CREW

CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON

October 12, 2022

Dear Secretary of State,

Last month, New Mexico District Judge Francis Mathew ruled that "the January 6, 2021 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an 'insurrection' within the meaning of Section Three of the Fourteenth Amendment," and that Otero County Commissioner Couy Griffin "engaged in" that insurrection.[1] As a result, the court ordered Mr. Griffin to be immediately removed from office and held that he is constitutionally disqualified from ever holding state or federal office again.[2] This lawsuit, which my organization, Citizens for Responsibility and Ethics in Washington (CREW) and co-counsel brought on behalf of three New Mexico residents, marks the first time since 1869 that a court has disqualified a public official under the Fourteenth Amendment.[3] I am writing both to make you aware of this important development and to explain the key role that Secretaries of State play to ensure those who participated in the January 6 insurrection are not permitted to run to represent the government they tried to overthrow.

Secretaries of State have the obligation to determine, as part of the balloting process, whether a candidate is constitutionally qualified and eligible to appear on the ballot.[4]

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[1] *State ex rel. White v. Griffin*, No. D-101-CV-202200473, 2022 WL 4295619 (N.M. 1st Jud. Dist. Ct., Sept. 7, 2022), https://perma.cc/88PE-SXPJ [hereinafter Griffin Judgment].

[2] "The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment," U.S. CRS, 117th Cong., LSB10569, Version 6 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10569.

[3] Aaron Blake, "Effort to bar Jan. 6 figures from office notches historic win. What now?," *The Washington Post*, Sept. 6, 2022, https://www.washingtonpost.com/politics/2022/09/06/couy-griffin-fourteenth-amendment-insurrection/.

[4] Ala. Code § 17-9-3, *see also id.* § 17-13-101; Alaska Admin. Code § 25.260(c); Ariz. Rev. Stat. §§ 16-311(D), 16-242, 16-344, 16-242; Ark. Code Ann. § 7-5-207(b); Cal. Const. art. 2, § 5(c), see also Cal. Elec. Code § 6340(a); Conn. Gen. Stat. § 9-4 Colo. Rev. Stat. §§ 1-4-1204(1)(b)-(c); *An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress*, 15 Stat. 73 (June 25, 1868); Sandlin, 21 La. Ann. at 633-34; Ga. Code. § 21-2-5; Haw. R.S. § 11-113(c), Haw. R.S. § 11-113(d); *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934); 10 Ill. Comp. Stat. § 5/10-5(3), *see Joyce v. Cruz*, 16 SOEB-GP 526 (Ill. State Bd. of Elec. Feb. 1, 2016); *Graham v. Cruz*, 16 SOEB GP 527 (Ill. State Bd. of Elec. Feb. 1, 2016), *Graham v. Rubio*, 16 SOEB GP 528 (Ill. State Bd. of Elec. Feb. 1, 2016); Ind. Code §§ 3-8-2-7(5), Ind. Code §§ 3-8-2-14(a), 3-8-2-18; Iowa Code § 43.18; Def. Mot. to Dismiss, ECF 2-1, at 4, *Hassan v. Iowa*, No. 11-cv-00574-REL (S.D. Iowa filed Dec. 27, 2011); K.S.A. § 25-208a; Ky. Dep't of State, Nominating Petition, Ky. Rev. Stat. §§ 118.315, 118.591, Ky. Rev. Stat. § 118.591(6); La. R.S. § 18:451., La. R.S. § 1280.23, La. R.S. § 1257; *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632, 1869 WL 4681, at *1 (La. 1869), 21-A Me. Rev. Stat. Ann. § 336(3); 21-A Me. Rev. Stat. Ann. §§ 337(2)(A); Md. Const. art. XV, § 3; Mass. Gen. Laws Ch.. 53, § 11; Mass. Gen. Laws Ch. 55B, § 5, Mass. Gen. Laws Ch. 55B, § 4; M.C.L.A. 168.21; MS Code § 23-15-359(8); MN ST § 204B.10(4); Mo. Rev. Stat. § 115.761(1); Mont. Code Ann. § 13-10-201(4), *see also id.* § 13-10-404(1); Neb. Rev. Stat. Ann § 32-624; NRS § 293.2045(1)(a)-(b); N.H. Rev. Stat. Ann. § 655:47, I.; N.J. Stat. § 19:23-7, N.J. Stat. §§ 19:13-10, 19:29-1, *see Layton v. Lewis*, No. A-4047-10T1, 2011 WL 1632039 (Super. Ct. App. Div. May 2, 2011); *State ex rel.* Chavez v. Evans, 79 N.M. 578, 446 P.2d 445; NY Elec. Law § 6-122, 16-102, 6-144, 6-138, 6-153; *Worthy v. Barrett*, 63 N.C. 199, 200 (1869); N.D.C.C. 16.1-12-02.1; Ohio Rev. Code Ann. § 3501.39(A)(4); Okla. Stat. tit. 26, § 5-111, Okla. Stat. Ann. tit. 26, §§ 20-102, -103; Or. Rev. Stat. Ann. §§ 249.031, Or. Sec'y of State, SEL 101: Candidate Filing, Or. Rev. Stat. Ann. §

Section Three of the Fourteenth Amendment, also known as the Disqualification Clause, is one of the constitutional qualifications for office that a Secretary of State must evaluate, in addition to the age, citizenship, and residency qualifications set forth elsewhere in the U.S. Constitution.[5] Ratified in the wake of the Civil War, Section Three bars any person from holding federal or state office who took an "oath…to support the Constitution of the United States" as a federal or state officer and then "engaged in insurrection or rebellion" against the United States.[6]

During Reconstruction, Congress and state courts invoked Section Three of the Fourteenth Amendment to disqualify and exclude former Confederates from office.[7] Although Section Three has largely remained dormant since then, the January 6 insurrection has renewed the applicability of this important constitutional qualification for office.

In March 2022, CREW filed a *quo warranto* lawsuit in New Mexico state court against former Commissioner Griffin, arguing that he violated his constitutional oath by engaging in the January 6 insurrection and that, as a result, he should be removed and disqualified from public office under the Fourteenth Amendment.[8]

The court agreed. In finding Mr. Griffin disqualified, the court explained that an insurrection need not "rise to the level of trying to overthrow the government."[9] Rather, an insurrection is an assemblage of people acting through force, violence, and intimidation by numbers to prevent the federal government from performing a constitutional function–a definition that indisputably applies to the January 6 attack. The ruling also cites Reconstruction-era case law establishing that a person can be disqualified under the Fourteenth Amendment even if they have not been convicted of a crime and even if they did not engage in violence; the test for disqualification is instead whether the person "'voluntarily aid[ed] the [insurrection], by personal service, or by contributions, other than charitable, of anything that [is] useful or necessary' to the insurrectionists' cause."[10] It is important to note that a disqualification

246.046; 25 Pa. Stat. Ann. § 2621(d), *see* 25 Pa. Stat. Ann. § 2936; R.I. Gen. Laws § 17-14-13, see also R.I. Gen. Laws Section 17-14-14; S.C. Code Ann. § 7-11-20(B)(2), *see also id.* §§ 7-19-70, 7-13-350; SCDL § 12-1-13; Tenn. Code Ann. §§ 2-11-202(a)(12), § 2-13-202, § 2-5-202; Tex. Elec. Code § 145.003(g), 192.033, 192.062(c); Utah Code Ann. § 20A-9-201(4); Va. Code Ann. § 24.2-612; RCW § 29A.24.075; W. Va. Code §3-1-41; Wis. Stat. § 8.21, § 8.30; Wyo. Stat. § 22-19-102(a), § 22-5-204(b)(i); *see e.g.* Code of Vt. Rules § 2605(a), § 2606(a).

[5] *See* U.S. Const. art. I, § 2, cl. 2 (House of Representatives qualifications clause); *id.* art. I, § 3, cl. 3 (Senate qualifications clause); *id.* art. II, § 1, cl. 5 (President qualifications clause).

[6] U.S. Const. amend. XIV, § 3.

[7] *E.g.*, *Worthy v. Barrett*, 63 N.C. 199, *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308 (1869); *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (La. 1869).

[8] *White v. Griffin*, 2022 WL 3908964.

[9] Griffin Judgment at 29.

[10] Griffin Judgment at 34.

under Section Three of the Fourteenth Amendment cannot be cured through a presidential pardon and can only be removed by a two thirds vote of Congress.[11]

The *Griffin* court's factual findings are instructive. The court found that, ahead of the January 6 attack, Mr. Griffin and his organization "Cowboys for Trump" played a significant role in mobilizing a violent mob to assemble in Washington, D.C. to stop Congress from certifying the 2020 presidential election as mandated by the Constitution. He was a featured speaker on a cross-country "Stop the Steal" road tour where he incited crowds, normalized violence, and encouraged Trump supporters to show up en masse in Washington D.C. on January 6. He flooded social media with similar messaging, and then traveled to D.C. to participate in the insurrection. On January 6, he joined the mob in breaching multiple security barriers and occupying restricted Capitol grounds, contributing to law enforcement being overwhelmed and the congressional proceedings being delayed. After January 6, Mr. Griffin took to social media to celebrate the violence he witnessed that day and previewed a more brutal attack on the Capitol to prevent President Biden from taking office where there would be "blood running out of that building."[12]

Although the court's decision sets a high bar for disqualification, CREW believes there are current and prospective candidates throughout the country who, under the court's standard, are disqualified from public office and thus should be excluded from the ballot. The obligation to exclude and disqualify these individuals will be borne by many federal and state officials throughout our country, but Secretaries of State have a particularly important role to play.

States, through their Secretaries of State and local elections officials, play a crucial role in administering federal and state elections. As then-Judge Neil Gorsuch wrote for the Tenth Circuit in *Hassan v. Colorado*, "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."[13] Thus, a Secretary of State can require that a candidate proactively prove that they are constitutionally eligible to appear on the ballot. Even if a Secretary of State does not require a candidate to prove their eligibility in advance, if they are presented with information pertinent to a candidate's eligibility, they are required to promptly review it and determine if the candidate in question can appear on the ballot.

[11] U.S. Const. amend. XIV, § 3.
[12] Griffin Judgment at 17-18.
[13] *Hassan v. Colorado,* 495 F. App'x 947 (10th Cir. 2012).

Making these ballot eligibility determinations is consistent with a Secretary of State's oath of office to support and defend the Constitution of the United States. As the *Griffin* court explained, enforcing constitutional disqualifications does not "subvert the will of the people" because "the Constitution itself reflects the will of the people and is the 'supreme Law of the Land.'"[14] And in the unprecedented context of the January 6 insurrection – an event that marked the first ever presidential transition marred by violence – failing to enforce the Constitution against those who sought to subvert a free and fair presidential election imperils the very foundations of American democracy.

Engaging in insurrection is a high bar, and CREW does not take lightly the idea that candidates should be excluded from the ballot based on Section Three of the Fourteenth Amendment. The court's recent decision in our lawsuit is, however, a helpful guide for Secretaries of State throughout the country to use when evaluating whether actions by a candidate or prospective candidate trigger disqualification under Section Three. Where the evidence supports disqualification, it is your constitutional duty to act.

Very respectfully,

Noah Bookbinder
President
Citizens for Responsibility and Ethics in Washington

[14] Griffin Judgment at 44-45.