# State of Minnesota
# In Supreme Court

Joan Growe, Paul Anderson, Thomas Beer, David Fisher, Vernae Hasbargen, David Thul, Thomas Welna, and Ellen Young,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent,

v.

Republican Party of Minnesota,

Respondent.

## PETITIONERS' SUPPLEMENTAL BRIEF

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## ARGUMENT

This Court's disposition of *Oines v. Ritchie*, No. A12-1765, has no effect on this matter. The petition was dismissed based on laches. The statements regarding the Court's jurisdiction are dicta, and the conclusions regarding jurisdiction are erroneous.

### I. THE *OINES* PETITION WAS DISMISSED ON LACHES.

On October 3, 2012, Reid Oines filed a petition seeking to remove President Obama from the general election ballot alleging he was not a "natural born citizen" and thus ineligible to hold the Office of President under Article II, Section 1 of the U.S. Constitution. The petition arose from the baseless "birther" conspiracy promoted by Trump, including in an August 6, 2012 tweet stating "An 'extremely credible source' has called my office and told me that @BarackObama's birth certificate is a fraud."[1]

On October 4, 2012, this Court ordered Oines to file a memorandum "addressing why this petition could not have been filed at an earlier date and why laches should not apply." *Oines v. Ritchie*, No. A12-1765, slip op. 2 (Minn. Oct. 4, 2012) (citing *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008)). The Court also invited responses from respondents Secretary of State Mark Ritchie and DFL Party Chair Ken Martin. *Id*.

Oines filed a brief asserting the petition was timely. Pet. Add. 1. Respondents Ritchie and Martin[2] each argued the petition was untimely and should be dismissed for laches. *See* PA9-13, PA18-20. Secretary Ritchie also asserted Congress has exclusive

[1] Tweet available at: https://twitter.com/realDonaldTrump/status/232572505238433794.
[2] Martin was represented by undersigned counsel from Lockridge Grindal Nauen.

authority to address challenges to an individual's ability to serve as president.[3] PA16-18. Neither Oines nor Martin addressed this issue. No argument was held.

The Court's order dismissing the petition fully evaluated the laches arguments and "reject[ed] petitioner's assertion that his petition could not have been filed sooner." *Oines v. Ritchie*, No. A12-1765, slip op. 3 (Minn. Oct. 18, 2012). Although the Court also stated, "under federal law it is Congress that decides challenges to the qualification of an individual to serve as president," *id*. at 4, this is neither binding, persuasive, nor correct.

## II. *OINES* IS NOT PERSUASIVE OR BINDING.

The *Oines* order, as it relates to this Court's authority to adjudicate presidential eligibility challenges, is nonbinding dicta. Sometimes, where two issues are addressed in an order, "even though a decision on one issue might have been sufficient to dispose of the case, the decision is equally binding as to both issues." *State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 266 (Minn. 1956). But that is only the case where "two or more issues are before the court and *are argued by counsel*." *Id*. (emphasis added); *cf*. *State v. Rainer*, 103 N.W.2d 389, 395-96 (Minn. 1960) (noting that dicta in a Minnesota Supreme Court case "should not be lightly disregarded," particularly where it is "an expression of opinion on a question directly involved and *argued by counsel* though not entirely necessary to the decision.") (emphasis added).

[3] Secretary Simon does not share this view. *See* Simon Resp. to Pet. at 1 ("But the Secretary agrees with Petitioners that the current proceeding—a ballot-error petition pursuant to Minn. Stat. § 204B.44—is the proper process by which Trump's eligibility should be determined.").

The *Oines* court requested briefing on the discrete issue of whether the petition should be dismissed for laches. All three parties submitted briefs on that issue which was the focus of the Court's Order dismissing the case. In contrast, the question of this Court's authority to hear the petition was raised, unsolicited, by one party. The truncated record—consisting of a conclusion drawn from a federal statute which has since been amended and a case which has been implicitly overruled, *see infra* § III—bears none of the hallmarks of a case argued by counsel and adjudicated by the court. It is dicta.

Even if *Oines* were not dicta, this Court is not bound to follow it. *Oanes v. Allstate Ins. Co.*, 617 N.W.2d. 401, 406 (Minn. 2000) ("stare decisis does not bind us to unsound principles."). As this Court explained, "'the mere fact that an error has been committed is no reason or even an apology for repeating it, much less, for perpetuating it." *Id*. (quoting *Hart v. Burnett*, 15 Cal. 530, 600-01 (1860)) (cleaned up). Now, this Court may decide, with the benefit of robust arguments of counsel, whether it may hear a presidential eligibility challenge under § 204B.44. The Court should not decline to decide this issue out of formalistic deference to a decade-old erroneous conclusion where the question was neither central to its disposition nor fully briefed and argued by the parties.

## III. THE CITED AUTHORITIES DO NOT SUPPORT FINDING CONGRESS HAS EXCLUSIVE AUTHORITY TO EVALUATE ELIGIBILITY.

### A. 3 U.S.C. Section 15 does not grant exclusive authority to Congress.

The once-obscure Electoral Count Act ("ECA") of 1887, later codified at 3 U.S.C. §§ 1 *et seq*., was enacted after problematic presidential elections, where, *e.g.*, states sent competing electoral slates. The ECA "place[d] responsibility for resolving presidential

election contests and challenges on the states." Counting Electoral Votes: An Overview of Procedures at the Joint Session, at 1 (Cong. Res. Serv. Dec. 8, 2020), *available at* https://sgp.fas.org/crs/misc/RL32717.pdf. While preserving Congress's right to object to electors, it limited the process: objections had to be in writing, debated separately by both houses for no more than two hours, and both houses had to agree to sustain the objection. The process was invoked only twice, both unrelated to eligibility of a president, and the objections were rejected. *See id.* at 6-7. Until 2021, the ECA succeeded in preventing a constitutional crisis days before inauguration.

3 U.S.C. § 15 was mentioned only in passing by courts, until reemerging in a 2008 case challenging Senator McCain's eligibility for president. *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008). The Northern District of California held first that it was "highly probable" that Senator McCain was a natural-born citizen and second that, in any event, Plaintiff had no standing (which ended the matter). The Court added a dictum suggesting the Twelfth Amendment and its implementing legislation, 3 U.S.C. § 15, as well as the Twentieth Amendment, provided an avenue for Congress to consider challenges to a candidate's eligibility before, or on, inauguration day. In the dozens of challenges to McCain, Obama, and even Ted Cruz, that followed, some courts relied on *Robinson* to opine, usually in dicta, that the challenges likely were committed to Congress and could not be decided by the courts. In 2010, an intermediate appellate court in California recited a dictum relying on *Robinson*. *See Keyes v. Bowen*, 189 Cal. App. 4th 647, 660-61 (2010). In 2012, *Oines* cited, in its own dictum, the *Keyes* court's dictum citing the *Robinson* court's dictum.

As addressed in Petitioner's opening and reply briefs, other courts disagreed and upheld states' authority to exclude ineligible candidates from the ballot. Notably, the Ninth Circuit implicitly overruled the *Robinson* dictum (the source of the *Keyes*, and from there, the *Oines* dicta):

> [N]othing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president. The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is qualified to hold office, a problem for which there was previously no express solution. *See* 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable) … Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.

*Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014). Pennsylvania courts also agreed that neither the Twelfth nor Twentieth Amendments committed evaluation of presidential candidates to Congress exclusively, and ruled that Ted Cruz was a natural born citizen. *Elliott v. Cruz*, 137 A.3d 646 (Commw. Ct. Pa. 2016). Other courts did not opine on these issues but adjudicated, or allowed states to adjudicate, presidential candidates' eligibility. *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.) (naturalized citizen); *Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 688 (Ind. App. 2009) (affirming dismissal of challenge to McCain and Obama's eligibility, holding both were natural born citizens); *Purpura v. Obama*, 2012 WL 1949041 (N.J. Super. App. Div. May 31, 2012) (similar). Scholars largely agreed that while the Twelfth and Twentieth Amendments, and 3 U.S.C. § 15, *may* provide an avenue to challenge a president's eligibility, they are not the *exclusive* means to do so and, importantly, did not prevent the

states from deciding such questions under their own election and ballot access laws. Derek T. Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L. J. 559, 605 (2015) ("The power of congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

After his 2020 loss, Trump attempted to abuse the process laid out in 3 U.S.C. § 15 to prevent certification of the election results, including by presenting fraudulent electors, *see, e.g.*, Pet. ¶¶ 57, 60, 81;[4] pressuring Vice President Pence to reject electoral votes, Pet. ¶¶ 68, 83-88, 118-21, 133, 136; and pressuring the Justice Department to "say the election was corrupt and leave the rest to [Trump] and the Republican congressmen," Pet. ¶ 71. When Pence refused his demands, Trump sent an armed mob to the Capitol.

In response, late last year, Congress amended 3 U.S.C. § 15. *See* Electoral Count Reform Act of 2022 (ECRA), Pub. L. 117-328, div. P, tit. I, 136 Stat. 4459, 5233 (Dec. 29, 2022). The ECRA clarified that the Vice President's role was ministerial; specified the types of objections allowed; and significantly raised the bar for bringing objections. Importantly, Congress clarified that the section regarding candidates' challenges "shall not be construed to preempt or displace any existing State or Federal cause of action." 3 U.S.C. § 5(d)(2)(B). ECRA sought to avoid the chaos and violence that erupted when a candidate tried to use 3 U.S.C. § 15 to throw out the results of an election. Even if Congress can consider an eligibility challenge, nothing in ECRA, any more than the original statute, suggests Congress's authority is exclusive. More importantly, under

[4] *See also United States v. Donald Trump*, No. 1:23-cr-00257 (D.D.C. filed Aug. 1, 2023) (criminal prosecution for this scheme).

Trump's incorrect view that Congress has exclusive authority to decide eligibility, and if he were allowed onto the ballot, and elected, then his eligibility would be adjudicated *for the first time* on January 6, 2025. That threatens a repeat (or worse) of January 6, 2021.

**B. *Keyes v. Bowen* was decided on the basis of California state law.**

The *Oines* Court's reliance on *Keyes v. Bowen* was also misplaced, because it was decided under *California state* law, not federal law. Plaintiff there petitioned for writ of mandamus compelling the Secretary of State to verify that candidates seeking elective office are eligible for office. The court held plaintiff had not established that California state law imposed upon the Secretary a "clear, present, or ministerial duty"—the standard for a California mandamus action—to investigate and determine whether a presidential candidate is constitutionally eligible for that office. *Keyes*, 189 Cal. App. 4th at 658-60.

The *Oines* Court failed to distinguish between the mandamus petition in *Keyes* and Minnesota § 204B.44 process, which explicitly authorizes petitioners to ask the *Court* to determine whether a candidate is eligible for office and, if they are not, the *Court* may order the Secretary to exclude the candidate from the ballot. That has always been the process—the Court determines eligibility, and the Secretary follows the Court's order.[5]

After determining mandamus did not lie, the *Keyes* court declined to address the plaintiffs' untimely and therefore forfeited argument that the California statute was unconstitutional, but then added a dictum relying on *Robinson*. *See id.* at 660-61. In this

[5] *Keyes* was filed ten days after Obama had won the general election. The *Keyes* court relied, in part, on the fact that California law provided the Secretary of State no discretion in placing a presidential candidate on the *general* election ballot, in contrast with the primary wherein the Secretary would have had such discretion. *Id.* at 559.

dictum, the *Keyes* court mused on the potential disruption that would arise if fifty states issued different opinions on eligibility and noted (in the context of a post-general election challenge) that this scenario might result in a "delayed transition of power." But January 6, 2021, has definitively shown that it is *waiting* to decide such questions that will lead to disruption, delays, and violence. As Petitioners outlined in their Reply brief, this Petition was initiated sufficiently in advance of voting—in the primary—so that a state-court decision disqualifying Trump from the ballot under Section 3 can be reviewed and decided by the U.S. Supreme Court before the election. The same would have been true had any Court ruled that Obama, McCain, or Cruz were not natural-born citizens. Section 204B.44 gives Petitioners the opportunity to prove Trump engaged in insurrection and is therefore barred from the ballot under the Fourteenth Amendment, and this Court the power to decide Trump's eligibility.

It must also be acknowledged that the eligibility challenges to President Obama in cases such as *Keyes* and *Oines* were borne out of a false and racist theory popularized by Trump himself. Several courts—presumably to give no credence to the birthers—hastened to endorse any procedural reason to dismiss such petitions. In hindsight, it may have been better if the courts had *not* dismissed these cases, and instead ruled that Obama was, in fact, a natural born citizen, as some courts did. *See, e.g.*, *Ankeny*, 916 N.E.2d at 688. Of course, no one at that time could have known what would occur on January 6, 2021. Few had thought of Section 3 for decades, or centuries. No one would have predicted that the person who embraced and stoked the birther theory would, fifteen years later, rely on the dismissal of those cases to evade responsibility for his actions inciting

and supporting an attack on the United States Capitol, that overwhelmed security forces, caused five deaths and hundreds of injuries, and delayed the peaceful transfer of power.

Finally, interpreting *Oines* as meaning that *only* Congress may enforce Section 3 is inconsistent with the Fourteenth Amendment's text, structure, and history, as well as longstanding and recent practice and precedent. *See* Pet Br. 12-29.

## IV. A COLORADO COURT JUST REJECTED A SIMILAR ARGUMENT.

Earlier today, in parallel litigation challenging Trump's eligibility under Section 3, a Colorado trial court ruled on the question of whether "the U.S. Constitution reserves exclusively to the U.S. Congress the decision as to whether a [presidential] candidate is unqualified." Order, *Anderson v. Griswold,* No. 2023CV32577, at 3-18 (Oct. 25, 2023). Trump argued that 3 U.S.C. § 15 is the exclusive means for adjudicating presidential candidates' eligibility. The court considered Trump's argument—including the impact of *Keyes*, *Robinson*, *Lindsay*, and most other cases cited here—and denied his motion to dismiss. *See id.* at 18 ("there is no textually demonstrable constitutional commitment of the issue to a coordinate political department").

## V. THIS COURT MAY ADDRESS CHALLENGES TO PRESIDENTIAL ELIGIBILITY.

States may exclude candidates from their presidential ballots who do not meet constitutional qualifications. *See* Pet. Br. 11; Pet. Reply Br. 5-8. In Minnesota, a presidential eligibility challenge is brought, and may be considered by this Court, under § 204B.44. *See* Pet. Reply Br. 12-18; Simon Br. 5 n.1 (instant petition fits squarely within the subject-matter limitations for § 204B.44 petitions) (citing *Clark*, 755 N.W.2d at 299).

The observation in *Oines* that presidential candidates do not file affidavits of candidacy is inapposite. Section 204B.44 does not mention an affidavit of candidacy. It does not make filing an affidavit of candidacy a prerequisite for § 204B.44 review or constrain the Court's scope of review. The fact that the legislature exempted presidential candidates from submitting certain paperwork does not reflect an intent to constrict its plenary authority to appoint electors by eliminating judicial review of presidential candidates' constitutional eligibility.

Furthermore, after the Court's decision in *Oines*, the statute was amended to add the phrase "*including* the placement of a candidate on the official ballot who is not eligible to hold the office for which the candidate has filed." Minn. Stat. § 204B.44(a)(1). "Including" here should be interpreted as expanding, not constraining the authority of the Court. *See* Pet. Reply Br. 12-15 (explaining authority to address eligibility is not limited to cases where candidate has "filed."). By analogy, if a major political party filed a certificate of nomination to fill a vacancy resulting from a court order that the original candidate was ineligible, *see* § 204B.13 subd. 1(3), and the replacement candidate also was ineligible, this Court would not be deprived of jurisdiction to correct the error simply because the replacement candidate did not file an affidavit of candidacy.

## CONCLUSION

For these reasons, and all those stated in Petitioner's Opening and Reply briefs, the Court should not rely on *Oines* as a basis for deciding this case.

Dated: October 25, 2023

Respectfully submitted,

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## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 132, subd. 3, for a brief produced with a proportional 13-point font. This brief satisfies the requirements of the Court's October 20, 2023 Order because it is 10 pages in length exclusive of pages containing the table of contents, tables of citations, and any addendum and contains 2,849 words. This brief was prepared using Microsoft Word 2016.

s/Charles N. Nauen
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