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Colorado ruling does not bar Ohio from determining if Trump qualifies for its ballot. The sad reality is it's unlikely to do so: Mark R. Brown

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In this Nov. 1, 2023, file photo, 2nd Judicial District Court Judge Sarah B. Wallace presided over a hearing in a lawsuit seeking to keep former President Donald Trump off the Colorado ballot. Judge Wallace ultimately decided that, while Trump engaged in insurrection, it did not disqualify him from the ballot per her reading of the language of the 14th Amendment. In a guest column today, law professor Mark R. Brown writes that the ruling, by finding Trump engaged in insurrection, opens the way to disqualifications in other states, including Ohio, where the power to exclude candidates from the ballot exists and where a different judicial

interpretation of the 14th Amendment may prevail. But in Ohio, he writes, the Republican establishment is unlikely to allow that to happen. (AP Photo/Jack Dempsey, Pool)AP

By

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COLUMBUS, Ohio -- On Nov. 17, a Colorado court [ruled](#) that Trump was not disqualified by his actions on Jan. 6, 2021, from again running for president. Importantly, however, it ruled as a factual matter that Trump had engaged in “insurrection” within the disqualifying terms laid out in Section 3 of the 14th Amendment and that it had the authority under Colorado law to enforce the 14th Amendment’s terms. It thus became the first court to reach the merits of the disqualification charges that have been leveled against Trump in several states, including [Michigan](#) and [Minnesota](#). Courts and officials in most states, including Michigan and Minnesota, have so far avoided reaching the merits on procedural grounds.

Notwithstanding its conclusion that Trump engaged in insurrection, the Colorado court also ruled that, because Trump had never sworn to “support” the Constitution (as spelled out in [Article VI](#)), but had only sworn to “preserve, protect and defend” it as president (under [Article II](#)), his oath was not covered by the 14th Amendment.

Section 3’s terms, the court observed, only disqualify those who previously had “taken an oath ... to support the Constitution.” The implicit reference was to Article VI, as opposed to Article II, it reasoned. Thus, Trump’s oath was not covered.

While I disagree with this reading of the 14th Amendment – I

believe that presidents are “officers of the United States” and that their oaths under Article II fall under the 14th Amendment’s terms -- the Colorado court’s decision to reach the merits is sound. I have written elsewhere that America’s legal community, and the framers of the 14th Amendment, understood in 1868, when the 14th Amendment was adopted, that the Constitution is “self-executing.” Its terms and limitations, including those in the 14th Amendment, did not then and do not now need to await congressional action. Any state that provides a mechanism for assessing candidates’ qualifications – and as Professor Derrick Muller of the Notre Dame law school [has reported](#), many do -- is free to explore the electoral consequences of the Jan. 6 insurrection.

Ohio should be one of those states. Ohio’s Supreme Court [has recognized](#) that the Ohio Revised Code authorizes the Ohio Secretary of State to reject primary candidates who have not complied with “the requirements of th[e] [Ohio Election Code], ... *or any other requirements established by law.*” Because Section 3 of the 14th Amendment is one of the “requirements established by law,” Ohio’s Secretary of State has the authority to exclude Donald Trump from the GOP primary ballot.

I am not naïve enough to believe the current Secretary of State, Frank LaRose, will live up to this obligation. I have written [elsewhere](#) about his office’s electoral lawlessness and will not dwell on it here. Suffice it to say that Trump supporters like [LaRose](#), Ohio Attorney General [Dave Yost](#), and Ohio’s GOP machinery will do whatever they can to protect Trump’s candidacy, law be damned.





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Can anything be done? Under Ohio law, a Republican “protestor” is free to challenge Trump’s credentials. LaRose would then be required to conduct what should be an impartial hearing.

Unfortunately, LaRose would still be the umpire, and he would not likely provide that protester with a fair hearing. It would thus be left up to the Ohio Supreme Court, which has in the past reviewed the Secretary of State’s [disqualifications of presidential candidates](#).

Depending on LaRose’s reasons for rejecting the protest, the Ohio Supreme Court could either defer to LaRose’s decision (which it usually does with factual matters and sometimes does with questions of Ohio law) or engage in de novo review (which it should do with constitutional questions).

My hope would be, given the stakes involved, that Ohio’s Supreme Court could rise above the partisan bickering that emerged in the [2020 gerrymandering cases](#) and address Trump’s candidacy objectively. Sadly, however, I must confess this is unlikely. Its solid four-justice GOP majority would almost certainly say and do whatever was needed to keep Trump on Ohio’s ballot. The argument that Trump should be disqualified – and I think there is a strong argument he should – is not likely to find an unbiased audience in Ohio.

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