

June 29, 2021

Damon Circosta, Chair
State Board of Elections
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Sent via email: damon.circosta.board@ncsbe.gov

Dear Chairman Circosta,

In the months leading up to the January 6, 2021 assault on the United States Capitol, and continuing through his urging and condoning his supporters in their attack on the Capitol, former President Donald J. Trump incited and facilitated an insurrection against the United States.¹

As you probably know, Mr. Trump has publicly flirted with running again in 2024. However, just like any other person (of any political background) who has previously sworn an oath to defend the Constitution and then engaged in insurrection or rebellion against the United States, Mr. Trump is constitutionally disqualified from federal office under the Fourteenth Amendment to the United States Constitution. We therefore write to request that you exercise your authority and obligation to exclude Mr. Trump from the ballot.

Trump is Constitutionally Ineligible for the Presidency

Section 3 of the Fourteenth Amendment provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having

¹ The facts underlying this misconduct are so well-known as not to require repetition here. The materials from Mr. Trump's second impeachment proceeding, for incitement of insurrection, are available at <https://www.govinfo.gov/collection/impeachment-related-publications>.

previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

You have the authority and responsibility to determine, as part of the state ballot qualification process, that Mr. Trump is ineligible to appear on a presidential ballot because, “having previously taken an oath . . . to support the Constitution of the United States,” he then proceeded to “engage[] in insurrection or rebellion against the same.”

There is no constitutional requirement that Congress, a court, or anyone else formally adjudicate this question before you may decide his eligibility for the ballot. Section 3 of the Fourteenth Amendment disqualifies officials who have engaged in insurrection from holding office without requiring any particular decisionmaker to make that determination, and “[c]onstitutional provisions are presumed to be self-executing.”²

The fact that the Senate failed to convict Mr. Trump in his impeachment trial is irrelevant. Fifty-seven senators voted to convict Mr. Trump of incitement to insurrection. Of the 43 senators who voted to acquit, 22 expressly based their vote on their belief that the Senate lacked jurisdiction to try a former official, and either criticized Mr. Trump or did not state any view on the merits.³ Thus, a clear majority, and a likely two-thirds majority, if not more, of senators agree that Mr. Trump is guilty of incitement to insurrection.

But even if not, nothing in section 3 of the Fourteenth Amendment says that two-thirds of the U.S. Senate must first render a preliminary determination. To the contrary, section 3 provides that a two-thirds of the Senate is needed to *remove* the disability. Even if all 43 senators who voted not to convict Mr. Trump voted to remove the disability

² 16 Am. Jur. 2d Constitutional Law § 103.

³ See Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (Feb. 15, 2021), <https://bit.ly/3uUZA1A>.

under section 3, that would fall well short even of a majority, let alone the two thirds needed to remove the disqualification.

The Role of States in Protecting the Ballot

This situation is not like other cases where courts have rejected state efforts to impose *additional* ballot access qualifications beyond those found in the Constitution.⁴ Here, the eligibility criterion is imposed by the Constitution itself. Section 3 of the 14th amendment added an additional qualification for presidential eligibility beyond those first imposed in 1787. In other words, since 1868, the qualifications for eligibility for the presidency—in addition to natural born citizenship, 35 years of age, and so forth—have also included *not* having engaged in insurrection against the United States after having taken an oath to support the Constitution.⁵

States may require presidential candidates to demonstrate that they meet these qualifications, and exclude them if they do not. As then-Judge (now U.S. Supreme Court Justice) Gorsuch “expressly reaffirm[ed]” in 2012, “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”⁶ Just as states are permitted (if not required) to exclude from the presidential ballot a candidate who is not a natural

⁴ See, e.g., *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019) (invalidating state ballot access law excluding presidential candidates who had not disclosed past federal tax returns), *appeal dismissed as moot and remanded*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

⁵ See *Powell v. McCormack*, 395 U.S. 486, 521 n.41 (1969) (noting in dictum that section 3 arguably imposes a “qualification” for office).

⁶ *Hassan v. Colorado*, 495 Fed. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.), *aff’g* 870 F. Supp. 2d 1192 (D. Colo. 2012) (upholding state requirement that presidential candidates affirm that they meet constitutional qualifications for office, including natural-born citizen requirement).

born citizen,⁷ who is underage,⁸ or who has previously been elected twice as president,⁹ so too states should exclude from the ballot a candidate, such as Mr. Trump, who previously swore to support the Constitution, but then engaged in insurrection.

Your Authority and Responsibility to Address this Issue

Fundamentally, your authority and responsibility to exclude an ineligible candidate from the presidential ballot inheres in the interaction between the roles of Congress and the states in the presidential selection process. The states play a critical role in that process, but cannot act inconsistently with the U.S. Constitution.¹⁰ Even in a state *without* specific legislation devoted to section 3 of the 14th Amendment, officials may not use their official powers to take any action—including approving, certifying, or implementing a ballot placement—to facilitate an insurrectionist’s attempt to obtain office.¹¹

The Constitution is “the supreme Law of the Land,” which you have taken an oath to support.¹² No further state implementing legislation is needed to confirm (nor could state legislation eliminate) your duty to act consistently with the Fourteenth Amendment. And allowing a known insurrectionist to appear on the ballot is inconsistent with your obligation and oath of office to support the U.S. Constitution.¹³

⁷ See Derek T. Muller, “*Natural Born*” *Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097, 1110 (2016) (noting that “[w]hen election administrators heard [such] eligibility challenges, they often asserted jurisdiction,” though in the 2016 election, administrators rejected those challenges on the merits).

⁸ See *Peace & Freedom Party v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding state officials’ rejection of underage candidate); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (same).

⁹ See U.S. Const. amend. XXII, § 1.

¹⁰ See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

¹¹ See *Ex parte Virginia*, 100 U.S. 339, 347 (1879) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”).

¹² U.S. Const., art. VI, cl. 2-3.

¹³ In fact, notwithstanding any contrary statement of state law, the U.S. Constitution trumps any state law that would ostensibly require you to approve or certify an insurrectionist as a valid candidate for federal office. No state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution. “[A]ny conflicting obligations” of state law “must give way” to federal law when there is a conflict. *Washington v. Wash. State*

The congressional act that readmitted North Carolina (and several other states) to the Union provided, as an express condition, that “no person prohibited from holding office under the United States, or by any state, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided by said amendment.”¹⁴

The leading North Carolina case involving ineligibility under section 3 of the Fourteenth Amendment is *Worthy v. Barrett*. In that case, the Supreme Court of North Carolina upheld the county commissioners’ refusal of office to a sheriff upon their determination that his participation in rebellion rendered him disqualified under the section 3 of the Fourteenth Amendment to the Constitution.¹⁵ The court’s analysis was straightforward: the plaintiff had been a sheriff before the rebellion, in which capacity he swore to support the U.S. Constitution; he then continued to hold the office of sheriff under the rebellious Confederate government; consequently, he was barred from future office by operation of the Fourteenth Amendment.¹⁶

If, as the Supreme Court of North Carolina agrees, a county sheriff must be excluded from office for having continued to serve in his post as county sheriff during the rebellion, then this logic applies even more strongly for a former leader who abused his post at the highest level of government to actively incite insurrection.

Furthermore, the general counsel for the State Board has recently confirmed that a candidate who is constitutionally ineligible for the

Comm’l Passenger Fishing Vessel Ass’n, 443 U.S. 658, 691–92 (1979). Any state law that purports to require you to misuse your official powers to aid a constitutionally ineligible insurrectionist in obtaining office must give way to the 14th Amendment.

¹⁴ *An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress*, 15 Stat. 73 (June 25, 1868); *Sandlin*, 21 La. Ann. at 633-34.

¹⁵ *Worthy v. Barrett*, 63 N.C. 199, 200 (1869).

¹⁶ *See id.* at 200-05. A state implementing statute was also then in effect.

presidency “will not qualify as a Presidential Candidate in the State of North Carolina.”¹⁷

There is no risk of deprivation of due process of law from your determination. Mr. Trump can later challenge an adverse determination in court.

Rather than wait until the urgency of an impending election, we urge you to address this critical issue now. Mr. Trump’s conduct encouraging the “Big Lie” of a stolen election, encouraging and inciting an insurrection, and facilitating that insurrection by refusing to intervene to stop it despite urgent requests that he do so and by supervising subordinates who actively blocked the National Guard from assisting the besieged Capitol Police, renders him ineligible for any federal office, including that of president.

Sincerely,

Ron Fein, Legal Director
Gillian Cassell-Stiga, Special Counsel
John Bonifaz, President
Ben Clements, Chair and Senior Legal Advisor

¹⁷ Letter from Don Wright, General Counsel, N.C. State Board of Elections, to Abdul K. Hassan, July 22, 2011, ECF No. 1-1, *Hassan v. State of North Carolina*, No. 11-cv-00720 (E.D.N.C. filed Dec. 9, 2011).