos Samour characterized the district court proceeding in this case as lacking "basic discovery," the power to compel witnesses and subpoena documents, "workable timeframes," and "the opportunity for a fair trial." Justice Samour further argued that most other states will not be able to enforce Section 3 because they lack similar election laws, which will result in Mr. Trump's disqualification from the ballot in only *some* states, "thereby risking chaos in our country."

In deciding that former President Trump was disqualified from holding future office, the Colorado Supreme Court held that "it would be a wrongful act under the Election Code" for the Colorado secretary of state to include his name as a candidate on the 2024 presidential primary ballot. However, the court stayed its decision until January 4, 2024 (the day before the Colorado secretary of state is required to finalize the ballot), or, if the decision is appealed, until the U.S. Supreme Court issues a ruling. On December 27, 2023, the Colorado Republican Party appealed the ruling to the U.S. Supreme Court, arguing, among other things, that the President is not covered by Section 3 and that Section 3 is not self-executing. On January 3, 2024, Mr. Trump likewise appealed the court's ruling to the Court, arguing, among other things, that Congress is the appropriate body to decide the eligibility of a presidential candidate and not a state court. On January 5, 2024, the Supreme Court agreed to hear the case on February 8, 2024, and ordered an expedited briefing schedule. The Colorado secretary of state announced that, as a result of the U.S. Supreme Court agreeing to review the case, Mr. Trump would be on the state's 2024 presidential primary ballot, but she indicated that the Court's decision may determine if votes for the former President are counted.

Maine Secretary of State's Decision on Trump's Ballot Access

On December 28, 2023, Maine's secretary of state determined that former President Trump is disqualified from holding the office of President under Section 3 and, accordingly, denied him access to Maine's presidential primary election ballot. Specifically, the secretary ruled in response to three challenges she received as to the nomination petition of Donald J. Trump for the Republican primary for President of the United States, which were filed under Maine statutes, 21-A M.R.S. §§ 336 and 337. As the secretary explained, Maine law requires that, in preparing the ballots for a presidential primary election, she must ascertain whether a candidate's primary election petition and candidate consent form comport with the requirements of Maine law, which is subject to challenge and appeal. Under Maine law, the candidate consent form requires a declaration that the candidate meets the qualifications for the office sought, which is verified by the candidate's oath or affirmation. If, in accordance with the challenge procedures, the secretary determines that the declaration is false, the candidate consent form and primary election petition are considered "void." In this case, the secretary found that the challengers met their burden of proving that Mr. Trump's declaration of qualification is false and, therefore, concluded that his primary election petition "is invalid."

The secretary further determined that she holds the authority to deny presidential primary election ballot access to unqualified candidates. She observed that, consistent with the Elections Clause and the Electors Clause of the U.S. Constitution, states have the authority to regulate their ballots. While states cannot establish *new* qualifications for the presidency, she explained that states can create their own unique processes that exclude candidates who are constitutionally unqualified. Hence, under that authority, the secretary of state concluded that the Maine legislature has "statutorily obligated" her to determine if

candidates are qualified and, if not, to limit their access to the Maine primary ballot. The secretary, referencing the short time frame involved, ballot preparation deadlines, the novel questions of constitutional law, and the importance of the case, suspended the decision until after either the Maine Superior Court rules or the deadline to appeal under Maine state law has passed.

On January 2, 2024, former President Trump appealed the Maine secretary of state's decision to the Maine Superior Court. Among other things, he alleged that the secretary of state was biased, provided him with insufficient due process, acted without legal authority under Maine law, committed several errors of law, and took arbitrary and capricious actions, all of which resulted in Mr. Trump being "illegally excluded from the ballot."

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