

ANDERSON V. GRISWOLD: SECTION THREE OF THE FOURTEENTH AMENDMENT AND ELECTION INTEGRITY

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The 2020 election, perhaps the most controversial election in history, created a great divide amongst the country. Now, the 2024 election proposes potential for the same candidates: President Joseph R. Biden Jr. (“Biden”) and former President Donald J. Trump (“Trump”).² To prevent history from repeating itself, extensive measures are ensuing to remove former President Trump from the ballot.

The controversy that former President Trump should not appear on the ballot lies in Section Three of the Fourteenth Amendment (“Section Three”) and Trump’s role on January 6, 2021³ (“January 6”). The Constitution 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 previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, 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.⁴

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² *Tracking the 2024 Presidential Candidates*, NBC NEWS (Mar. 26, 2024), <https://www.nbcnews.com/politics/2024-elections/presidential-candidates-tracker>.

³ On the afternoon of January 6, Trump called his supporters to a rally about a mile from the U.S. Capitol in an attempt to protest the 2020 election results. Towards the end of President Trump’s speech, thousands began to march towards the Capitol, breaking through barricades, until eventually entering the Capitol building. In the midst of the riot, Congress was in the process of counting electoral votes, and consequently adjourned, as rioters continued to aggressively and violently raid the Capitol. Later that evening, Congress reconvened and affirmed Biden as the winner of the 2020 election. History.com Editors, *U.S. Capitol Riot*, HISTORY (Jan. 5, 2022), <https://www.history.com/this-day-in-history/january-6-capitol-riot>.

⁴ U.S. CONST. amend. XIV, § 3.

Voters in thirty-six states challenged former Trump's name appearing on the primary ballot.⁵ Of these states, Colorado, Illinois, and Maine declared Trump ineligible to appear on the ballot, while fourteen others rejected this claim entirely.⁶ With President Trump leading the Republican Primary polls,⁷ and many still questioning the validity of the 2020 election,⁸ how will disparities from state-to-state impact the overall results of the 2024 election? This article will examine the implications of Section Three and the dangers of removing political candidates from the ballot.

I. *ANDERSON V. GRISWOLD*

The main question presented in *Anderson v. Griswold* was whether Trump engaged in insurrection, thus disqualifying him from re-election as President.⁹ The suit arose from a group of voters who sought to remove Trump from the Colorado primary ballot because he “engaged in insurrection,” consequently violating his oath “to support the Constitution.”¹⁰

First, the Colorado Supreme Court concluded the State does have the authority to assess Presidential Candidates.¹¹ The court held that Article II¹² gives Colorado the power to appoint electors, and Colorado utilizes this power through the Election Code.¹³¹⁴ Additionally, the Election

⁵ Lazaro Gamino ET AL., *Tracking Efforts to Remove Trump From the 2024 Ballot*, NEW YORK TIMES (Mar. 4, 2024), <https://www.nytimes.com/interactive/2024/01/02/us/politics/trump-ballot-removal-map.html>.

⁶ *Id.*

⁷ Gamino ET AL., *supra* note 5.

⁸ See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

⁹ See *Anderson v. Griswold*, 2023 CO 63, ¶¶ 1–2, 543 P.3d 283, 296.

¹⁰ *Id.*

¹¹ *Id.* at ¶¶ 51–56, 305–06.

¹² States may appoint presidential electors “in such Manner as the Legislature thereof may direct,” so long as there is no other constitutional restraint. U.S. CONST. art. II, § 1, cl. 2.

¹³ The Secretary must certify the names and party affiliation of the candidates on the presidential primary ballot; electors may challenge a presidential primary ballot candidate's qualifications, who is constitutionally disqualified to assume office. Colo. Rev. Stat. Ann § 1-4-1204(4).

¹⁴ *Anderson*, ¶¶ 52, 56, 543 P.3d at 305–06.

Code was properly exercised by the Electors to challenge the listing of Trump on the primary ballot.¹⁵

The court then turned to the construction of the language in Section Three to determine whether it applies to the President.¹⁶ The court held “any office, civil or military” being overbroad meant to include the President.¹⁷ Next, “officer of the United States” is a “catch-all phrase,” including the President.¹⁸ Lastly, the court found that the presidential oath aligns with the meaning of “support the Constitution”¹⁹ In conclusion, the court held Section Three may prohibit Trump from re-election if found that he “engaged in insurrection,” with no action of Congress necessary.²⁰²¹

A. “Engage”²² in “Insurrection”²³

The court found that the mob’s purpose was to reverse the 2020 election results. To achieve this, the mob attacked the Capitol while Congress was convening, with the intent to disrupt the certification of the votes.²⁴ The court found “the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government

¹⁵ *Anderson*, ¶ 87, 56, 543 P.3d at 312.

¹⁶ *Id.* at ¶ 128, 319–320.

¹⁷ *Id.* at ¶ 140, 322.

¹⁸ *Id.* at ¶¶ 144, 151, 323–24.

¹⁹ *Anderson*, ¶ 156, 543 P.3d at 325.

²⁰ The Supreme Court of Colorado found that Section Three is self-executing; precedent shows the Thirteenth and Fifteenth Reconstruction Amendments are self-executing and the Fourteenth Amendment, also a Reconstruction Amendment, follows suit. *See id.* at ¶ 106, 316.

²¹ *Id.* at ¶¶ 107, 160, 316, 326.

²² The *Anderson* Court defined “engaged in” to mean “an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.” *Id.* at ¶ 194, 332.

²³ The *Anderson* Court defined “insurrection” as “encompass[ing] a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.” *Id.* at ¶ 184, 330.

²⁴ History.com Editors, *supra* note 3.

from taking the actions necessary to accomplish the peaceful transfer of power in this country.”²⁵

The question then for the court was whether Trump incited the mob.²⁶

The Colorado Supreme Court contends that Trump “fan[ed] the flames of his supporters” from the date of the election results until the events on January 6.²⁷ The court referenced Trump’s tweets²⁸ contesting the election results and calling for a protest on January 6.²⁹ In brief, the court held that there was ample evidence that Trump is an oath-breaking insurrectionist.³⁰

II. THE THREAT OF ALTERING THE BALLOT

At the heart of United States democracy lies the right of qualified citizens to freely vote for a candidate of their choosing *and* to have their votes counted.³¹ Even if the Constitution permits Trump’s disqualification, it’s a slippery slope that society needs to be wary of. The Colorado Supreme Court chose to exercise this “power” at the outset of the election, prohibiting the people from choosing to cast their vote for Trump.³² However, perhaps the biggest controversy with *Anderson v. Griswold* is that even “write-ins” cast would be disregarded.³³ When taking away the people’s ability to vote for the candidate of their choosing, the people are deprived of their right: the people can neither freely vote, nor have their vote counted.

More importantly, the Colorado Election Code gives the Secretary of State the power to disqualify candidates.³⁴ This bestows politicians the power “to disqualify their political opponents

²⁵ *Anderson*, ¶ 189, 543 P.3d at 331.

²⁶ *Id.*

²⁷ *Id.* at ¶ 200, 333.

²⁸ See e.g. “Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!” *Id.* at ¶ 202, 333.

²⁹ See *id.* at ¶ 204, 333.

³⁰ *Id.* at ¶ 224, 336.

³¹ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

³² *Anderson*, ¶ 257, 543 P.3d at 342.

³³ *Id.* at ¶ 257, 543 P.3d at 342.

³⁴ COLO. REV. STAT. ANN. § 1-4-1204(4).

from the ballot.”³⁵ When this power is abused, democracy faces a tremendous threat. Interestingly enough, Colorado, Illinois, and Maine have historically been democratic states, all voting Biden into office in the 2020 election.³⁶ Applying logic, these states are trying to remove political opponents. It is difficult to argue here that this is not an abysmal abuse of power.

Finally, if Section Three is truly self-executing and may be enforced by the states, the results of the election would be severely interrupted. With no uniform resolution, this would allow states to essentially opt out of allowing Trump to appear on the ballot, while others do not. The results would not reflect the true outcome of the election, since votes would be misplaced. Correspondingly, other candidates would have an advantage in the states in which Trump did not appear on the ballot. The Presidential election is a national matter, not a state-to-state matter.

III. *TRUMP V. ANDERSON*

The Supreme Court of the United States granted certiorari over Trump’s petition to answer the question “Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?”³⁷ Without even assessing the Colorado Supreme Court’s contention that Trump “engaged in insurrection,” all nine Justices agreed³⁸ that Colorado could not exclude President Trump from the ballot.³⁹

³⁵ Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, REASON (Aug. 12, 2023), <https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/>.

³⁶ See *Colorado*, 270 TO WIN, <https://www.270towin.com/states/Colorado> (last visited Mar. 30, 2024); *Illinois*, 270 TO WIN, <https://www.270towin.com/states/Illinois> (last visited Mar. 30, 2024); *Maine*, 270 TO WIN, <https://www.270towin.com/states/Maine> (last visited Mar. 30, 2024).

³⁷ *Trump v. Anderson*, 144 S. Ct. 662, 666 (2024).

³⁸ Justice Barrett concurred in part, holding the Court did not need to address the exclusive vehicle in which Section Three can be enforced. *Id.* at 671 (Barrett, J., concurrence). Justices Sotomayor, Kagan, and Jackson concurred in judgment, holding that a “chaotic state-by-state patchwork, at odds with our Nation’s federalism principle” was enough to resolve this case. *Id.* at 672 (Sotomayor, J., concurrence).

³⁹ See *id.* at 671.

Rather than assessing whether Section Three applied to President Trump, the Court held that neither Colorado nor any other state has the power to enforce Section Three to any federal officer, including the President; this power rests with Congress through Section Five of the Fourteenth Amendment.⁴⁰⁴¹ Congress may exercise this power under Section Three at any time by a two-thirds vote of each house.⁴² Be as that may, the Court calls attention to the history of Section Three, which has only been enforced *post*-election “to ensure that some of the people’s chosen candidates could take office.”⁴³ As can be seen, this is contrary to Colorado’s purpose.

More importantly, the Court illustrates the potential harm if some states remove Trump from the ballot, while others do not.⁴⁴ The Court goes on to say that “the President . . . represent[s] all the voters in the Nation,” but for some states to disqualify Trump from the ballot would be contrary to this essential principle.⁴⁵ Equally important, this could allow some states, depending on their election procedures, to achieve disqualification under Section Three, while other states would fail based on the *same* premise.⁴⁶

Overall, the electoral map would face the biggest threat. The Court recognizes that votes cast, or lack thereof, would of course affect the votes cast for the other candidates in other states.⁴⁷ It would be natural to follow that voters and political parties could “dramatically change their behavior” because of this.⁴⁸ Most importantly, the Court states that the change in the electoral map

⁴⁰ Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV, § 5.

⁴¹ *Trump*, 144 S. Ct. at 667–68.

⁴² U.S. CONST. amend. XIV, § 3.

⁴³ *Id.* at 669.

⁴⁴ *See Trump*, 144 S. Ct. at 670–71.

⁴⁵ *Id.* at 670 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

⁴⁶ *Id.* at 670.

⁴⁷ *Id.* at 671.

⁴⁸ *Id.*

“could nullify the votes of millions and change the election result,” leading to chaos.⁴⁹ For these reasons, the Court held Colorado is precluded from removing Trump from the primary ballot.⁵⁰

IV. CONCLUSION

It remains unclear whether Section Three precludes Trump from reelection. Nonetheless, the Court made very clear that a state-by-state resolution of this matter creates both a burden on Congress and a profound threat to the election results.⁵¹ Ultimately, to grant states the power to challenge the validity of a Presidential candidate would be the greatest danger to this country's democracy.

⁴⁹ *Trump*, 144 S. Ct. at 671.

⁵⁰ *Id.*

⁵¹ *Id.* at 669–71.