

Q. & A.

# COLORADO'S TOP COURT KICKED TRUMP OFF THE BALLOT. WILL THE SUPREME COURT AGREE?

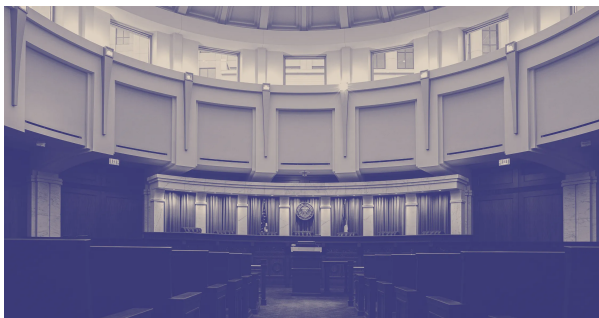
*A legal scholar analyzes how the nine Justices are likely to view the blockbuster decision.*



**By Isaac Chotiner**

December 21, 2023

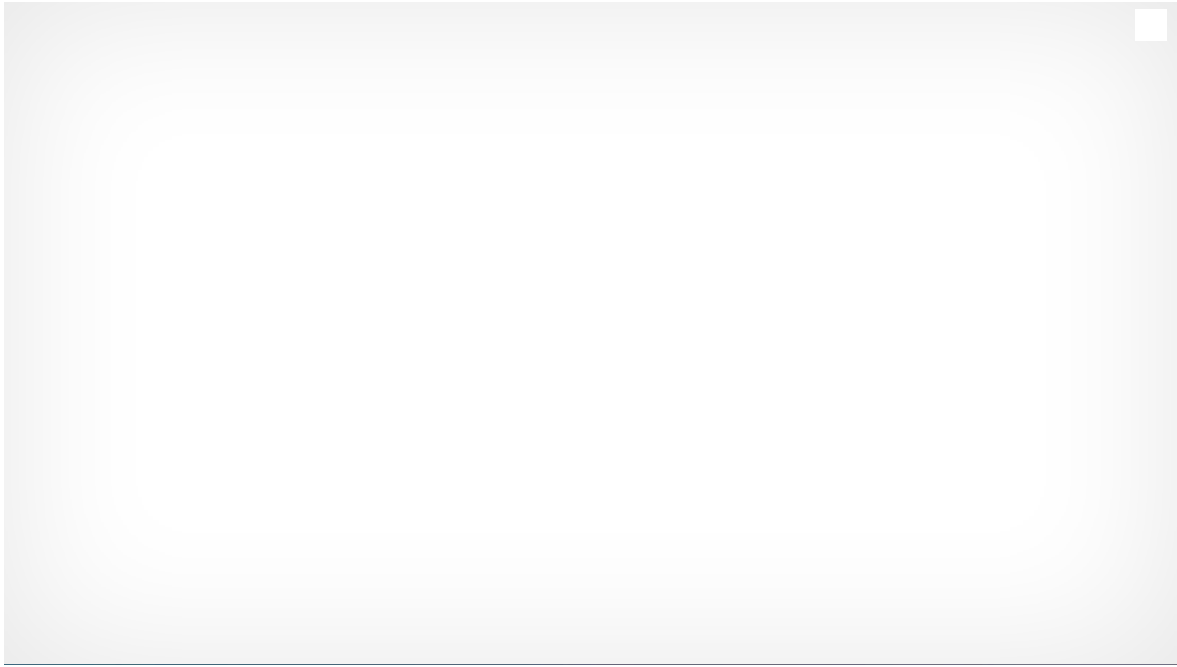
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On December 19th, a 4–3 majority of Colorado’s Supreme Court ruled that the former President Donald Trump is barred from holding office again because of his role during the January 6th riot at the Capitol, which led to at least seven deaths and dozens of injuries. Similar suits are proceeding in several other states. The Colorado court found that, according to Section 3 of the Fourteenth Amendment, Trump “engaged in insurrection” and is therefore ineligible to serve in any federal, civil, or military position. The decision did not address the general election, but instead directed the Colorado secretary of state to leave Trump’s name off the ballot for the Republican primary on March 5, 2024. The case is almost certain to end up before the U.S. Supreme Court, which, unlike the Colorado Supreme Court, has a strong conservative majority. (The Colorado court put its ruling on hold until next month to allow for Trump’s legal team to file an appeal.)

To understand how the Supreme Court might approach the case, I recently spoke by phone with Richard H. Pildes, a professor of constitutional law at New York University and an expert on election law. During our conversation, which has been edited for length and clarity, we also discussed what the dissents in the Colorado decision suggest about the case’s potential weaknesses and whether the results of the federal case against Trump for attempting to interfere with the

transfer of power after the 2020 election will affect his ability to remain on the ballot.



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**What did you think of the Fourteenth Amendment being applied to Trump when the idea was first broached after January 6th, and what did you think of this specific ruling?**

I thought it was a serious legal question. Even though I teach quite a lot about the Fourteenth Amendment, I had never focussed on Section 3, because obviously it hadn't been an issue since the

aftermath of the Civil War. I was persuaded by the early academic writing that was done on this that it was a question that had to be taken seriously, and that was well before the more recent academic writing that got a lot of attention, particularly the article that Will Baude and Michael Paulsen wrote. I also thought that, because it raised a lot of novel issues, it was going to be a complicated question that would inevitably be pursued if Trump ran again.

The Colorado decision was not unforeseeable, but it was also something of a surprise given that several state courts had confronted the issue and had decided that they couldn't address the merits. But they did not reach the same conclusion here.

**Why did the prior courts not come out this way? And why did this one? What was the difference either in the circumstances or in the legal reasoning?**

The prior courts had different bases for not reaching the same conclusion. One basis, seen in the Arizona Supreme Court and the Michigan Court of Appeals, was that the state procedures for determining if a candidate was qualified to be on the ballot weren't designed for these kind of complex, factual legal questions, in the absence of a criminal conviction. These procedures were designed for fairly straightforward qualification questions like: Has the person met the age-limit requirement? Is the person a citizen? But the novel issues that were presented with this case were not ones that those state election-code provisions were designed to address.

Another state court, this one in Minnesota, reached the conclusion that because this involved only the primaries, which are basically the

party choosing who it wants to put forward as a candidate, these provisions didn't apply. They apply only in the general-election context. None of these other cases, by the way, reached the merits of



substantive issues that the Colorado Supreme Court addresses once it gets past those kinds of procedural issues.

**What did the Colorado court address, and why did it choose to address the merit? What do you think of its decision on the merits?**

The Colorado Supreme Court was divided 4–3, mostly—or, really, entirely—on process-oriented issues. Those divisions reflect some of what we were just discussing, which is whether the Colorado procedure, which is a special procedure under the state election code for determining whether candidates are qualified, is appropriate for the kinds of questions that have to be addressed here. These procedures in Colorado, as in most states, are very time-compressed, because they're designed for quick resolution. There is not a full civil trial that is used, for example. There's no subpoena power.

The majority of the court concluded that these procedures are still adequate to address this issue. Then you get to the substance. Interestingly, the dissents really did not engage on the substantive questions, but the substantive questions are: Was January 6th an insurrection? Did President Trump engage in that insurrection, to the extent that case hinges in part on the statements he made? Are those statements within the protection of the First Amendment? And the majority, of course, answered yes, this did constitute an insurrection. Yes, he did engage in the insurrection. No, his statements are not protected under the First Amendment.

**One of the dissents says, essentially, that to make this decision without a criminal ruling against Trump is problematic. He has not been convicted of a crime.**

Yes. But that was in the context of saying the process here wasn't adequate to reach that conclusion in the absence of these other facts. In other words, this would not be hard as a matter of process if Trump had been convicted of insurrection. It would be very much like simply saying someone doesn't meet the age requirements. But I think the dissent you mention is arguing that, because we don't have that here, this requires a fuller process than is available under the Colorado election code. Part of what that dissent argues—and this has always been an issue about this provision of the Fourteenth Amendment—is, in the absence of a criminal conviction, there has to be a congressional statute that specifies what the procedures are to enforce the Section 3 disqualification provision.

**I'm curious what you think of that argument. Should we be concerned that—without a law that, in this case, former President Trump has broken—the courts could still remove him from a ballot? Does that seem like a radical step to you?**

Well, the difficulty in this area is that so much of this is novel territory. After the Civil War, after this provision had been passed, Congress did pass statutes specifying how this provision was to be enforced and what it required to enforce it. There's a case, *In Re Griffin*, which held that a statute was required. Congress later repealed those statutes. And good arguments have been made by modern scholars looking at the way other comparable provisions of the Constitution are structured that say it shouldn't require a

congressional statute.

Right now, we're talking about the process debates that are clearly going to be central when the Supreme Court hears this case, as it undoubtedly will. Even if a congressional statute is not required, I'm sure that the argument to overturn the decision will be partly based on the view that these procedures weren't adequate. Even if a statute by Congress is not required, there still has to be an appropriate process to reach a judgment on a question like this. And the Colorado process, the argument goes, just isn't structured to provide that.

### **Why is that?**

For example, one factual issue is: Did Trump know his claims about the election being stolen were false? And was the process that's provided here sufficient to reach a reliable judgment about a critical question like that?

### **I know that his state of mind is important, for example, in the January 6th case, but why does it matter here?**

There's a question when we get to the substance about whether he specifically intended to incite violence with his speeches and the overall context in which those speeches were made. That's another very specific intent question, because, under the Colorado court's opinion, that's relevant to whether his comments are within the First Amendment or whether they meet this *Brandenburg v. Ohio* test for imminent incitement to violence. Certainly, the district court here in Colorado made finding that he knew the claims he was making about the election being stolen were not true.

**What about the idea that Section 3 does not apply to the Presidency? In full, it says:**

**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.**

**Can you explain what that argument is and what you think of it?**

The argument is that, if you parse the language very closely, it doesn't specifically apply to the President. I find that of all the arguments that will be made before the Supreme Court, this one is least likely to persuade the Court. In this case, the majority of the Colorado court spent a fair amount of time addressing that issue. But I find that that particular argument, even though some scholars have made it, is a very unlikely basis for any Supreme Court decision here.

**Why?**

Because I think it's very hard to come up with any plausible account of why the Fourteenth Amendment would've been designed to disqualify from every office in the land, federal and state, someone guilty of insurrection except the most powerful official in the land, the President. I've never seen a plausible, rational, or convincing



explanation as to why that provision would make sense.

**Because the oath a President takes is different, correct? He swears to “preserve, protect and defend the Constitution” instead.**

One of the arguments is if you parse the language of the oath of the President, it's slightly different in wording. He doesn't actually take an oath to support the Constitution. That word “support” is not in there, and I just think this is nitpicky wordsmithing.

**Obviously, the Colorado Supreme Court is much more liberal than the Supreme Court. What will the Supreme Court be looking at—both the procedural issues and the substantive issues?**

On the process issues, they're largely what we've talked about already: First, does Congress have to pass a statute to enforce this provision, which would specify the kind of process needed to reach a judgment on this question of insurrection in the absence of a criminal conviction? And, second, even if Congress doesn't have to pass a statute, are the procedures under the Colorado election code constitutionally adequate to reach the judgment that the Colorado Supreme Court did?

Then, on substance, the Colorado Supreme Court concluded that the comments President Trump made on January 6th were not First Amendment-protected, that they actually met the very demanding standard of the Brandenburg test, which states that speech can be criminalized only if there was a specific intent to incite imminent violence.

One interesting thing about this is that in the article that Will Baude

and Michael Paulsen wrote, concluding that Trump met the standards for insurrection, they bypassed this Brandenburg issue and said that it doesn't really matter because, in their view, the Fourteenth Amendment trumps the First Amendment. But that's not the approach the Colorado court took. The Colorado court was of the view that you had to be able to show his speech met the Brandenburg test, and it concluded that that's the right test and that he met the test. So one question will be: Does the Supreme Court agree with that? And then, of course, there'll be the question of whether January 6th itself constituted an insurrection in the legal sense, as well as the question of whether Trump engaged in that insurrection through his speech, the various aspects of his prior conduct, and his failure to do anything during those three hours after the attack on the Capitol had commenced.

**Whether his behavior constitutes an insurrection might go to the question of how to interpret the Constitution. What are the different ways you think the Justices might look at that question?**

I think they'll look to the limited prior history of courts engaging with that question. They do look to dictionaries from the era, and I think they will look into the deep history of how the legal concept of insurrection has been understood over time, to the extent that there's evidence from when this issue was being debated in Congress at the time the provision in Section 3 was put together. I think that many of the Justices will look to similar sources on this question because frequently, when we have debates between what's sometimes called living constitutionalism versus originalism, the debate centers on a whole body of Supreme Court precedent that's developed over time and how much weight that body of precedent should have as

compared with some view about what the original meaning of the provision was when it was enacted. And here we don't really have that situation, because it's not as if the Supreme Court has a long body of precedent on the meaning of insurrection under this provision, so they can't draw on that.

**Let's say Trump had already been convicted in the January 6th case. How would this change this case, if at all?**

If he's convicted of all the counts in that January 6th case, that would include being guilty of obstruction of justice, and guilty of obstruction of the congressional proceeding on January 6th. I think the question of insurrection would still be a somewhat distinct question, but the judgment would certainly be informed by the legal conclusion that he had obstructed justice.

**Could you see a decision that keeps Trump on the ballot but makes clear that it would have to be revisited if he was convicted of certain crimes?**

Well, almost by definition, if the Court were to say in the absence of a criminal conviction there must be a fuller process than what was provided by the Colorado election code, then, if he were actually convicted of insurrection, that would change things dramatically.

**Of course, this conviction wouldn't be for insurrection, per se.**

It's hard to imagine there being enough time for the scenarios that we're trying to imagine here playing out before the November election. If the Court keeps him on the ballot and he's later convicted of obstruction of Congress and obstruction of justice, and that

happens before November, 2024, then a new case might be brought trying to litigate the issue again, saying that circumstances have changed. But it would be the beginning of new litigation. If he were going to be nominated, he probably would've been nominated by then. So this is a matter of the time constraints between now and the November election. It's hard to see all those dominoes falling in that way. ♦

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