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March 30, 2017

Honorable Holly Schepisi
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Dear Assemblywoman Schepisi:

You have asked for a legal opinion concerning the extent to which the Legislature's authority to institute ballot access restrictions for candidates seeking federal elective office is limited by the United States Constitution.

It is the opinion of Legislative Counsel that the Qualification Clauses in Articles I and II of the United States Constitution constrain the Legislature's power to restrict candidates for federal elective office from appearing on the ballot. The extent to which the Legislature may restrict ballot access for federal candidates is not well settled, but the constitutionality of any restriction will depend on whether the restriction imposes a procedural burden, which is permissible, or an additional qualification for federal office beyond those required by the Constitution. Moreover, laws that have the purpose and effect of handicapping a particular class of candidates may infringe upon rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The Constitution requires popular elections for members of the House of Representatives and the Senate. U.S. Const. Art. I, Sec. 2, cl. 1; U.S. Const. Amend. XVII. Conversely, individual citizens have no federal constitutional right to vote for electors for the President of the United States, unless and until a state legislature chooses a statewide election as the means to appoint members of the Electoral College. Bush v. Gore, 531 U.S. 98, 104 (2000). The Constitution empowers each state's legislature to select the manner for appointing members of the Electoral College. U.S. Const. Art. II, Sec. 1, cl. 2. For this reason, the State may possess more leeway to regulate presidential election procedures than congressional

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election procedures. Therefore, this opinion analyzes the Legislature's authority to regulate presidential elections and congressional elections separately.

Congressional Elections

Qualification Clauses

The United States Constitution sets forth the qualifications required of members of the House of Representatives and the Senate as follows:

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[U.S. Const. Art. I, Sec. 2, cl. 2.]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[U.S. Const. Art. I, Sec. 3, cl. 3.]

Relying on the Qualification Clauses in Article I of the Constitution, the Supreme Court upheld the invalidation of an amendment to the Arkansas Constitution that prohibited a candidate for the House of Representatives or the Senate from appearing on the general election ballot if the candidate had already served three terms in the House or two terms in the Senate. United States Term Limits v. Thornton, 514 U.S. 779 (1995). In Thornton, the Court rejected the argument that term limitations were merely a procedural requirement and a permissible exercise of the state's power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" pursuant to Article I, Section 4, Clause 1 of the United States Constitution. The Court stated that "allowing States to evade the Qualifications Clauses by dressing eligibility to stand for Congress in ballot access clothing trivializes the basic principles of our democracy that underlie those Clauses." Id. at 831 (internal quotations omitted).

In Thornton, the Court reviewed the history of Article I, Section 4, Clause 1 of the Constitution and determined that the "Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes

of candidates from federal office.” Id. at 832-33. During the Constitutional Convention debates, James Madison illustrated the procedural focus of that clause by noting that it covered “whether the electors should vote by ballot or viva voce[;] should assemble at this place or that place; should be divided into districts or all meet at one place[;] should all vote for all the representatives; or all in a district vote for a number allotted to the district.” Id. at 833 (citing 2 Records of the Federal Convention of 1787, p. 240 (M. Farrand ed. 1911)). The Thornton Court also cited a litany of lower court decisions that had invalidated ballot access restrictions for candidates for the House of Representatives and the Senate on the basis that the restrictions added an additional qualification for office beyond what the Constitution required. Thornton, supra, 514 U.S. at 798-99.

Not every law enacted by a state that restricts a candidate’s access to the ballot imposes constitutionally suspect burdens. The Court has recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Storer v. Brown, 415 U.S. 724, 730 (1974). Courts have distinguished between statutes seeking to impose a procedural burden upon candidates for federal office from those statutes that impose qualifications for federal office beyond those required by the Constitution.

In Storer v. Brown, the Court evaluated the constitutionality of a California statute prohibiting candidates for the House of Representatives from appearing on the ballot as an independent if the candidate voted in the immediately preceding primary election or if the candidate had a registered affiliation with a political party at any time within the prior year. The statute also required that independent candidates file nomination papers signed by a specified percentage of the vote cast in the preceding general election to obtain a ballot position. The Court held that the statute did not violate the Qualification Clauses of the Constitution because the requirements no more established an additional requirement for the office of Representative than requiring that candidates win a primary election, or otherwise demonstrate popular support, to secure a place on the general election ballot. Id. at 746, n. 15.

First and Fourteenth Amendments

Ballot access requirements that do not go so far as to impose an additional qualification for office, nevertheless, may violate constitutional protections embodied in the First and Fourteenth Amendments to the United States Constitution. The First Amendment guarantees “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). The First Amendment protects freedom of association against federal encroachment and the Fourteenth Amendment extends the same

protection against infringement by the States. Ibid. The First and Fourteenth Amendments limit the procedural burdens States may impose upon candidates seeking elective office.

In exercising their power to regulate the “Times, Places, and Manner of holding Elections,” states inherently impose some burden upon individual voters and candidates. Burdick v. Takushi, 504 U.S. 428, 433 (1992). In considering a constitutional challenge to an election law, a court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’” Id. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). The severity of the burden that the election law imposes on the voter’s rights dictates the level of scrutiny applied by the court. Ibid. When an election regulation imposes severe restrictions, the state must narrowly tailor the regulation to advance a state interest of compelling importance. Ibid. When an election law provision imposes only reasonable, nondiscriminatory restrictions upon First and Fourteenth Amendment rights, the state’s regulatory interests are generally sufficient to justify the restrictions. Ibid.

In deciding which standard to utilize in evaluating a Hawaii statute prohibiting write-in voting and requiring all candidates to participate in an open primary, the Burdick Court stated:

It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.

[Id. at 440, n. 10 (citations omitted).]

The Burdick Court held that the Hawaii statute did not unconstitutionally limit access to the ballot and did not unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot. The Court noted that any burden that the statute inflicted on voters’ freedom of choice and association was a very limited one, given that the state provided for easy access to the ballot, and there was nothing content-based about a flat ban on all forms of write-in ballots. An election restriction that does not apply to all political parties equally, however, may violate the First and Fourteenth Amendments to the United States Constitution. See Anderson, supra, 460 U.S. at 793 (discussed infra).

The legal authority of the State Legislature to impose a ballot access requirement upon congressional candidates will depend, in large part, upon whether the requirement imposes additional qualifications for the office beyond the qualifications set forth in Article I of the Constitution. The State Legislature has the power to impose regulations to ensure fair and

honest elections. In the past, courts have upheld ballot access restrictions that require prospective candidates to hire a campaign treasurer, disavow party affiliations to run as an independent, and demonstrate popular support for their candidacy.¹ In other instances, courts have invalidated state-imposed term limits, district residency requirements, loyalty oath requirements, and restrictions on those convicted of felonies on the basis that the restrictions imposed additional qualifications for federal office beyond those required by the Constitution.² However, even restrictions that do not rise to the level of imposing an additional qualification must be implemented in an evenhanded manner to avoid violating the First and Fourteenth Amendments to the United States Constitution.

Presidential Elections

Similar to the Qualification Clauses of Article I, setting forth the requirements for holding congressional office, the Constitution sets forth minimum requirements for holding the Office of President of the United States as follows:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[U.S. Const. Art. II, Sec. 1, cl. 5.]

¹ The Court of Appeals of Maryland upheld a state statute requiring candidates to appoint a campaign treasurer to appear on the ballot. A candidate for Congress challenged the statute upon the grounds that it imposed an additional qualification for the office of Representative beyond the qualifications set forth in Article I, Section 2, Clause 2 of the United States Constitution. The Court of Appeals of Maryland rejected that argument, holding that requiring the appointment of a campaign treasurer does not impose an additional qualification for congressional candidates in violation of the Constitution. Secretary of State v. McGucken, 222 A.2d 693 (Md. 1966).

² Courts have abrogated, as additional qualifications, restrictions in the form of term limits, Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994); Stumpf v. Lau, 839 P.2d 120 (Nev. 1992), district residency requirements, Hellmann v. Collier, 141 A.2d 908 (Md. 1958); Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968); State ex rel. Chavez v. Evans, 446 P.2d 445 (N.M. 1968), loyalty oath requirements, Shub v. Simpson, 76 A.2d 332 (Md. 1950); In re O'Connor, 173 Misc. 419 (N.Y. Sup. Ct. 1940), and restrictions on those convicted of felonies, Application of Ferguson, 57 Misc.2d 1041 (N.Y. Sup. Ct. 1968); Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950); State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918).

The Supreme Court of the United States has not explored the limitations of the Qualifications Clause in Article II in depth, as challenges to ballot access restrictions in presidential contests have centered upon the rights guaranteed by the First and Fourteenth Amendments to the Constitution. For example, in Anderson, supra, the Court invalidated an Ohio statute setting an early deadline for independent candidates for President to declare their candidacy. The early deadline burdened independent voters by restricting independent candidates, while allowing the major parties' candidates to declare their candidacy closer to Election Day. The Court held that the "extent and nature" of the burdens that the early deadline placed on the voters' freedom of choice and freedom of association, outweighed the State's minimal interest in imposing the deadline. Anderson, supra, 460 U.S. at 806.

The Anderson Court expressed concern about the effect that allowing states to enact a varied patchwork of ballot access requirements could have on a national election. The Court maintained that, in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. Id. at 794-795. A state's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Id. at 795. The Court noted that a state has a less important interest in regulating presidential elections than statewide or local elections, because voters beyond the state's boundaries will largely determine the outcome of presidential elections. Ibid.

Notwithstanding the Anderson Court's concerns about an individual state's influence over a national election, just seventeen years later, the Court ruled in Bush v. Gore that there was an Equal Protection Clause violation in using different standards of counting votes in different counties within the same state. Significantly, the Bush Court recognized a much broader authority of states to administer the presidential election process. The Court declared that a state "legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution" Bush, supra, 531 U.S. at 104. Article II of the Constitution "conveys the broadest power of determination" and "leaves it to the legislature exclusively to define the method of appointment." Id. at 113 (quoting McPherson v. Blacker, 146 U.S. 1, 27 (1892)).

In discussing ballot access restrictions for presidential candidates, the Supreme Court in Anderson highlighted the national impact on presidential elections of an Ohio statute setting an early filing deadline for independent candidates. The Court expressed trepidation over the prospect of a single state's regulations influencing the outcome of a national election. In the subsequent Bush decision, however, the Court recognized a much broader authority of states to administer the presidential selection process. The Bush Court asserted that states have greater leeway in regulating presidential elections because of the states' constitutional

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“plenary” authority over selecting the manner for appointing members of the Electoral College. Bush, supra, 531 U.S. at 104.

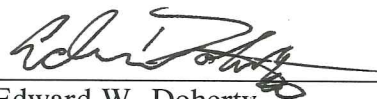
One common theme found in the holdings of both Anderson and Bush is that treating voters or candidates for federal office in an inconsistent manner, without sufficient justification, violates the provisions of the First and Fourteenth Amendment. Therefore, any ballot access requirement implemented by the State Legislature must treat all candidates for the office equally to have a greater likelihood of surviving a constitution challenge. Moreover, the success of any challenge to a ballot access restriction applicable to a presidential election may turn on whether the reviewing court adopts the more expansive view of state power over presidential contests expressed in the Bush decision, over the more narrow view of state power expressed by the Anderson Court.

Conclusion

In conclusion, it is the opinion of Legislative Counsel that the Qualification Clauses in Articles I and II of the United States Constitution and the First and Fourteenth Amendments to the United States Constitution constrain the Legislature’s power to restrict candidates for federal elective office from appearing on the ballot. Although the Legislature may regulate the “Times, Places, and Manner of holding Elections,” the Legislature cannot add qualifications for federal office beyond those set forth in the Constitution. Moreover, the Legislature must apply any ballot access restriction it implements in an evenhanded manner to avoid violating the voters’ freedom of choice and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Very truly yours,

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JK: D