



**DEPARTMENT OF JUSTICE
APPELLATE DIVISION**

November 14, 2023

LaVonne Griffin-Valade
Secretary of State
State of Oregon
255 Capitol St. NE
Salem, OR 97310

Re: Presidential primary ballot

Dear Secretary of State:

In recent months, scholars and advocates have argued that, as a result of his role in the January 6 insurrection, Donald Trump is barred from serving as President under Section 3 of the Fourteenth Amendment to the United States Constitution. In light of this controversy, you ask whether you should omit him from the upcoming presidential primary ballot. We conclude 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.

Although the events of January 6th were unprecedented, the underlying legal question here is not new. More than 50 years ago, the Secretary of State asked whether he should remove Michigan Governor George Romney from Oregon's presidential primary ballot because Governor Romney was born in Mexico and thus arguably not a "natural born Citizen" qualified to hold the office of President. This office opined that the Secretary of State should not remove Governor Romney from the ballot. 33 Op Atty Gen 504 (1968). Although some of the analysis in that opinion is questionable in light of later developments in the law, we continue to adhere to the conclusion that a candidate's qualification (or lack thereof) to serve as President does not affect whether the Secretary may place a candidate on the ballot for the presidential preference primary election. The presidency is unique under Oregon law in that respect.

The Secretary of State is ordinarily responsible for determining the qualifications of candidates who will appear on the ballot, including for primary elections. The Secretary is the chief elections officer of the state, ORS 246.110, and may verify the validity of the contents of documents filed with her office, ORS 249.004(2). In general, a person seeking nomination for office by a major political party must file either a nominating petition or declaration of candidacy stating (among other things) that the person "will qualify if elected." ORS 249.031(1)(f); *see also* ORS 259.020(1) (requiring

either a petition or declaration). The Secretary has authority to verify that statement and, if the Secretary determines that “the candidate will not qualify in time for the office if elected,” must omit the candidate’s name from the printed ballot. ORS 254.165; *see also State ex rel Kristof v. Fagan*, 369 Or 261, 277, 504 P3d 1163 (2022) (explaining Secretary’s authority to remove unqualified candidates from the ballot).

But presidential primaries are different. Unique among Oregon elections, they do not determine who is elected to office or even who will appear on the general-election ballot. Rather, they effectively serve as a straw poll of party members to determine their preferred candidates and to guide the delegates to the party’s national convention. The statute refers to the process as a “presidential preference primary election” and requires the party to select convention delegates “so that the number of delegates who favor a certain candidate shall represent the proportion of votes received by the candidate in relation to the other candidates of that party at the presidential preference primary election.” ORS 248.315(1), (3). Each delegate then must “sign a pledge” that the person will support the candidate the delegate was selected to favor until the candidate is nominated, the candidate receives less than 35 percent of the vote at the convention, the candidate releases the delegate from the pledge, or the convention proceeds to a third ballot. ORS 248.315(3). The presidential preference primary election thus does not operate like other primary elections do.

The Oregon Supreme Court’s ruling in *McCamant v. Olcott*, 80 Or 246, 156 P 1034 (1916), confirms that the presidential preference primary election has a unique status under Oregon law and is not necessarily subject to the rules that apply to nominations or traditional elections. Although the wording of the statute has changed, in substance it is similar to the law that the court addressed in *McCamant*. That case held that the Secretary was required to include Justice Charles Evans Hughes on the Republican primary ballot even though Justice Hughes had asked not to be included and Oregon law normally permitted candidates to refuse a nomination. *Id.* at 247, 254. The court explained that the presidential preference primary election did “not amount to a nomination, but merely to the expression of a preference by a majority of the voters.” *Id.* at 249. Thus, “[t]he person whose name is thus placed upon the ballot is not a candidate in the sense of seeking or running for the office. The preferential vote cast in his favor does not nominate him for President, but is merely advisory to and morally obligatory upon the delegates chosen to represent the party in the national convention.” *Id.* at 253. It noted that the voters could achieve the same result through write-in votes for Justice Hughes, so “[p]rinting his name upon the ballot merely enables his supporters to do conveniently and expeditiously what would otherwise cause inconvenience and delay at the polls, and is in line with the primary intent of the act, which is to enable every citizen to express his preference.” *Id.* at 254.

Reflecting that unique status, Oregon law continues to set forth a different process for major-party presidential candidates to appear on the primary ballot than the process that applies to any candidates for any other office. Names are printed only if either (1) the Secretary, in her “sole discretion,” determines that the candidacy “is generally advocated or is recognized in national news media,” or (2) someone submits a nominating petition with 1,000 elector signatures from party members in each congressional district. ORS 249.078(1)(a), (2). Neither statutory avenue expressly requires a determination about qualifications. The State Candidate Manual, which has the status of an administrative rule, confirms that “[m]ajor party presidential candidates do not submit a declaration of candidacy.” Secretary of State, Elections Division, *State Candidate Manual 10* (rev 9/2023); OAR 165-010-005.

We conclude that current Oregon law does not require the Secretary to make a determination about a candidate’s qualification to hold office as President before putting the candidate’s name on the primary ballot under ORS 249.078(1)(a).¹ If the Secretary concludes that the candidacy is generally advocated or recognized in national news media, the Secretary may include the candidate on the ballot without respect to qualifications. Because no declaration of candidacy is required, there is no statement of qualification for the Secretary to verify under ORS 249.004(2).

The one statutory provision that might be read to require the Secretary to consider a presidential candidate’s qualifications is ORS 254.165(1), but we conclude that it does not apply to the presidential preference primary election. ORS 254.165(1) provides in relevant part that if the Secretary “determines that a candidate has died, withdrawn or become disqualified, or that the candidate will not qualify in time for the office if elected, the name of the candidate may not be printed on the ballots.” To the extent that provision is inconsistent with ORS 249.078, however, the latter—as the more specific statute—controls. ORS 174.020(2). ORS 249.078 states explicitly that it sets forth the “only” paths for major-party presidential candidates to appear on the primary ballot. It supersedes other statutes, including ORS 254.165(1), that control access to the primary ballot more generally for other offices.

Context supports that understanding of the statutes. ORS 254.115(1)(c) and (e) respectively require primary ballots to include “[t]he names of all candidates for nomination at the primary election whose nominating petitions or declarations of candidacy have been made and filed, and who have not died, withdrawn or become disqualified” and, separately, “[t]he names of candidates for the party nomination for President of the United States who qualified for the ballot under ORS 249.078.” That statute’s separate mention of presidential candidates—and its omission of the “died,

¹ We need not address whether the analysis would be different under ORS 249.078(1)(b), which allows presidential candidates to appear on the ballot through a nominating petition.

withdrawn or become disqualified” wording for the provision on presidential candidates—suggests that that the limitation set forth in ORS 254.165(1) does not apply in the specific context of a presidential preference primary election.

Litigants in other states have argued that state elections officials are bound to enforce the disqualification of Section 3 of the Fourteenth Amendment because they are bound to uphold the federal constitution as the supreme law of the land. But in our view, even if a candidate is barred from office by Section 3, including that candidate’s name on the ballot for the presidential preference primary election would not itself violate the federal constitution. The federal constitution’s Supremacy Clause requires state law to give way if it violates federal law. As a result, state law could not allow a person disqualified by virtue of Section 3 to be elected in violation of that provision. But as explained above, the presidential preference primary election does not, in fact, elect anyone to office. It does not even nominate the person for the presidency or determine whether they appear on the general election ballot. It merely guides the appointment of delegates to the party’s national convention and the pledges that those delegates must take about who to support in the initial rounds of voting at the convention. In our view Section 3 does not prevent placing a candidate on the presidential primary ballot.

That conclusion is consistent with previous advice that we have provided the Secretary of State on issues related to the presidential preference primary election. As noted above, we opined that the Secretary was not authorized to determine if Governor Romney was a “natural born Citizen” as required to be eligible to serve as President by Article II, § 1, of the United States Constitution. 33 Op Atty Gen 504 (1968). We similarly opined that the Secretary could not disqualify Dwight Eisenhower from the primary ballot for a party on the basis that he was not registered with the party. 25 Op Atty Gen 349 (1952). And we have determined that a number of other general election laws do not apply to presidential primaries because the primary candidates are not truly “candidates” standing election for a “nomination.” *See, e.g.*, 33 Op Atty Gen 516 (1968) (ORS 249.020, which required candidates to sign nominating petitions, did not apply); 33 Op Atty Gen 474 (1968) (ORS 249.750, which barred candidates from running for two offices at once, did not apply); 23 Op Atty Gen 533 (1948) (Corrupt Practice Act did not apply). *But cf.* Letter of Advice dated February 14, 1992, to Colleen Sealock, Director of Elections Division, Office of the Secretary of State, 1992 WL 526784 (concluding that ORS 249.048, the defeated-candidate law, did apply to presidential candidates with respect to the *general* election ballot).

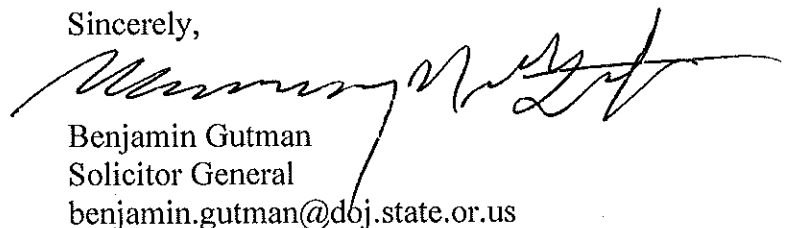
To be sure, some of those opinions rely on analysis that is no longer sound in view of more recent case law. The opinion on Governor Romney, for example, suggested that the Secretary generally has only a “ministerial” role in preparing the ballot. 33 Op Atty Gen 504. More recent decisions have confirmed that the Secretary has “the responsibility of determining, in the first instance, whether a prospective candidate is qualified to

appear on the ballot.” *Kristof*, 369 Or at 278; *see also McAlmond v. Myers, Corbett*, 262 Or 521, 525, 500 P2d 457 (1972) (“the Secretary of State has a duty to withhold certification of a candidate who he knows is ineligible, even though the candidate received the highest number of votes in the primary election”). But in our view the underlying conclusion remains correct. The rulings in cases like *Kristof* and *McAlmond* turned on the specific statutory authority to verify a candidate’s filing that, by statute, had to include a statement of qualification. *Kristof*, 369 Or at 277–78; *McAlmond*, 262 Or at 525. As explained above, no such statement of qualification is required of candidates for the presidential preference primary election.

This letter analyzes the statutes that apply to that primary election and therefore is limited to the Secretary’s responsibility with respect to the primary ballot. We recognize that the same question may come up with respect to the general election if Donald Trump is nominated at the Republican National Convention. But because it is not clear whether that will happen, and because there is already litigation in other states that may lead to precedential rulings on the application of Section 3 of the Fourteenth Amendment to these circumstances, we think it would be prudent to defer consideration of the general-election question at present.

Whether Section 3 bars former President Trump from returning to office is a question of paramount importance to American democracy. But it is not a question that the legislature has charged the Secretary with determining when assembling a list of candidates at the primary election stage. Instead, that important question must be resolved in the first instance by other participants in the selection process such as the convention delegates and ultimately, in an appropriate case, by the courts. Nothing in this letter should be taken to suggest that Section 3 is unenforceable or to express an opinion one way or the other on the merits of the Section 3 question.

Sincerely,



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