



December 7, 2023

Peter S. Kosinski, Co-Chair
Douglas A. Kellner, Co-Chair
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

Dear Co-Chairs Kosinski and Kellner:

We urge you to exercise your duty under the United States Constitution to immediately exclude Donald J. Trump from the New York presidential primary and general election ballot pursuant to the Fourteenth Amendment. As primary season quickly approaches, presidential campaigns will soon file petitions with the Board to obtain a place on the ballot. Under Section Three of the Fourteenth Amendment (also known as the Insurrectionist Disqualification Clause) and applicable state law, however, Trump is constitutionally disqualified from public office and should be excluded from the ballot.

Section 3 of the Fourteenth Amendment provides:

No person shall . . . hold any office, civil or military, under the United States . . . who, having 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.

This clause applies to Donald Trump. Having sworn an oath to support the Constitution as an officer of the United States, he then “engaged” in the violent January 6 insurrection as that term is defined by law and precedent. As a result, Trump is now ineligible to hold any “office . . . under the United States,” including the presidency, unless and until he is relieved of that disqualification by two-thirds of both chambers of Congress.

You have the authority and responsibility to determine whether Trump is eligible to appear on the ballot. Under the recently-passed amendments to the Election Law enacted on September 20, 2023, a candidate for president “shall be eligible to appear on the ballot of such party in the state of New York at the primary election for that year if the state board of elections determines that the person is a nationally known and recognized candidate and the candidacy of such person for the party nomination for president is generally and seriously advocated or recognized according to reports in the national or state news media.”¹ No matter how many news articles may cover his candidacy, a candidate who is ineligible under the U.S. Constitution whether because he is not a natural-born citizen,² or because he is disqualified under section 3 of the Fourteenth Amendment – is not “seriously” advocated or recognized.

Indeed, New York law tasks the state Board of Elections with making the first determination as to whether a candidate has met the qualifications to be on a ballot. New York election law explicitly states that candidates are not eligible to run if they are “ineligible to be elected to such office or position; or [] who, if elected, will not at the time of commencement... meet the constitutional or statutory qualifications thereof.”³ Thus, ineligible candidates who have engaged in insurrection in violation of the Constitution are not eligible for candidacy under New York law. Donald Trump, as the leader of such an insurrection, should not be listed on New York ballots.

New York law and commissioners’ oaths of office require the Board to refuse Trump’s petition to be placed on New York’s ballots. Because the Board has the sole authority to approve a presidential candidate’s ballot placement in our state, by allowing his name on the ballot the Board would be actively asserting Trump’s “authorized” status as a candidate. Such an action would be in direct violation of commissioners’ sworn oath of office, which forbids using official powers to violate the Constitution.

The practice of barring ineligible candidates from running for office is also grounded in Supreme Court precedent. As Judge (now Justice) Gorsuch “expressly

¹ NY Elec. Law § 2-122-b(3)(b); L. 2023, c. 474, § 4. This provision also notes that “[n]otwithstanding any inconsistent provision of law to the contrary, a request by a candidate to appear on the presidential primary ballot of a major political party shall be determined solely upon a joint recommendation by the commissioners of the state board of elections who have been appointed on the recommendation of such political party or the legislative leaders of such political party, and no other commissioner of the state board of elections shall participate in such determination.”

² See, e.g., David Weigel, *Cenk Uygur running for president as Democrat*, *Semafor*, Oct. 11, 2023, <https://www.semafor.com/article/10/11/2023/cenk-uygur-running-for-president-as-democrat>.

³ NY Elec. Law. § 6-122; see also *id.* § 2-122-b(3)(b)(6) (“All provisions of this chapter which are not inconsistent with this section shall be applicable to a primary election conducted pursuant to this section.”); see also *Matter of Mintz v. Board of Elections in the City of N.Y.*, 32 N.Y.3d 1054, 112 N.E.3d 848 (2018) (holding that the Board of Elections of New York City correctly withheld ballot access to a candidate that failed to meet the regulatory requirements).

reaffirm[ed]" in 2012 on behalf of a federal appellate court, "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."⁴

Contrary to myths about Section 3,⁵ this provision of the Constitution does not require a prior criminal conviction.⁶ Nor does it require that the Board wait for any new federal legislation to officially exclude Trump from the ballot.⁷ The Board is —by the power vested in states by the Constitution— authorized to enforce Section 3 without any new federal legislation.⁸

Commissioners' oath to support the Constitution and the weighty responsibility entrusted to the Board by the state of New York compel the Board to exclude Trump's name from the list of qualified candidates in the presidential primary. Just as you would exclude a candidate who is not a natural born citizen,⁹ or who is underage,¹⁰ so too

⁴ *Hassan v. Colorado*, 495 Fed. Appx. 947, 948 (10th Cir. 2012) (Gorsuch, J.) (unpublished), *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).

⁵ See, e.g., Myths and Realities about the 14.3 Insurrectionist Disqualification Clause, Free Speech For People,

<https://freespeechforpeople.org/wp-content/uploads/2023/09/myths-and-reality-about-14.3-2.pdf>.

⁶ To the contrary, most ex-Confederates—including those disqualified under Section 3—were never charged with any crimes. See, e.g., *United States v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871) (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (1869) (defendant not charged with any crime); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (in special congressional action in 1868 to enforce Section Three and remove Georgia legislators, none of whom had been charged criminally). Indeed, rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. See Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.

⁷ See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

⁸ In 2022, a Georgia court confirmed that no authority suggests that a criminal conviction was ever considered necessary to trigger the Disqualification Clause. See *Rowan et al. v. Marjorie Taylor Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, slip op. at 13-14 (Ga. Ofc. of Admin. Hrgs. May 6, 2022), available at <https://bit.ly/MTGOSAH> (adopting the *Worthy-Powell* standard), *aff'd* sub nom. *Rowan v. Raffensperger*, No. S23D0071 (Ga. Sept. 1, 2022). See also Ron Fein et al. & Gerard Magliocca, *States Can Enforce Section Three of the Fourteenth Amendment Without Any New Federal Legislation*, Free Speech For People Issue Report 2023-01 (Mar. 2023), available at <https://freespeechforpeople.org/wp-content/uploads/2023/03/14.3-fsfp-magliocca-report-mar-2023.pdf>.

⁹ 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 they rejected them on the merits).

¹⁰ See *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding California Secretary of State's rejection of underage candidate); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (similar in Illinois).

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should you exclude from the ballot a candidate who previously swore to support the Constitution but then engaged in insurrection.

The January 6 insurrection was a violent uprising against the United States that tragically resulted in loss of multiple lives. That dark day in our nation's history was led, facilitated, and encouraged by Trump. The Board must not allow those who participated to run again for office against the mandate of the Constitution.

Therefore, with the urgency of an approaching primary election, we urge the Board to address this critical issue now and to ensure Trump's name does not appear on the New York ballot.

Sincerely,



Brad Hoylman-Sigal
NYS Senator - 47th District



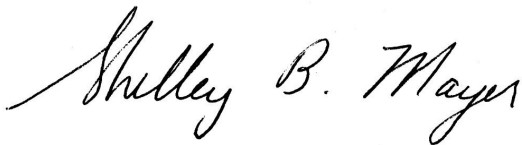
Liz Krueger
NYS Senator - 28th District



Gustavo Rivera
NYS Senator - 33rd District



Timothy M. Kennedy
NYS Senator - 63rd District



Shelly B. Mayer
NYS Senator - 37th District