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POLICY PAPER

NEW JERSEY SHOULD PREPARE NOW FOR LIKELY TRUMP BALLOT CHALLENGES

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New Jersey Appleseed Public Interest Law Center is a 501(c)(3) nonprofit, legal advocacy organization that has been active in state-based election reform and voting rights issues since our inception in 1998. We are part of a network of 18 justice centers across the United States and Mexico working together to reduce poverty, combat discrimination, and invigorate democracy.

January 8, 2024

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TRUMP BALLOT CHALLENGES

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Foreword

The potential disqualification of Donald Trump from running as a candidate for President due to his engagement in alleged "insurrection," pursuant to the terms of Section Three of the Fourteenth Amendment to the U.S. Constitution, has been the subject of much news coverage, scholarly commentary and litigation over the past six months. This has only intensified since the Colorado Supreme Court and the Maine Secretary of State both recently ruled that Trump is ineligible to appear on the Republican primary election ballots in those states. Although the Colorado decision has been appealed by Trump to the U.S. Supreme Court, which has accepted his appeal and has set forth an expedited briefing and oral argument schedule, the timing, applicability and scope of any such decision is still uncertain. In the meantime, those states like New Jersey whose election laws require election officials to make a determination of a candidate's eligibility to appear on a Presidential primary ballot (after a challenge to the candidate's eligibility has been filed) must prepare to deal with and determine such potential challenges on the expedited time frames typically provided by those state laws.

It is our contention that, given the likelihood that a challenge to Trump's candidacy will be filed in New Jersey following the filing of his nominating petition on or before March 25, 2024, the Secretary of State, as the election official of the state charged with determining challenges to presidential candidate eligibility, should prepare for such challenge now. The extremely tight time-frame in which such a challenge must be resolved, and the timing and other uncertainties associated with any U.S. Supreme Court ruling require the Secretary of State to be prepared to proceed under New Jersey election laws. That is why we wrote this paper.

The most important concrete step that the Secretary can take at this time is to request a legal opinion from the Attorney General covering many if not all of the most contentious legal issues involved in such challenge, which we outline herein. Armed with such an opinion, the decision-

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making process which must accompany any such challenge, including the holding of a hearing before an administrative law judge, may be streamlined in advance by providing research and advice to the Secretary, the administrative law judge, and the appellate judges hearing any appeal of the Secretary's decision.

We further believe, as a matter of public policy, that given the voluminous amounts of relevant material and the political context in which any legal challenge will occur, it would be advantageous for the Attorney General to accept submissions from interested parties and members of the public to aid his position and ultimately, advice to the Secretary of State.

Summary

Given the numerous challenges that have been and continue to be brought in several states asserting that Donald Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the U.S. Constitution, and especially in light of the Colorado Supreme Court's recent Anderson v. Griswold[5] decision and the Maine Secretary of State's ruling,[6] both of which disqualified Trump from appearing on the primary election ballot in those states, New Jersey should be prepared for how to handle such a challenge. A challenge to Trump's eligibility would seek to exclude him from the state's presidential primary election ballot and would likely be submitted after the filing by Trump with the New Jersey Secretary of State, on or before March 25, 2024, of a petition to be placed on the ballot. Given the complexities of the factual and legal issues involved, and the very tight 10-day window (between petition filing and final decision) provided by New Jersey law for resolution of such challenges, we believe that the Secretary of State and the New Jersey Attorney General should take concrete steps now, in advance of such dates, in order to prepare for any such challenges. In particular, we do not think that it would be prudent for New Jersey election authorities to wait to see if the U.S. Supreme Court, which has accepted the Griswold appeal and set a February 8 oral argument date, will provide a definitive ruling on Trump's eligibility under Section Three prior to March 25, for the reasons explained in greater detail below.

We believe that the mechanism for such preparation should be the rendering of a formal legal opinion by the New Jersey Attorney General to the Secretary of State which covers, at a minimum, a number of the legal issues that would be presented by such a challenge. We note that the website of the New Jersey Division of Law (DOL), a division of the state's Department of Law and Public Safety, indicates that it "serves as primary legal counsel for New Jersey state government, with its work [including] *providing legal advice to the state's departments and agencies* …."[7] (Emphasis supplied.) The Secretary of State should request and receive such an opinion from the Attorney General in advance of any challenge. Alternatively, the request for the legal opinion may come from members of the general public as an exercise of their general right to petition their government pursuant to the New Jersey Constitution.[8] As explained in greater

[5] Slip Op., 2023 CO 63 (Dec. 19, 2023).

[6] Ruling of the Secretary of State, In re: Challenges of Kimberly Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Dec. 28, 2023).

[7] https://www.njoag.gov/about/divisions-and-offices/

[8] New Jersey Const., Art. 1, ¶ 18. We note that New Jersey law also allows members of the public to request binding declaratory rulings from state agencies. See N.J.S.A. 52:14B-8, "Declaratory Rulings" ("[A]n agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged"). We do not believe that following this process is feasible in this instance,

detail below, because many of the issues involve U.S. Constitutional law and there is already a wealth of relevant publicly available information and documents, we believe that the Office of the Attorney General should solicit and accept submissions from the public to aid it in reaching its conclusions in any such legal opinion.

Background

Section Three of the Fourteenth Amendment provides that:

> 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. (Emphasis supplied.)

A number of legal scholars, including both those who identify as conservatives and those who identify as liberals, have published articles and other commentaries indicating that, in their view, former President Trump is ineligible to hold the office of President under Section Three by virtue of the fact that, having previously taken an oath as President to support the Constitution, he thereafter, through his actions taken to overturn the results of the 2020 election, including but not necessarily limited to his actions on January 6, 2021, "engaged in insurrection … against" the Constitution.[9] According to one source, as of January 2, 2024, Section Three challenges have been filed to Trump's candidacy with respect to ballots in eighteen states, including multiple

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however, since the New Jersey election statutes lay out the exclusive process by which objections to candidates may be made and resolved.

[9] *See, e.g.,* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 J. Michael Luttig & Lawrence H. Tribe, "The Constitution Prohibits Trump from Ever Being President Again"; *The Atlantic*, Aug. 19, 2023, https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048/

challenges in certain states.[10] As of January 8, 2024, there have been notable decisions made by state courts in three states with respect to Trump's potential disqualification:

- Minnesota Supreme Court: On November 8, 2023, the court dismissed a challenge to Trump's inclusion on the state's Republican primary election ballot on the grounds that Minnesota law does not prevent the inclusion on political parties' primary ballots of candidates which are or may be ineligible to hold the office for which they are seeking nomination.[11] The court stated that "[T]here 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."[12] The court then went on to find that a potential challenge to Trump's inclusion on the state's general election ballot was not yet ripe. "Because there is no error to correct here as to the presidential nomination primary, and petitioners' other claims regarding the general election are not ripe, the petition must be dismissed, but without prejudice as to petitioners bringing a petition raising their claims as to the general election."[13]

Presumably, the challengers in the Minnesota case will re-file their case to object to Trump's inclusion on the general election ballot if he indeed does win the Republican nomination for President.

- Michigan Court of Appeals: On November 14, 2023, with respect to three separate actions, two brought by voters seeking a declaration of Trump's ineligibility and a third brought by Trump seeking a declaration of his eligibility, the Michigan Court of Claims had dismissed a challenge to Trump's potential placement on the 2024 primary ballot, relying upon a mix of Federal and Michigan law.[14] The Court had specifically held that:

  > (1) "The Secretary [of State] has neither the affirmative duty nor the authority [under Michigan law] to separately decide whether Donald J. Trump will be placed on the Michigan presidential primary ballot on the grounds that he is

[10] *See* "Tracking Section Three Trump Disqualification Challenges," https://www.lawfaremedia.org/current-projects/the-trump-trials/section-3-litigation-tracker

[11] Minnesota Supreme Court Order in Growe v. Simon, Minnesota Secretary of State, Case No. A23-1354 (Nov. 8, 2023).

[12] *Id*. at 3.

[13] *Id*. at 3.

[14] *See* Michigan Court of Claims Opinion and Order in Trump v. Benson, in her official capacity as Secretary of State, Case No. 23-000151-MZ (Hon. James Robert Redford, Nov. 14, 2023).

> disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution."
>
> (2) "The question of whether Donald J. Trump is ineligible from being placed on the 2024 Michigan presidential primary ballot because he is disqualified from serving under Section 3 of the Fourteenth Amendment presents a political question that is nonjusticiable at the present time."[15]

The court went on to find that the question of Trump's eligibility for the 2024 general election ballot in Michigan was not ripe for adjudication at that time.

On appeal, the Michigan Court of Appeals affirmed, but only on the grounds that the Michigan Secretary of State had no authority under Michigan law to determine the qualifications of candidates appearing on primary election ballots, and that the question of whether or not Trump is qualified to appear on the general election ballot is not yet ripe:

> [W]hen it comes to Michigan's presidential primary, applicable statutes limit the Secretary of State's role to that of an administrator of what are internal party elections. There is virtually no discretion left to the Secretary of State in this process. The Secretary of State, rather, follows the directions of the political parties and the candidates themselves. The Secretary of State is obligated to place on the presidential ballot those individuals identified by the political parties, unless a candidate files an affidavit saying otherwise. MCL 168.615a(1). Nothing in this framework exhibits any decision-making to be had, at least by the Secretary of State. Michigan's statutes also contain no provisions that prohibit a candidate who is, or may be, disqualified from holding the office of President of the United States from appearing on the presidential primary ballot. In other words, nothing in the statutory framework prevents a political party from placing an individual on the presidential primary ballot who would be disqualified from holding the office, and nothing requires, or even implies, that the Secretary of State can refuse to place an individual on the presidential primary ballot for such reasons.[16]

The Court of Appeals decision has been appealed to the Michigan Supreme Court.

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[15] *Id.* at 2.

[16] Davis v. Wayne County Election Commission, Michigan Court of Appeals, No. 368615 (Dec. 14, 2023), slip op. at 18.

- Colorado Supreme Court – On November 17, 2023, in the only decision reached after a full evidentiary hearing before the court, Judge Sarah B. Wallace of the Colorado District Court had ruled that, among other things:

    - "Trump incited an insurrection on January 6, 2021 and therefore 'engaged' in insurrection within the meaning of Section Three of the Fourteenth Amendment."[17]

    - However, she was "unpersuaded that the drafters [of Section Three] intended to include the highest office in the Country in the catchall phrase "office … under the United States;"[18] and that "it appears to the Court that for whatever reason the drafters of Section Three did not intend to include a person who had only taken the Presidential Oath."[19]

Therefore, she had concluded that "Section Three of the Fourteenth Amendment does not apply to Trump."[20]

On appeal, in a four-to-three decision, the Colorado Supreme Court affirmed in part and reversed in part, ruling that, among other things:

> Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error ….
>
> The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an 'insurrection.'
>
> The district court did not err in concluding that President Trump 'engaged in' that insurrection through his personal actions ….
>
> The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a

[17] Final Order of District Court, City and County of Denver, State of Colorado, in Anderson v. Griswold, Case No. 23CV32577 (Judge Sarah Wallace, Nov. 17, 2023), at 90.

[18] *Id*. at 97.

[19] *Id.* at 101. The District Court found it instructive that the Presidential Oath is one to "preserve, protect and defend" the Constitution, whereas all other federal and state officers must take an oath to "support" the Constitution, and that Section Three only textually refers to the latter. *Id.* at 100-01 & n. 19.

[20] *Id.* at 101.

> wrongful act under the [Colorado] Election Code for the Secretary to list him as a candidate on the presidential primary ballot."[21]

Trump and the Colorado Republican State Central Committee have both filed appeals of the decision with the U.S. Supreme Court.[22] The U.S. Supreme Court has accepted Trump's appeal.[23] The Colorado Supreme Court has provided that the effectiveness of its decision will be stayed during the pendency of any such appeal.[24]

In addition to the above court decisions, the Maine Secretary of State, applying Maine election law, has ruled that "Trump's primary petition is invalid …. Specifically, I find that the declaration on his candidate consent form [that he meets the qualifications of the office of the Presidency] is false because he is not qualified to hold the office of the President under Section Three of the Fourteenth Amendment."[25] The Secretary of State ruled that the provision of Maine election law that requires her to determine if a nomination petition meets the requirements of Maine law, including determining whether any part of the petition is false, gives her the power and authority to review a Presidential candidate's qualification under Section Three. "Maine's election laws thus contemplate that I review the accuracy of a candidate's declaration that they meet the qualifications of the office they seek."[26] She went on to find that, among other matters:

- [N]o Congressional action is necessary to render effective the qualification set forth in Section Three.[27]
- [T]he presidency is covered by Section Three. It is an 'office, civil or military, under the United States,' and the President is an 'officer of the United States.[28]
- [T]he events of January 6, 2021 … constituted an insurrection.[29]

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[21] Anderson v. Griswold, Slip Op. 2023 CO at 8.

[22] *See* Petition for Certiorari filed by Trump on January 3, 2024 and Petition for Certiorari filed by the Colorado Republican State Central Committee on December 27, 2023.

[23] S. Ct. Order No. 23-719 (Jan. 5, 2024).

[24] Anderson v. Griswold, Slip Op. 2023 CO at 8-9.

[25] Ruling of the Secretary of State, In re: Challenges of Kimberly Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Dec. 28, 2023) at 1.

[26] *Id.* at 12.

[27] *Id*. at 19

[28] *Id*. at 20.

[29] *Id.* at 26.

- "[T]he record establishes that Mr. Trump, over the course of several months and culminating on January 6, 2021, used a false narrative of election fraud to inflame his supporters and direct them to the Capitol to prevent certification of the 2020 election and the peaceful transfer of power." As such, she concluded that Trump engaged in insurrection.[30]

- Trump's public statements and speeches are not protected by the First Amendment for two reasons: The First Amendment does not override the qualification for office set forth in Section Three, and "[a]dditionally, because I conclude that Mr. Trump intended to incite lawless action, his speech is unprotected by the First Amendment."[31]

The Secretary of State suspended her ruling until the Maine Superior Court ruled on any appeal.[32] Trump has appealed her ruling to that court.[33]

In addition to the above cases, challengers have filed requests with, among others, the Oregon Secretary of State[34]and the New Hampshire Secretary of State. The latter sought guidance from the New Hampshire Attorney General, who ruled that "There is nothing in the relevant [New Hampshire] statutes that empowers or permits the Secretary of State to engage in independent investigation or to conduct an adjudicative process related to a candidate's qualifications under Section Three."[35] As such, the New Hampshire Secretary of State was obligated to place Trump's name on the primary election ballot. In addition, a Federal District Court has determined that a challenger who, although a declared candidate in the New Hampshire primary, nevertheless stipulated that he was at best a "longshot" candidate and had no "serious prospects of getting any delegates" to the Republican National Convention, lacked standing to bring a challenge in Federal Court, and that in any event, a challenge to the inclusion of Trump on the

[30] *Id*. at 32.

[31] *Id*. at 32.

[32] *Id.* at 34.

[33] Trump v. Bellows, Complaint filed in Maine Superior Court, Kennebec, AP-24-01, on January 2, 2024.

[34] *See* Letter dated November 21, 2023 from Free Speech for People to LaVonne Griffin-Valade, Oregon Secretary of State, https://freespeechforpeople.org/wp-content/uploads/2023/11/fsfp-and-or-co-counsel-letter-to-secry-griffin-valade-112123-1.pdf, requesting issuance of a temporary rule and subsequent declaratory ruling that Trump is ineligible to appear on any Oregon future ballot for nomination of election to federal office.

[35] *See* Letter dated September 13, 2023 from NH Attorney General to NH Secretary of State and Ballot Law Commission Chairman https://protect-us.mimecast.com/s/Fn3gCwplQ0iPz9WAcVbLIM?domain=doj.nh.gov at 3.

New Hampshire primary election ballot was a nonjusticiable political question which the court lacked jurisdiction to hear under the political question doctrine.[36]

In the case of the Oregon challenge, the Oregon Secretary of State had previously pre-emptively requested guidance on this issue from that state's Department of Justice. The state's Solicitor General advised that "Oregon law does not charge the Secretary of State with determining whether a major party candidate in a presidential primary election will be qualified to serve as President if ultimately elected."[37] The Solicitor General deferred any determination concerning whether or not this is true with respect to candidates in the general election. Acting upon such advice, the Secretary of State announced that she would not remove Trump from the primary election ballot, again reserving judgment on the question of Trump's qualification to be on the ballot for the general election.[38] The challengers have filed an action with the Oregon Supreme Court seeking to reverse this decision.[39]

Each of the cases and administrative decisions discussed above involved questions of both state and, in the Federal District Court decision cited, federal procedural law (e.g., standing of challengers, powers of court and/or secretary of state to receive and determine challenges, process and evidentiary standards to follow, etc.) as well as substantive federal constitutional law (e.g., the meaning of "officer," "insurrection" and other terms used in Section Three, whether courts must treat challenges under Section Three as nonjusticiable political questions, etc.). Most observers believe that, ultimately, the U. S. Supreme Court must determine the constitutional issues presented by Section Three challenges, which it may well do in connection with the appeal of the Colorado Supreme Court's Anderson v. Griswold decision. However, there is no assurance that any such Supreme Court decision will be available prior to the deadline for any individual state's primary or general election ballot finalization date, or that such decision will constitute a definitive ruling on each of the many sub-issues subsumed within the challenges. For example, to the extent any such decision is based upon a lack of standing by the challengers under applicable state or federal law, or a state's election laws being too narrowly drawn to enable Section Three challenges to be evaluated, its scope and binding authority will necessarily be limited. It should

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[36] Castro v. New Hampshire Secretary of State, ___ F. Supp. 3d ___ (D.N.H. 2023)(Docket No. 23-CV-416-JL, issued Oct. 27, 2023).

[37] Letter dated November 14, 2023 from Benjamin Gutman, Solicitor General, to LaVonne Griffin-Valade, Secretary of State, https://www.oregon.gov/newsroom/pages/newsdetail.aspx?newsid=167382.

[38] State of Oregon Press Release, *Secretary of State LaVonne Griffin-Valade Will Not Remove Donald Trump from Presidential Primary Ballot* (Nov. 30, 2023), https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=203915

[39] Julia Shumway, *Group sues Oregon Secretary of State Griffin-Valade to keep Trump off ballot*, Oregon Capital Chronicle (Dec. 6, 2023, 11:37 AM), https://oregoncapitalchronicle.com/2023/12/06/group-sues-oregon-secretary-of-state-griffin-valade-to-keep-trump-off-ballot/

also be noted that the Colorado Supreme Court has voluntarily stayed the effectiveness of its Anderson v. Griswold ruling during the pendency of any U.S. Supreme Court appeal, meaning that Trump may well appear on the Colorado Republican primary election ballot (presumably as a conditional candidate), perhaps removing some of the urgency which the U.S. Supreme Court might otherwise have to render an opinion prior to that state's primary election on March 5, 2024.

This means that, as much as election officials in any state may wish to avoid having to make a decision on Trump's eligibility to stand as a Presidential candidate in its primary and/or general elections, they may well be forced to make such decisions in the absence of a definitive U.S. Supreme Court decision prior to the deadline for finalizing ballots in that state. As explained in greater detail below, we believe that this may well be the case for the upcoming New Jersey Presidential primary election.

New Jersey Presidential Primary Law

Under New Jersey election law, primary elections must be held on the Tuesday after the first Monday in June (N.J.S.A. 19:23-40), which falls on June 4, 2024. The applicable statute, N.J.S.A. 19:25-3, states that petitions requesting the name of an individual to be placed on the primary election ballot for the office of President must be filed with the Secretary of State on or before the 64th day before a primary election, which will be April 1, 2024. Based on the text of the law, all other primary candidates must file 71 days before, or by March 25, 2024. However, the Secretary of State appears to take the view that even presidential petitions are due on the earlier date (March 25).[40] We believe it is likely that Trump will file his petition either shortly before or on such date, which has important implications for the timing of any challenge to his qualification to appear on the primary election ballot.

Challenges to Presidential Primary Candidates under New Jersey Law

An individual may object to a petition nominating a candidate for a primary election by filing an objection with the Secretary of State not later than 4 p.m. on the fourth day after the last day for filing petitions (N.J.S.A. 19:13-10; 19:23-20.1), which will be March 29, 2024. (Of course, challenges can be filed any time after the candidate has filed a petition but, if Trump files his petition on the last possible day, then the earliest any objection could be filed would be March 26, 2024.) Once an objection has been filed, the Secretary of State must determine the validity of the objection (N.J.S.A. 19:23-20.2; 19:13-11). Because this matter would constitute a "contested

[40] *See 2024 Primary Election Timeline* (Dec. 29, 2023) at 2-3, https://www.nj.gov/state/elections/assets/pdf/chrons/2024-chron-primary-election.pdf (citing N.J.S.A. 19:23-14). We assume, without expressing any opinion, that the Secretary of State's choice to prefer the general deadline in N.J.S.A. 19:23-14 rather than the specific deadline in N.J.S.A. 19:25-3 is accurate, and the computation of dates in this paper is based on that interpretation.

case," New Jersey law provides that the Secretary must refer it to the Office of Administrative Law (OAL) for a hearing before an administrative law judge (N.J.S.A. 52:14B-2; 52:14B-10(c)). Following such a hearing, the administrative law judge must prepare a recommended report and decision for the Secretary's review. The Secretary may adopt, reject or modify the administrative law judge's decision in rendering her final determination.

Of particular concern here is the deadline for the Secretary's final determination: the ninth day after the deadline for filing petitions for a primary election (N.J.S.A. 19:13-11; 19:23-20.2), which will be April 3, 2024. Therefore, even under a best-case scenario where an objection is filed on March 26, 2024, New Jersey law requires an administrative hearing, the preparation of an administrative law judge's recommended report and decision, and a final decision by the Secretary to be accomplished in the space of eight calendar (six business) days.

In addition, the Secretary's final determination is subject to appeal to the Appellate Division of the New Jersey Superior Court, which has exclusive jurisdiction to review all final decisions of any state administrative officer or agency.[41] Given the urgency of the matter, it might be anticipated that the losing party would seek review directly by the New Jersey Supreme Court.[42] In any event, in such a case, the Secretary of State and other state and county election officials would be placed in an untenable limbo, unable to proceed with the printing of ballots while the issue plays out in the court system.

Despite the tight time-frames[43] provided for by New Jersey law, we believe that the process for objecting to a primary candidate which is laid out above does indeed represent the only valid path under New Jersey law to objecting to Trump's (or any other candidate's) inclusion on the Presidential primary ballot. This view is bolstered by the history of the only Section Three court challenge to have been filed in New Jersey thus far.

On September 13, 2023, a *pro se* plaintiff filed an action in New Jersey Superior Court requesting that the court declare Trump ineligible for the office of President and directing the Secretary of State and the Director of Elections to exclude Trump from both the primary and general election ballots, relying on Section Three.[44] The New Jersey Attorney General

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[41] *See, e.g.*, Mutschler v. New Jersey Dept. of Environmental Protection, 337 N.J. Super. 1, 9 (App. Div. 2001).

[42] R. 2:12-2(a). The Court could also take up such a matter directly on its own motion. R. 2:12-1.

[43] Even if the nine-day deadline for administrative adjudication of ballot challenges were not enforceable, other deadlines loom by virtue of the election calendar: a printers' proof of the ballot is due on the 50th day before the election, N.J.S.A. 19:14-1, and mail-in (formerly known as absentee) ballots must be sent to voters requesting them starting on the 45th day before the election under both federal and state law, 52 U.S.C. § 20302 and N.J.S.A. 19:63-9.

[44] *See* Complaint and additional documents filed in Bellocchio v. Way, Docket No. MER-L-1762-23

subsequently filed a Motion to Dismiss on October 20, 2023 relying on two major grounds: First, that the claims brought are not ripe because Trump has not yet filed a petition to appear on the Presidential primary ballot; second, that the New Jersey election statutes outlined above provide the exclusive means by which objections to candidates for primary and general elections may be made, and as such, the Superior Court lacks subject matter jurisdiction to determine the matter.[45] The action was later voluntarily dismissed by the plaintiff, so the court did not have occasion to evaluate the motion.

We agree with the Attorney General that there is no ability under New Jersey law to seek a declaratory judgment from its courts that a candidate is ineligible to appear on a ballot in advance of the filing of a petition with the appropriate election official (in the case of Presidential and other state-wide elections, or for the U.S. Congress or the Legislature, the Secretary of State; in other cases, the municipal or county clerk). It is clear that any objection to the eligibility of a candidate for any office must be undertaken in accordance with the statutory scheme provided for under New Jersey law. Therefore, we believe that, if the case had not been voluntarily dismissed by the plaintiff, the court should have dismissed it on the two grounds cited by the Attorney General.

As noted above, in several states, challengers have requested that the secretaries of state pre-emptively declare that Trump is ineligible to appear on the state's primary ballot. Also, leading commentators have expressed the view that state election authorities have inherent authority, derived from the U.S. Constitution, to apply Section Three to disqualify candidates even in the absence of state-law authority:

> [State election] bodies or officers are obliged, often by oath – sometimes by oath mandated by the U.S. Constitution – to act consistently with the requirements of the Constitution in the discharge of their duties. Accordingly, such state actors can and must apply Section Three's disqualification in carrying out their state-law responsibilities – just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[46]

However, it is our view that under New Jersey law, the Secretary of State (as well as every other state or county election official) does ***not*** have the inherent power, using Section Three or any

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(Super. Ct. Mercer County).

[45] The Attorney General also asserted a third ground: that the complaint should be dismissed for failing to name an indispensable party, Trump. Such concerns would not exist in a petition challenge before the Office of Administrative Law, as the challenged candidate is automatically a party, and in practice, actually conducts the defense to the challenge before the administrative law judge.

[46] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 at 24.

other disqualification criteria provided by state or federal law, to disqualify candidates who have filed petitions that are in "apparent conformity" with the requirements of New Jersey law. *See* N.J.S.A. 19:13-10: "Every petition of nomination *in apparent conformity* with the provisions of this Title shall be deemed to be valid, unless objection thereto be duly made in writing and filed with the officer with whom the original petition was filed …." (Emphasis supplied.) That is, a challenge is necessary to authorize any state action; we do not believe that New Jersey election officials may, on their own initiative, disqualify candidates based on facts or legal theories outside of the scope of the petition itself; nor may they pre-emptively determine that particular candidates are ineligible prior to the filing of a petition. However, once a petition has been filed and an objection has been properly made under N.J.S.A. 19:13-10, the procedure for resolving such objections must be followed. As explained in greater detail below, in the case of any objection to Trump's candidacy, this must necessarily include a substantive evaluation of his eligibility under Section Three.[47]

The New Jersey Secretary of State recently promulgated the form of petition to be filed by 2024 Presidential primary candidates.[48] The form unlawfully omits two requirements: (1) that the candidate "file a certificate" attesting that he or she meets all of the criteria for holding the office of President, and (2) that the candidate annex an "oath of allegiance" to support and bear true faith and allegiance to the Federal and State Constitutions.[49] Even with those omissions, it will probably be the case that the petition filed by Trump will meet the "apparent conformity" test laid out above (or at least be curable to meet it)– and therefore, the Secretary of State will not have the inherent power to remove Trump from the primary ballot in the absence of a formal objection to his petition.

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[47] The Colorado Supreme Court found that the Colorado election statutes also provide that the Secretary of State does not have the inherent duty or authority to disqualify a candidate whose filings are apparently in order: "[T]he Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified." It went on to indicate, however, that this does not preclude a court challenge to the qualifications of a presidential candidate pursuant to applicable Colorado law. Anderson v. Griswold, Slip Op. 2023 CO 63 (Dec. 19, 2023) at 34.

[48] *See* https://www.nj.gov/state/elections/candidate-information.shtml, which contains links to both the petition and the accompanying instructions.

[49] Specifically, N.J.S.A. 19:25-3, governing presidential primary petitions, incorporates all of the "form and manner" requirements applicable to nonpresidential primary candidates (with two exceptions not applicable here). And those laws, in turn, expressly require every petitioning candidate to certify, among other things, "that he is qualified for the office mentioned in the petition" and that he or she annex an oath of allegiance to the Federal and State Constitutions. N.J.S.A. 19:23-7. Although voters have questioned this omission, as of the publication of this paper, the Secretary of State has not explained or corrected her failure to include those requirements in the petition form.

One more point of law bears noting. Although it is desirable to have challenges to a candidate's qualifications adjudicated before the election, so that the name of an ineligible or unqualified candidate does not appear on the ballot and mislead voters, it is clear that the qualifications of a winning primary candidate can be challenged *after* the election through the statutory "contest" procedure, on the grounds that the winner was not "eligible to the office at the time of the election."[50] The rules for contests vary from the administrative procedures described in this paper in some material respects, which we present here summarily for the sake of completeness, not because we think this is the optimal way of adjudicating Trump's ballot eligibility. First, a contest must be commenced by either a defeated candidate or 25 voters who have organized themselves for contest purposes; it is not open to all the way an administrative challenge is.[51] Second, contests for statewide offices, Congress, or the Legislature would be filed first in the Superior Court, Law Division, not with the Secretary of State with a potential referral to an administrative law judge.[52] Third, subject to certain tolling extensions, contests must be commenced by the 12th day after the primary election, and adjudicated within 15-30 days after filing, rather than adhering to pre-election petition challenge deadlines.[53] Fourth, as the matter proceeds in a regular trial court, the rules of evidence apply fully,[54] and litigants cannot avail themselves of the residuum rule, which is discussed later.

Steps to Take Now to Prepare for a Challenge

As noted above, the authors believe that the chance that a formal objection will be made to Trump's primary election petition on the grounds of Section Three is very high, at least in the absence of a definitive ruling from the U.S. Supreme Court in the interim. This fact, when combined with the very short time period in which such objections must be dealt with and resolved under New Jersey law, leads us to strongly recommend that the Secretary of State lay the groundwork for determining the merits of any such challenge at this time. The most important step which she can take now is to request legal guidance from the Attorney General's office, in the form of a formal legal opinion, on a number of the issues which will be subsumed within any Section Three objection. There is precedent for such a request: in 1980, the Secretary of State requested and received a formal opinion from the Attorney General as to whether a candidate for election to the Legislature must meet the age, citizenship and residency qualifications for office set forth in the New Jersey Constitution by election day or by the day he

[50] N.J.S.A. 19:29-1(b); *see also* In re Contest of November 8, 2011 Gen. Election of Office of New Jersey Gen. Assembly, 210 N.J. 29, 75 n.11 (2012); Davis v. City of Plainfield, 389 N.J. Super. 424, 434 (Ch. Div. 2006).

[51] N.J.S.A. 19:29-2.

[52] *Id.*

[53] N.J.S.A. 19:29-3 and -4.

[54] N.J.R.E. 101(a)(1).

or she assumes office.[55] The Secretary of State should likewise request the Attorney General to provide its formal opinion regarding several important issues that will necessarily have to be determined in resolving any objection to Trump's candidacy under Section Three.

That having been said, it is understood that the ultimate question of Trump's eligibility under Section Three is a mixed question of fact and law. To add to the complexity, new facts which are potentially relevant to the determination of whether or not Trump "engaged in … insurrection" are coming to light literally every day, and courts and administrative agencies continue to process Section Three challenges in other states. It would be too much to expect the Office of the Attorney General to be able to deal with each individual issue in a formal opinion, especially in light of the moving target nature of the inquiry. But we believe that the Office of the Attorney General can provide its opinion on several crucial legal issues, most of which are may be grounded in New Jersey state law and precedent, which can then guide the determination of the Secretary if and when a formal objection is made. At a minimum, we believe that these legal issues should include:

1. Standing of challengers to file an objection.

2. Jurisdiction of Secretary of State to determine Section Three eligibility of primary candidates.

3. Evidentiary rules and standards to be applied by Administrative Law Judge at hearing.

4. Applicability of Section Three to the Presidency.

5. Standard for Determination of "Engaging in Insurrection."

By providing such legal guidance to the Secretary (and any administrative law judge) in advance of the filing of a formal objection, it is hoped that their decision-making process may be more finely focused by building on the guidance provided by the Attorney General. This is particularly true with respect to the first three issues set forth above, which are primarily, if not entirely, New Jersey law issues for which there is New Jersey precedent to provide a roadmap for determination. Note that parties would be free to object to the Attorney General's guidance in the objection and/or at the hearing and that a formal Attorney General opinion does not have the same force as, for example, a court decision, and as such, any court ultimately reviewing the Secretary of State's decision would not be bound by such an opinion. However, given the likelihood that the Secretary would have to determine such issues in any event, it would be far better to obtain carefully researched, vetted guidance from the Attorney General rather than shoe-horn such a determination within the short eight-day period provided for determination

[55] 1980 N.J. Op. Atty. Gen. 132, N.J. Formal Opinion No. 5-1980; 1980 WL 119542.

after the filing of an objection. As noted above, the Oregon Secretary of State had previously pre-emptively requested legal guidance from that state's Department of Justice, before any challenge had been filed. We believe that such a pre-emptive request from the New Jersey Secretary of State for a legal opinion from the Attorney General on these issues would be a wise step in preparing for any potential challenge.

We discuss each of the issues and, to the extent that there is existing New Jersey law or precedent that is applicable to the issue, we indicate what we believe the proper resolution of such issue should be under New Jersey law. In the case of questions which are purely or primarily issues of interpreting the U.S. Constitution, we briefly summarize the arguments for and against particular interpretations, indicating certain of the sources that the Attorney General may consider consulting in its effort to provide guidance on these issues.

1. Standing of Challengers to File an Objection

In a number of the Section Three challenges discussed above, Trump and his co-defendants have challenged the standing of the plaintiff-challengers. See, for example, the Federal District Court's decision in the Castro case, finding that the challenger had no standing to challenge Trump's inclusion on the New Hampshire primary election ballot because the plaintiff, although a purported Presidential candidate, was not a serious candidate who would actually suffer a "political competitive injury" if Trump were to appear on the primary ballot.[56]

In contrast, the New Jersey election statutes impose no limitation on the persons who may file a valid objection to a primary candidate's petition. N.J.S.A. 19:13-10 does not specify the persons who may file an objection to a petition. In an unpublished decision, the Appellate Division dealt with the question of whether registered members of the Republican Party could file an objection to the inclusion of a candidate on the Democratic primary election ballot for state senator. In holding that they could do so, the court stated that:

> N.J.S.A. 19:13-10 does not contain any political party membership restriction. Permitting the filing of any objection, without any limitations on the objector, serves the fundamental electoral goal of assuring only qualified candidates are on the ballot and is in furtherance of preserving the integrity of elections. In this case, but for the filing of petitioners' objection and its administrative review, the issue of appellant's qualifications may not have been subject to review until the general election. *See* N.J.S.A. 19:29-1 to -14.
>
> In addition to the absence of restrictive language under the statutes, a practice of screening objectors before accepting a challenge to a nomination petition would raise

[56] Castro v. N.H. Secretary of State at 1.

> significant collateral issues that would be outweighed by the salutary purpose of permitting challenges from any objector under N.J.S.A. 19:13-10.
>
> Ultimately, the balancing of the various interests involved compels a result where insuring qualified candidates of whatever party are presented to the public outweighs the potential, if not real, mischief that can be visited on a political party's fortune by inter-party challenges that in one sense may disrupt the activities of a party while at the same time result in qualified candidates standing for election.
>
> If there is to be an adjustment of this balance, that will be left to the Legislature and appropriate amendments to Title 19. We conclude that petitioners have standing to challenge appellant's candidacy.[57]

While this unpublished opinion is of limited precedential value, it was cited by the administrative law judge in the Williams v. Cruz decision discussed below, which upheld the standing of an out-of-state resident who was not a registered New Jersey voter to file an objection under N.J.S.A. 19:13-10 to the inclusion of a candidate on the New Jersey 2016 Republican Presidential primary ballot.

In the absence of any authority to the contrary, and in view of the broad language of N.J.S.A. 19:13-10, New Jersey law provides standing to any potential objector, regardless of whether that objector is an organization or a natural person, or whether or not the objector, if eligible to register to vote, is a member of the same political party that is holding the primary election. This should effectively dispose of any standing issues that may otherwise be raised by an objection.

2. **Jurisdiction of Secretary of State to determine Section Three eligibility of primary candidates.**

This is a multi-faceted, mixed question of New Jersey and U.S. constitutional law. The question really breaks down into two sub-issues: First, does New Jersey law provide for a mechanism by which the Secretary of State (and, if her final determination is appealed, the New Jersey judiciary) may evaluate and determine a primary candidate's eligibility under Section Three? If the answer is "No," then no further inquiry is necessary. But if the answer is "Yes," the second inquiry is whether there is a U.S. Constitutional and/or Congressional mandate that blocks the ability of the Secretary to engage in this process. We believe that it would be useful for the Attorney General to provide guidance to the Secretary on both the New Jersey and U.S. Constitutional and Congressional law aspects of this question.

With respect to the first sub-issue, based upon New Jersey election law and precedent, it is our view that the Secretary of State ***does*** have jurisdiction, and therefore the power and duty, to

[57] Layton v. Lewis, No. A-4047-10, 2011 WL 1632039 (N.J. Super. Ct. App. Div. May 2, 2011).

determine the Section Three eligibility of Presidential primary candidates under New Jersey election law. It is our further view that, based in part on the New Jersey precedent described below, there is no U.S. Constitutional or Congressional mandate which would serve to block the Secretary of State from making this determination with respect to a candidate seeking inclusion on the New Jersey Presidential primary ballot and whose qualification has been challenged under Section Three.

Attorney general opinions in New Hampshire and Oregon, as well as the Michigan Appeals Court decision in Davis v. Wayne County Election Commission and the Minnesota Supreme Court decision in Growe v. Simon, relied in part on the unfettered ability of political parties under those states' laws to choose their own *primary* election candidates. As expressed in some of the opinions and decisions, this unfettered ability applies even if such candidates are ineligible to hold the offices for which they are standing for nomination and therefore may be validly excluded from the *general* election ballot. These opinions and decisions also note the absence of any mechanism under those states' laws to require or allow their respective secretaries of state to evaluate any claims that a primary candidate is subject to disqualification under Section Three. *See, for example*, the Michigan Appeal Court's statement in Davis v. Wayne County Election Commission: "[N]othing in the [Michigan] statutory framework prevents a political party from placing an individual on the presidential primary ballot who would be disqualified from holding the office, and nothing requires, or even implies, that the Secretary of State can refuse to place an individual on the presidential primary ballot for such reasons."[58] Of similar import is language in the Minnesota Supreme Court's decision in Growe v. Simon: "[T]here is no [Minnesota] 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."[59]

This is an unlikely outcome in New Jersey. Our primary elections are funded by taxpayers, not political parties. N.J.S.A. 19:45-1. And our State law, including N.J.S.A. 19:23-5, -7, and -45, does not give political parties or their leadership the unfettered ability to approve or veto candidacies. Rather, an eligible candidate must be a registered voter who has declared a political party affiliation on their voter registration, timely files a petition with sufficient valid signatures, and meets the eligibility and qualifications applicable to the office (e.g., age, residency, citizenship, nonparticipation in an insurrection). The candidate who wins a plurality of votes in the primary becomes the party's nominee for the general election. There is no opportunity for a party's primary voters to see an ineligible candidate's name on the ballot, and there is no ability for a party's leaders, rank-and-file members, or even the government itself to exclude a candidate or veto a winner's nomination just because the candidate is thought to be distasteful. As long as

[58] Davis v. Wayne County Election Commission, Michigan Court of Appeals No. 368615 (Dec. 14, 2023), slip op. at 18.

[59] Growe v. Simon at 3.

the candidate is duly registered with the State as a voter and party member, files the requisite petition, and meets the qualifications for office, the candidate has the ability to appear on the ballot, compete and win.

If a candidate is challenged on those grounds (i.e., party membership, petition insufficiency, or lack of qualifications), New Jersey election law dictates that the decision be made by a government official or judge (not a political party), and upon the complaint of any New Jersey organization or voter (not just a party member or leader). The law allows for the filing of objections on such grounds to the inclusion of a candidate on primary, as well as general, election ballots under N.J.S.A. 19:13-10 (as applied to primary elections by N.J.S.A. 19:23-58).[60] Under the administrative law judge's decision in Williams v. Cruz (N.J. Office of Administrative Law, Docket No. STE 5016-16, April 12, 2016)[61], these include the power and duty to make a determination of the eligibility of a Presidential primary candidate under the criteria for holding the office of President under the U.S. Constitution. In that case, the petitioners had challenged the ability of Senator Ted Cruz to appear on the 2016 Republican Presidential primary ballot by reason of the fact that he purportedly was not a "natural born Citizen" as required under Article 2 of the U.S. Constitution. Counsel for Senator Cruz contended that the objectors lacked standing (which, as described above, the judge disagreed with) and that his eligibility for nomination to the Presidency was "a non-justiciable issue, such that neither the Secretary of State, for whom the Office of Administrative Law provides the administrative hearing, nor the New Jersey Judiciary, has any role to play, as that issue is reserved to the Electoral College and Congress."[62]

The judge's analysis of the question of justiciability is instructive, and we lay it out verbatim below:

> It is the responsibility of the Judiciary to decide cases that are properly before it, even those it "would gladly avoid." Cohens v. Virginia, 6 Wheat 264, 404, 5 L.Ed. 257 (1821); quoted in Zivotofsky ex rel. Zivotofsky v. Clinton, U.S. 132 S.Ct. 1421, 1427, 182 L.Ed 2d 423 (2012). The avoidance of "political questions" by courts is a "narrow exception" to this rule. This exception comes into play where "there is a 'textually demonstrable constitutional commitment to the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" Nixon v. United States, 506 U.S. 224, 228, 113 S.Ct. 732, 122 L.Ed. 2d 1 (1993)(quoting Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed. 2d

[60] "Any provisions of this title which pertain particularly to any election or to the general election shall apply to the primary election for the general election insofar as they are not inconsistent with the special provisions of this title pertaining to the primary election for the general election." *See also* Lesniak v. Budzash, 265 N.J. Super. 165, 168 (App. Div.), *aff'd* 133 N.J. 1 (1993).

[61] https://www.nj.gov/oal/decisions/admin/.

[62] Williams v. Cruz at 3.

663 (1962). Neither of these criteria exists in the present matter. The issue here involves an interpretation of the meaning of a phrase contained in the United States Constitution. That document has been held to be a judicially declarable law. Madison v. Marbury, 1 Cranch 137, 2 L.Ed. 60 (1803).

N.J.S.A. 19:13-11 requires that the "officer with whom the original petition was filed shall pass in the first instance on the validity of such objection . . . ." Thus, the Secretary of State is obliged to rule. In doing so, the Secretary sits in a quasi-judicial role, to adjudicate the acceptability of a nominating petition that she must determine to certify or reject. While she does not sit in the Judiciary, the same issue of interpreting the Constitution is before her, and judicial review, by a Judiciary competent to adjudicate that meaning, lies after her decision is rendered. The Constitution, as originally adopted, provided that the legislature of the several states would "appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and representatives to which the State may be entitled." U.S. CONST. art. II, § 1, cl. 2. These electors then meet in their respective states and vote by ballot for President and for Vice President, in conformity with the Twelfth Amendment, which changed the procedure from its original format. These votes are transported to the nation's seat of government where the President of the Senate opens the ballots and counts them in the presence of the members of both Houses of Congress. The Electoral College is not vested with the power to determine the eligibility of the Presidential candidate since it is only charged to select the candidate for each office and transmit its votes to the "seat of government." Congress has no power over this process for choosing the President and Vice President, except where a tie vote occurs, when Congress chooses the President and Vice President. While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship as required for service in the house to which they have been elected, U.S. CONST. art. I, § 5, cl. 1.; U.S. CONST. art I. § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3., Congress is not afforded any similar role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to Congress or the Electoral College".[63]

[63] Williams v. Cruz at 3-4. New Jersey courts follow similar principles in abstaining from deciding political questions that are textually committed to another branch of the government. *E.g.*, I/M/O Establishment of Congressional Districts, 249 N.J. 561, 571 (2022); DeVesa v. Dorsey, 134 N.J. 420, 429-31 (1993) (Pollock, J., concurring). However, the power to hear and decide challenges to a candidate's eligibility to appear on the ballot has been routinely exercised by our state courts since at least 1898. *See* Murray v. Murray, 7 N.J. Super. 549, 554 (Law Div. 1950)(Brennan, J.S.C.). Thus, a claim that a challenge to a candidate for ineligibility is a nonjusticiable political question is unlikely to succeed in New Jersey.

In a searching, in-depth analysis of the relevant facts, history and U.S. Constitutional law regarding the background and meaning of the term "natural born Citizen," the judge went on to find that "Senator Cruz meets the Article II, Section 1 qualification and is eligible to be nominated for President. His name may therefore appear on the New Jersey Republican primary ballot."[64] This determination was adopted by the Secretary of State.

In our view, the above analysis and reasoning are directly applicable to a determination of whether a Presidential primary candidate may be disqualified from appearing on the ballot by reason of the provisions of Section Three. As stated by the administrative law judge in the Cruz decision, we see no basis to conclude that the eligibility of a person to serve as President under Section Three has been "textually committed to Congress or the Electoral College" by the U.S. Constitution. In our view, at least for purposes of determining a candidate's qualification under New Jersey election law, there is no substantive distinction between the qualifications for President that are set forth in Article II, Section 1, and the additional qualification set forth in Section Three of the Fourteenth Amendment.[65] The New Jersey Secretary of State, in the case of an objection to a candidacy based upon any of these U.S. Constitutional criteria, has the right and duty under New Jersey election law to determine the candidate's eligibility under these criteria. As stated in the decision of the Appellate Division in Layton v. Lewis, it is a "fundamental electoral goal" of New Jersey election law to assure that "only qualified candidates are on the ballot … in furtherance of preserving the integrity of elections."[66] And federal courts have recognized the legitimacy of state election laws and actions by state election officials that are designed to remove from the ballot candidates who do not meet the U.S. Constitutional requirements for holding the federal office to which they are attempting to be elected.[67]

We also recognize that there is a great deal of controversy over whether or not Section Three is "self-executing," or whether any attempted application of Section Three by a state election official or court must be preceded by Congressional implementing legislation adopted under Section Five of the Fourteenth Amendment.[68] We believe that, at least in the case of New Jersey

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[64] Williams v. Cruz at 26.

[65] *See also* the Colorado District Court's statement in Anderson v. Griswold that "If Intervenors [Trump] could point to a *clear* textual commitment to Congress [of eligibility determinations under Section Three], this Court would readily hold that the questions this case presents have been delegated in the Constitution to Congress." Co. District Court decision at 6, fn. 2 (emphasis in original).

[66] Layton v. Lewis at 7.

[67] *See, e.g.*, the opinion of then Federal Tenth Circuit Court of Appeals Judge Gorsuch in Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 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" (upholding removal by Colorado Secretary of State from Presidential election ballot of candidate born outside the U.S.).

[68] Section Five reads: "The Congress shall have the power to enforce, by appropriate legislation, the

election law, this issue is inapposite. The grant of lawmaking power to Congress in Section Five, which applies with equal force to all of the sections of the Fourteenth Amendment, including the Due Process and Equal Protection clauses, is not an exclusive one, as evidenced by both its text (i.e., it does not say that "only" or "exclusively" Congress may adopt implementing legislation) and by the historical record, including the very many instances in which states have themselves enforced provisions of the Fourteenth Amendment, including Section Three, even in the absence of Congressional implementing legislation. Under well-known principles of federalism, unless and until Congress exercises its power under Section Five by adopting federal legislation which "occupies the field" of Section Three disqualification and, in so doing, pre-empts state legislation or action dealing with this subject matter, states remain free to adopt their own legislation which is consistent with the wording and goals of Section Three. The New Jersey election law, as interpreted by the prior decisions discussed above, has as one of its objects that only "qualified candidates" appear on ballots for any election, including Presidential elections, and as such it necessarily incorporates all of the U.S. Constitution's qualifications for the office of President, including Section Three. **Therefore, the question of whether or not Section Three is "self-executing" is irrelevant as applied to New Jersey elections – New Jersey has, in its election law, provided for a clear incorporation of all U.S. Constitutional requirements regarding office-holding, as well as a well-thought out (albeit extremely time-limited) process for filing and resolving challenges based on those requirements, as a matter of state law.**

We agree with the Colorado Supreme Court's holding in Anderson v. Griswold that a state's ability to remove Presidential candidates who do not meet the Constitution's qualifications from its primary and general election ballots derives from the fact that the Constitution reserves to the states, and not to Congress or any other Federal government entity, the ability to regulate the manner in which Presidential electors may be chosen:

> Under Article II, Section 1, each state is authorized to appoint presidential electors 'in such Manner as the Legislature thereof may direct.' U.S. Const. art. II, § 1, cl. 2. So long as a state's exercise of its appointment power does not run afoul of another constitutional constraint, that power is plenary.[69]

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provisions of this article." For a discussion of this controversy, including the decision in Griffin's Case by Chief Justice Chase which found that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect, see William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 at 17-45. The authors ultimately conclude that Section Three is self-executing and that therefore Griffin's Case was wrongly decided. For a contrary view, *see* Tom Ginsburg, Aziz Huq & David Landau, "The Law of Democratic Disqualification," 111 Calif. L. Rev. at 16, 51 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938600.

[69] Anderson v. Griswold, Slip Op. 2023 CO at 30.

Of similar import is the Constitution's delegation to the states, in Article I, Section 4, of the "time, place and manner" of holding Congressional elections. As noted above, federal courts have upheld the disqualification of Presidential candidates who fail to meet the criteria for President set forth in Article I, Section 2 of the Constitution through the application of state election laws. We see no basis for concluding that a different rule should apply to Presidential or other federal office candidates who do not meet the qualification for holding that office that is set forth in Section Three. In both instances, state election laws may serve to ensure that only persons who are eligible to hold the office will appear on that state's ballots.

3. **Evidentiary rules and standards to be applied by Administrative Law Judge**.

As stated above, the filing of an objection to Trump's inclusion on the Republican primary ballot would cause the matter to constitute a "contested case" and therefore would trigger a hearing before a New Jersey administrative law judge.[70] The New Jersey Office of Administrative Law (OAL) has adopted extensive regulations regarding the conduct, evidentiary rules, etc. with respect to all hearings before administrative law judges.[71] However, because of the necessarily expedited time-frame in which ballot-challenge hearings must be held and a recommended decision and final determination rendered, in our view, the Attorney General should provide advice to the Secretary of State regarding how the flexibility afforded by such rules can be utilized to expedite and avoid duplication in such a hearing.

In particular, in an ideal world there would be time for a full presentation of witnesses, written documentation, and other materials by the parties. In reality, however, the testimony of such witnesses, and the documents submitted, would undoubtedly be substantially identical to those in other Section Three cases held in other states, as all of the issues are the same and the parties to such cases may well be identical. Although, as of this writing, the only court to hold a full evidentiary hearing, and to accept into evidence various relevant documents (most notably, the Congressional January 6th Report[72]), in the course of a five-day hearing, was the Colorado District Court in the Anderson v. Griswold case, by the time that any objection may be filed in New Jersey, there may well have been additional evidentiary hearings held by courts in other

[70] The Rules for the Office of Administrative Law (OAL) define a "contested case," in relevant part, as "an adversary proceeding, … in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing." N.J.A.C. 1:1-2.1.

[71] N.J.A.C. 1:1-2.1 et seq.

[72] Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022).

states. The Maine Secretary of State held an approximately eight-hour hearing in connection with the challenge filed in that state.[73]

We believe that the OAL's evidentiary rules are flexible enough to allow the parties to introduce into evidence the same documents as were introduced in other state proceedings, and to also introduce transcripts of witness testimony from such proceedings, in lieu of having such witnesses appear personally at such hearing. We believe that allowing such evidence would serve the salutary purposes of both expediting the hearing and avoiding a situation where each state facing a Section Three challenge would need to hold a separate and largely duplicate "mini-trial" to receive largely duplicative live testimony from witnesses. We believe that these concerns outweigh the fact that the administrative law judge would not be able to see the demeanor, etc. of a live witness.[74] We note that the Maine Secretary of State allowed the introduction of evidence in the administrative hearing she held, the majority of which "had already been presented and litigated in *Anderson v. Griswold*."[75]

The following OAL rules are particularly relevant here:

> N.J.A.C. 1:1-15.1 – General Evidence Rule:
>
> Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> 1.Necessitate undue consumption of time; or
>
> 2.Create substantial danger of undue prejudice or confusion."

[73] https://www.youtube.com/watch?v=JvBkgW893g8

[74] We note that the full transcripts of the hearings held by the Colorado District Court in the Anderson v. Griswold case were filed by the Oregon challengers as exhibits to their Petition before the Oregon Supreme Court. *See* Petition for Preemptory or Alternative Writ of Mandamus filed on December 6, 2023 in Nelson v. Griffin-Valade, https://freespeechforpeople.org/oregon-voters-file-lawsuit-to-bar-donald-trump-from-ballot/.

[75] Ruling of the Secretary of State, In re: Challenges of Kimberly Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Dec. 28, 2023) at 7.

N.J.A.C. 1:1-15.5 – Hearsay evidence; residuum rule:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

In suggesting that a liberal interpretation of these rules be adopted to avoid unnecessary duplication of witness testimony and to allow receipt of a wide range of documents, we are mindful of the fact that either party would retain their rights to introduce additional witnesses and documents, and would be free to attack the veracity and credibility of prior witness testimony and of documents previously introduced in other state proceedings. For example, although we believe that the above rules should allow the introduction of the January 6th Report into evidence, in weighing its probative value, the judge would be entitled to consider all of the objections to the Report which were raised by Trump in the Colorado case (e.g., that the Special Committee lacked meaningful Republican input, etc.), as well as any other objections which he may raise at the hearing, when determining the evidentiary weight to give such report. We note that the Maine Secretary of State allowed into evidence both the January 6th Report and exhibits and transcripts of testimony from the Colorado District Court Anderson v. Griswold proceeding, finding that they met the standards for admission of evidence under the Maine Administrative Procedure Act.[76]

Subsection (b) of N.J.A.C. 1:1-15.5 expresses the so-called "residuum rule," first articulated by the New Jersey Supreme Court in the case of Weston v. State, 60 N.J. 36, 51 (1972):

> [I]n our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

[76] *Id*. at 6-11.

We believe that the Attorney General should provide its guidance in the requested opinion on the issues of the admissibility of transcripts of witness testimony and exhibits from other state proceedings, as well as on what direct evidence would be necessary to satisfy the residuum rule in the context of a potential Section Three hearing.

4. **Applicability of Section Three to the Presidency**.

Although we are discussing this U.S. Constitutional issue rather late in this article, it is of course a pre-requisite to the validity of any objection to Trump's candidacy based on Section Three that Section Three itself apply to the Presidency. Section Three explicitly specifies Senator, Representative and presidential elector as the among the offices covered by its language. But it also textually refers to "an officer of the United States." It would be fatuous to suggest that other federal "officers," whether the President, any other federal judges, cabinet appointees, or other persons holding positions within the federal government are not among the positions covered by Section Three.[77]

The issue breaks down into two competing arguments. Proponents of the view that Presidents are not covered state that by failing to include the Presidency among the enumerated positions covered by the section, and by failing to explicitly include the language of the oath taken by Presidents to "preserve, protect and defend" the Constitution, the drafters meant to exclude it from the operation of the section. Proponents of the opposite view point to the inclusion of all "officers of the United States" who take an oath to "support the Constitution of the United States," which in their view incorporates the "office of" the Presidency and, in sum and substance, the Presidential oath. Such proponents also invoke the "absurdity doctrine" and point out that, if the Presidency was intended to be excluded from Section Three, Jefferson Davis, the former president of the Confederacy, would have been eligible to hold the office of President, but not be a Senator, Representative, or hold even a petty local government office. Both sides point to portions of the legislative history of Section Three that they claim support their positions.

So far, only two courts, the Colorado District Court and the Colorado Supreme Court in Anderson v. Griswold, as well as the Maine Secretary of State, have issued rulings on this question. The Colorado District Court held that "[T]he Court is persuaded that 'officers of the United States' did not include the President." The District Court went on to state that "It appears to the Court that for whatever reason the drafters of Section Three did not intend to include a

[77] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution (Department of Justice Office of Legal Counsel, Oct. 16, 2000), https://www.justice.gov/d9/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf (repeatedly speaking of the President as an "officer of the United States" at least for purposes of Art. II, sec. 4 of the Constitution). *See also* James A Heilpern & Michael T. Worley, *Evidence that the President is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment* (Jan. 1, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4681108.

person who only had taken the Presidential Oath." [78] [79] As set forth above, this portion of her opinion was reversed by the Colorado Supreme Court, which undertook a full examination of the usage of the term "officer" as applied to the President in the Constitution and an analysis of the history and purposes of Section Three, ultimately concluding that " 'officer of the United States,' as used in Section Three, includes the President,"[80] and that "The Presidential Oath Is an Oath to Support the Constitution."[81] After undertaking an analysis of the question similar to the one undertaken by the Colorado Supreme Court, the Maine Secretary of State likewise concluded that the President is covered by the disqualification provisions of Section Three.[82]

Given that this is a purely legal issue of the proper interpretation of the U.S. Constitution, and unlike other issues that are mixed questions of fact and law which present "moving targets" given the new facts which come to light on a nearly daily basis, we believe that the New Jersey Office of the Attorney General is in an excellent position to supply legal guidance to the Secretary of State on this issue now. The respective legal arguments on this issue have already been fully if not exhaustively set forth in law review articles and other commentaries, briefs, court decisions and other sources, and the Office of the Attorney General can and should avail itself in full of this wealth of materials in the course of preparing its formal opinion. As we set forth below, we are also advocating an "open submissions" process whereby interested parties be allowed to submit materials, whether advocating a particular position or providing additional information in a neutral manner, to the Office of the Attorney General to aid its decision making. This would include directing the Office of Attorney General to the wealth of publicly available documents on this question, which are already available.

5. Standard for Determination of "Engaging in Insurrection."

As in the case of the application of Section Three to the Presidency, the only courts which have thus far dealt with the "Engaging in Insurrection" issue in a substantive manner are the Colorado

[78] Anderson v. Griswold, Co. District Court decision at 100-01.

[79] Even before her holding was reversed by the Colorado Supreme Court, Judge Wallace's reasoning and conclusions in this regard were severely criticized by several constitutional scholars. *See, e.g.*, *'Simply incorrect': Judge Luttig and Professor Tribe react to Judge's decision to reject Trump 14th Amendment challenge*, Velshi, MSNBC (Nov. 18, 2023), https://news.yahoo.com/simply-incorrect-judge-luttig-tribe-160354633.html. For a contrary view, *see* Seth Barrett Tillman & Josh Blackman, "Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment?" 15(1) N.Y.U. J.L. & LIBERTY 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978095.

[80] Anderson v. Griswold, Slip Op., 2023 CO at 84.

[81] *Id.* at 84. Notably, none of the three dissenting justices took issue with these holdings in their dissenting opinions.

[82] Ruling of the Secretary of State, In re: Challenges of Kimberly Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Dec. 28, 2023) at 20-23.

District Court and the Colorado Supreme Court in the Anderson v. Griswold case. After reviewing the history of the meaning of the term "insurrection," the District Court held that "[A]n insurrection as used in Section Three of the Fourteenth Amendment is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States."[83] The District Court further examined whether the claimed "incitement" of the mob by Trump could qualify as "engagement" in insurrection. After laying out the various arguments pro and con, the District Court concluded that "[E]ngagement under Section Three of the Fourteenth Amendment includes incitement to insurrection."[84] She also rejected Trump's contentions that his actions on January 6, 2021 constituted protected speech under the First Amendment, finding that his actions were intended to incite violence on January 6, 2021, and therefore fell outside the scope of First Amendment protection under the test in Brandenburg v. Ohio, 395 U.S. 444 (1969).[85]

The Colorado Supreme Court affirmed the District Court's holdings in this regard: "Mindful of the deferential standard of review afforded a district court's factual findings, we conclude that the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and that President Trump engaged in that insurrection."[86] The Court also undertook a searching analysis of whether Trump's speech and conduct on January 6 met each of the prongs required by the Brandenburg decision in order for speech to fall outside of the scope of the First Amendment, and found that they did: "In sum, we conclude that President Trump's speech on January 6 was not protected by the First Amendment."[87]

The Maine Secretary of State likewise concluded that the events of January 6, 2021 constituted an "insurrection" for purposes of Section Three and that Trump "engaged in" the insurrection through his "incitement" of the insurrectionists.[88]

While the Colorado courts' and the Maine Secretary of State's reasoning may be instructive, the New Jersey Attorney General should advise the Secretary of State regarding the proper standards

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[83] *Id*. at 70-71. The Court went on to find that "the events on and around January 6, 2021, easily satisfy this definition of 'insurrection.'" *Id*. at 71.

[84] *Id.* at 73. The Court went on to find that "Trump incited an insurrection on January 6, 2021 and therefore 'engaged' in insurrection within the meaning of Section Three of the Fourteenth Amendment." *Id.* at 90.

[85] *Id.* at 79-95.

[86] Anderson v. Griswold, Slip Op., 2023 CO at 96.

[87] Anderson v. Griswold, Slip Op., 2023 CO at 132.

[88] Ruling of the Secretary of State, In re: Challenges of Kimberly Rosen, et. al to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Dec. 28, 2023) at 23-32.

for determining each of these legal questions, including the First Amendment issue raised by Trump but rejected by the court and the Secretary.

It must be remembered that any speech that is capable of triggering Trump's disqualification under Section Three of the Fourteenth Amendment would not be protected, as speech integral to illegal conduct; that is, speech that encourages or furthers a conspiracy to take or threatens to take violent or imminent criminal action. New Jersey law follows U.S. Supreme Court precedent in this regard, protecting only expressions of belief — i.e., mere advocacy — not speech that threatens use of force or is directed at producing imminent lawless action. *See, e.g.,* State v. Burkert, 231 N.J. 257, 274 (2017)(stating that NJ's cyber-harassment statute limits criminalization of speech to communications that threaten to cause physical or emotional harm or damage); Besler v. Board of Educ. of West Windsor, 201 N.J. 544 (2010)(accepting Brandenburg v. Ohio's protection of "mere advocacy," court upheld appellate court's judgment affirming jury finding that the board violated a parent's First Amendment rights); S.B.B. v. L.B.B., 476 N.J. Super. 575 (App. Div. 2023)(finding that there was no credible evidence that the wife's video criticizing her husband's refusal to agree to a traditional religious divorce "incited or produced imminent lawless action" or was likely to do so); State v. Fair, 469 N.J. Super. 538 (App. Div. 2021)(holding that the "reckless disregard" portion of a NJ criminal statute was unconstitutional since it did not require proof of an "intent to commit an act of unlawful violence" as required by Virginia v. Black, 538 U.S. 343 (2003)); State v. Carroll, 456 N.J. Super. 520 (App. Div. 2018)(citing with approval Brandenburg v. Ohio and Virginia v. Black and holding that speech threatening imminent danger, coupled with speaker's intent to cause such danger, will remove such speech from First Amendment protection); State v. Hopson, 119 N.J. Super. 84 (App. Div. 1972)(where court confirmed conviction of the defendant for inciting assault on specific police officer); State v. Cappon, 118 N.J. Super. 9, 10 (Law Div. 1971)(acknowledging right of state to punish advocacy directed to inciting imminent lawless action and which produced such action where defendant charged with advocating and encouraging assault on named police officers).

Again, the Attorney General should take full advantage of the publicly available commentaries, briefs and other materials which discuss these issues, as the Attorney General may be directed to the same under the process advocated for below.

Suggested Process

Section Three challenges to Trump's ability to appear on election ballots present unique difficulties for state election and legal officials. In the absence of a definitive decision from the U.S. Supreme Court, state officials must necessarily determine the merits of objections to Trump's candidacy in accordance with their state laws (at least in those states like New Jersey where there is statutory authority to file and resolve such objections). Each state's election officials must also take into account the undesirability of potentially having inconsistent

determinations among states. And the issues involved in Section Three challenges are playing out against a backdrop of numerous state and federal court actions, state administrative agency actions and determinations, and scholarly commentary, both pro and con.

We would suggest that, in preparing the legal opinions that will guide the Secretary of State in dealing with any such objection, the New Jersey Office of the Attorney General indicate its willingness to accept submissions from the public to assist it in reaching its determinations. These can take the form of letters, amicus briefs, documents, references to other state agency and court determinations, submissions made in other cases, or any other input which could potentially be useful to the Office of the Attorney General. There is no need for the Office of the Attorney General to re-invent the wheel here, given the wealth of materials that are available to it to review and either take account of or disregard in reaching its opinions. The important point is that this process must start ***now***, in advance of the March 25, 2024 primary petition filing deadline, in order to assure a coherent process in the likely event of an objection to Trump's candidacy at that time.

APPENDIX

RELEVANT NEW JERSEY ELECTION STATUTES

NJSA 19:13-1 Direct petition and primary election

Candidates for all public offices to be voted for at the general election in this state or in any political division thereof, except electors of president and vice president of the United States nominated by the political parties at state conventions, shall be nominated directly by petition as hereinafter provided, or at the primary for the general election held pursuant to this title.

NJSA 19:13-2 State convention; presidential and vice presidential electors

In presidential years the state conventions shall severally nominate for their respective parties such number of candidates for electors of president and vice president of the United States as this state shall be entitled to elect or appoint.

NJSA 19:13-4 Contents of petition

Such petition shall set forth the names, places of residence and post-office addresses of the candidates for the offices to be filled, the title of the office for which each candidate is named, that the petitioners are legally qualified to vote for such candidates and pledge themselves to support and vote for the persons named in such petition and that they have not signed any other petition of nomination for the primary or for the general election for such office. The petitions of a candidate for any State, county, or municipal elective public office shall also include a functioning campaign e-mail address for the candidate.

In the case of a petition or petitions nominating electors of president and vice president of the United States, the names of the candidates for president and vice president for whom such electors are to vote may be included in the petition or petitions, but the petition or petitions shall not include the names of any candidates for president or vice president who have been nominated at a convention of a political party, as defined by this title.

The petition shall also state in not more than three words the designation of the party or principles which the candidates therein named represent, but such designation shall not contain the designation name, derivative, or any part thereof as a noun or an adjective of any political party entitled to participate in the primary election.

The petition shall also include the request that the names of the candidates and their designations of party or principles be printed upon the ballots to be used at the ensuing general election.

No such petition shall undertake to nominate any candidate who has accepted the nomination for

the primary for such position.

Each petition shall be arranged to contain double spacing between the signature lines of the petition, so that each signer thereof is afforded sufficient space to provide his or her printed name, address and signature.

Any form of a petition of nomination, other than petitions for federal office, which is provided to candidates by the Secretary of State, the county clerk, or the municipal clerk shall contain the following notice: "Notice: All candidates are required by law to comply with the provisions of the 'New Jersey Campaign Contributions and Expenditures Reporting Act.' For further information, please call (insert phone number of the Election Law Enforcement Commission)."

NJSA 19:13-9 Filing of petitions, time

All such petitions and acceptances thereof shall be filed with the officer or officers to whom they are addressed before 4:00 p.m. of the day of the holding of the primary election for the general election in this Title provided. All petitions when filed shall be open under proper regulations for public inspection.

Notwithstanding the above provision, all petitions and acceptances thereof nominating electors of candidates for President and Vice President of the United States, which candidates have not been nominated at a convention of a political party as defined by this Title, shall be filed with the Secretary of State before 4:00 p.m. of the 99th day preceding the general election in this Title provided. All petitions when filed shall be opened under proper regulations for public inspection.

The officer or officers shall transmit to the Election Law Enforcement Commission the names of all candidates, other than candidates for federal office, nominated by petition and any other information required by the commission in the form and manner prescribed by the commission and shall notify the commission immediately upon the withdrawal of a petition of nomination.

NJSA 19:13-10 Objection to petition

19:13-10. Every petition of nomination in apparent conformity with the provisions of this Title shall be deemed to be valid, unless objection thereto be duly made in writing and filed with the officer with whom the original petition was filed not later than 4:00 p.m. of the fourth day after the last day for filing of petitions. If such objection is made, notice thereof signed by such officer shall forthwith be mailed to the candidate who may be affected thereby, addressed to the candidate at the candidate's place of residence as given in the petition of nomination.

NJSA 19:13-11 Determination of validity of objections

The officer with whom the original petition was filed shall in the first instance pass upon the validity of such objection in a summary way unless an order shall be made in the matter by a

court of competent jurisdiction and for this purpose such officer shall have power to subpoena witnesses and take testimony or depositions. He shall file his determination in writing in his office on or before the ninth day after the last day for the filing of petitions, which determination shall be open for public inspection.

In the case of petitions nominating electors of candidates for President and Vice President of the United States, which candidates have not been nominated at a convention of a political party as defined by this Title, the Secretary of State shall file his or her determination in writing in his or her office on or before the 93rd day before the general election, which determination shall be open for public inspection.

NJSA 19:13-12 Judicial hearing

Any judge of the Superior Court, in the case of candidates to be voted for by the electors of the entire State or of more than one county thereof, and in all other cases a judge of the Superior Court assigned to the county in which any petition of nomination shall be filed, on the application or complaint, duly verified, of any candidate, which application or complaint shall be made on or before the twelfth day after the last day for the filing of petitions, setting forth any invasion or threatened invasion of his rights under the petition of nomination filed with the Secretary of State or with any county clerk, shall hear such application or complaint in a summary way and make such order thereon as will protect and enforce the rights of such candidates, which order or determination shall be filed within three days after the filing of the application or complaint.

Notwithstanding the above provision, in the case of a nomination petition or petitions for electors of candidates for President and Vice President of the United States, which candidates have not been nominated at a convention of a political party as defined by this Title, any judge of the Superior Court, on the application or complaint, duly verified, of any candidate, which application or complaint shall be made at least 95 days before the general election, setting forth any invasion or threatened invasion of his or her rights under the petition of nomination filed with the Secretary of State, shall hear such application or complaint in a summary way and make such order thereon as will protect and enforce the rights of such candidates, which order or determination shall be filed within three days after the filing of the application or complaint.

NJSA 19:13-13 Amendment of petitions; time

A candidate whose petition of nomination, or any affidavit or affidavits thereto, is defective may cause such petition, or the affidavit or affidavits thereto, to be amended in matters of substance or of form as may be necessary, but not to add signatures, or such amendment or amendments may be made by filing a new or substitute petition, or affidavit or affidavits, and the same when so amended shall be of the same effect as if originally filed in such amended form; but every amendment shall be made on or before the third day after the last day for the filing of petitions.

This provision shall be liberally construed to protect the interest of candidates.

Notwithstanding the above provision, in the case of nomination petitions for electors for candidates for President and Vice President of the United States, which candidates have not been nominated at a convention of a political party as defined by this Title, every statutorily authorized amendment shall be made on or before the 93rd day before the general election.

NJSA 19:13-15 Presidential and vice presidential electors; certificate of nomination, acceptance
In presidential years the State committee of a political party shall meet at the call of its chairman, within 1 week following the closing of the party's national convention, for the purpose of nominating candidates for electors of President and Vice-President of the United States and shall certify such nomination in a written or printed or partly written and partly printed certificate of nomination.

The certificate of nomination shall contain the name of each person nominated, his residence and post-office address, the office for which he is named, and shall also contain in not more than 3 words the designation of the party the nominating body represents. The names of the candidates for President and Vice-President for whom such electors are to vote may be included in the certificate. The State committee may also appoint a committee to whom shall be delegated the power to fill vacancies occurring prior to the election of the electors, howsoever caused, and the names and addresses of such committee shall be included in the certificate.

The certificate shall be signed by the State chairman who shall make oath before an officer authorized to administer the same that he is the State chairman of the political party and that the certificate and statements therein contained are true to the best of his knowledge and belief. A certificate that such oath has been taken shall be made and signed by the officer administering the same and indorsed upon or attached to the certificate of nomination. Inclosed upon or attached to the certificate shall be statements in writing that the persons named therein accept such nominations and the oath of allegiance prescribed in section 41:1-1 of the Revised Statutes duly taken and subscribed by each or all of them before an officer or officers authorized to take oaths in this State.

The certificate of nomination and the acceptance thereof shall be filed with the Secretary of State not later than 1 week after the nomination of such electors of President and Vice-President of the United States.

The procedure for all objections to the certificates of nomination, the determination of the validity of such objections, the correction of defective certificates, and the presentation of such certificates and any documents attached thereto, shall be the same as herein provided for direct petitions of nominations.

NJSA 19:13-22 Secretary of State; statement to county clerks of nominations, vacancies

19:13-22. a. The Secretary of State, not later than 99 days, and with respect to candidates for President and Vice President of the United States not later than 88 days, before any election whereat any candidates nominated in any direct petition or primary certificate of nomination or State convention certificate filed with the Secretary of State are to be voted for, shall make and certify, under the Secretary's hand and seal of office, and forward to the clerks of the several counties of the State, and post on the Secretary's website, a statement of all such candidates for whom the voters within such county may be by law entitled to vote at such election. This statement shall contain the names and residences of all candidates, the offices for which they are respectively nominated, and the names of the parties by which or the political appellation under which they are respectively nominated. Candidates nominated directly by petition, without distinctive political appellation, shall be certified as independent candidates. Similar statements shall be made, certified and forwarded, when vacancies are filled subsequently, according to law.

b. The Secretary of State shall certify and forward the statement required by subsection a. of this section no later than the fourth Friday in June following a primary election for the candidates for the office of Governor for whom the voters may be by law entitled to vote at the next subsequent general election. The statement shall include the information required by subsection a. of this section. Candidates nominated directly by petition for the office of Governor, without distinctive political appellation, shall be certified as independent candidates at the same time as candidates nominated for the office of Governor at a primary election are certified by the Secretary of State. Similar statements shall be made, certified and forwarded, when vacancies are filled subsequently, according to law.

NJSA 19:23-14 Certification by municipal clerk

Petitions addressed to the Secretary of State, the county clerks, or the municipal clerks shall be filed with such officers, respectively, before 4:00 p.m. of the 71st day next preceding the day of the holding of the primary election for the general election.

Not later than noon of the 61st day preceding the primary election for the general election, the municipal clerk shall certify to the county clerk the full and correct names and addresses of all candidates for nomination for public and party office and the name of the political party of which such persons are candidates together with their slogan and designation. The county clerk shall transmit this information to the Election Law Enforcement Commission in the form and manner prescribed by the commission and shall notify the commission immediately upon the withdrawal of a petition of nomination.

NJSA 19:23-20.1 Deadline for objection to nomination petition

8. Every petition of nomination in apparent conformity with the provisions of this Title shall be deemed to be valid, unless objection thereto be duly made in writing and filed with the officer with whom the original petition was filed not later than 4:00 p.m. of the fourth day after the last day for filing of petitions. If such objection is made, notice thereof signed by such officer shall forthwith be mailed to the candidate who may be affected thereby, addressed to the candidate at the candidate's place of residence as given in the petition of nomination.

NJSA 19:23-20.2 Duties, responsibilities of officer with whom original petition was filed

9. The officer with whom the original petition was filed shall in the first instance pass upon the validity of such objection in a summary way unless an order shall be made in the matter by a court of competent jurisdiction and for this purpose such officer shall have power to subpoena witnesses and take testimony or depositions. The officer shall file a determination in writing in the officer's office on or before the ninth day after the last day for the filing of petitions, which determination shall be open for public inspection

NJSA 19:25-3 Presidential candidates

1. Not less than 1,000 voters of any political party may file a petition with the Secretary of State on or before the 64th day before a primary election in any year in which a President of the United States is to be chosen, requesting that the name of the person indorsed therein as a candidate of such party for the office of President of the United States shall be printed upon the official primary ballot of that party for the then ensuing election for delegates and alternates to the national convention of such party.

The petition shall be prepared and filed in the form and manner herein required for the indorsement of candidates to be voted for at the primary election for the general election, except that the candidate shall not be permitted to have a designation or slogan following his name, and that it shall not be necessary to have the consent of such candidate for President indorsed on the petition.

NJSA 19:25-4 Certification of names indorsed

2. The Secretary of State shall certify the names so indorsed to the county clerk of each county not later than the 54th day before such primary election, but if any person so indorsed shall on or before such date decline in writing, filed in the office of the Secretary of State, to have his name printed upon the primary election ballot as a candidate for President, the Secretary of State shall not so certify such name.