

(Intro music)

Chief Justice John Roberts: We'll hear argument this morning in case 23-719, Trump versus Anderson.

Kelsey Reichmann: Welcome, listeners, to a special breaking news episode of Sidebar, a podcast by Courthouse News. I'm your host, Kelsey Reichmann, with news from the Supreme Court. In a unanimous decision earlier today, the Supreme Court ruled to keep Donald Trump on Colorado's presidential primary ballot, a decision that reverberates across the nation to stop other states from removing him from their ballots. All nine justices agreed that Colorado did not have the authority to remove Trump using Section 3 of the 14th Amendment, but the court split 5-4 on who should have the power to disqualify presidential candidates. The ruling settles a contentious debate, as states issue conflicting decisions about whether the former president's actions on January 6, 2021, should bar him from running for president in 2024. Lucky for us, we have Amanda Pampuro in Denver to break down how we got here. Amanda, can you help us understand how the Colorado courts decided to remove Trump from the ballot?

Amanda Pampuro: Last September, six voters sued Colorado's secretary of state, asking her to keep Trump's name off the ballot. The voters said that following the 2020 election, Trump sowed disinformation and tried to overturn the results of a legitimate election. Then, he called supporters to meet in D.C. on January 6, 2021, where he told them to march to the U.S. Capitol, disrupting the counting of electoral votes. There is a bogus conspiracy theory he helped popularize that if Vice President Mike Pence refused to count the electoral college votes, it would force state legislatures to submit new votes through which Trump could initiate a second election and win. A large enough group of supporters took the call to heart and marched on the Capitol building, forcing their way in and sending elected officials to flee for their lives. Five people died during the attack, there was \$30 million in property damage and we've seen hundreds of indictments against the people who breached the building. Four of the Colorado voters who sued are Republicans, including a conservative columnist for the Denver Post and a former House speaker. They said that Trump incited an insurrection against the U.S. Constitution, and so Section 3 of the 14th Amendment bars him from holding office. They wanted Trump's name taken off the ballot so people wouldn't waste their vote on someone ineligible for the White House. A Denver judge held an expedited bench trial and found Trump engaged in insurrection, but she was hesitant to pull him from the ballot because she found the 14th Amendment ambiguous. The Colorado Supreme Court reversed 4-3, finding Trump engaged in insurrection and so he cannot hold office. And, by the way, the three state judges that sided with Trump said the state elections law was the wrong arena for the issue entirely.

KR: And now we're here because Trump and the Colorado Republican Party appealed the case to the U.S. Supreme Court, asking the justices to decide if the Colorado court had the authority to use Section 3 to remove Trump from the ballot. The heart of Trump's argument before the Supreme Court was that presidents are not subject to Section 3. Trump says that Section 3's disqualification only applies to those who had previously taken an oath to support the Constitution as a member of Congress, an officer of the United States, a member of any state legislature or an executive or judicial officer of any state. Since Trump has never held office as a legislator, state executive or judge, the only category left is an officer of the United States.

AP: That makes him perhaps the only president in U.S. history since George Washington to whom the 14th would just technically not apply.

KR: Trump argued it was improper to consider him an officer because presidents appoint officers, like ambassadors, to their posts. Trump says his oath as president never said he would support the Constitution, as the language in Section 3 notes. Instead, Trump said he promised to preserve, protect and defend the Constitution. Here's his attorney, Jonathan Mitchell.

Jonathan Mitchell: President Trump is not covered by Section 3 because the president is not an officer of the United States as that term is used throughout the Constitution. Officer of the United States refers only to appointed officials and it does not encompass elected individuals such as the president or members of Congress.

KR: Trump also said state courts and legislators shouldn't get to enforce Section 3 without approval by Congress. This is a little bit of a sticky argument, so I talked to Mark Graber, a law professor at the University of Maryland, to break it down.

Mark Graber: Well, the idea is that Section 3 is not self-executing, that just as the United States could repeal laws and slavery would be legal in the United States, so if Congress doesn't make any laws, disqualified candidate Jefferson Davis is free to run for president or hold any other office. That's the logic. Notice saying it that way, it applies to no other provision of the 13th and 14th amendments.

AP: But does Section 3 include a pretty clear rule for Congress? The text says Congress can remove the disability any time with a two-thirds vote in Congress and keep Trump in the running without the Supreme Court.

KR: That's right, but some lawmakers thought they couldn't utilize this authority alongside Colorado's ruling. A group of Republicans, led by Texas Senator Ted Cruz, told the justices that the state court's removal of Trump from its ballot prevented Congress from acting here. Basically, Cruz's argument said that without Trump on the ballot, there would be no way for Congress to exercise its Section 3 power to remove a disability. That result, in Cruz's opinion, unconstitutionally limits Section 3's disability removal provision.

AP: Oh, and that makes sense, because the examples we have from history are of Section 3 being used to stop elected officials from taking their seats in Congress after they were elected. But the Colorado voters want to just block an ineligible candidate from the get-go.

KR: This idea really picked up steam during oral arguments, where many justices were receptive to the claim that Colorado overstepped its authority in removing Trump from the ballot. The justices asked a lot around the role of Congress, a key indicator that the court thought lawmakers had a bigger role in disqualifying presidential candidates. Chief Justice John Roberts seemed to summarize why the justices keyed in on this issue.

JR: If Colorado's position is upheld, surely there will be disqualification proceedings on the other side and some of those will succeed. Some of them will have different standards approved. Some of them will have different rules about evidence. Maybe the Senate report won't be accepted in others because it's hearsay, maybe it's beyond a reasonable doubt, whatever. In very quick order, I would expect, although my predictions have never been correct, I would expect that a goodly number of states will say whoever the Democratic candidate is, you're off the ballot, and others, for the Republican candidate, you're off the ballot, and it'll come down to just a handful of states that are going to decide the presidential election. That's a pretty daunting consequence.

KR: Constitutional issues aside, Trump says even if Section 3 applies to presidents, his actions on and leading up to January 6th do not constitute an insurrection. Amanda, what did the trial court determine about Trump engaging in an insurrection?

AP: During the Colorado trial, the voters relied heavily on the select January 6th committee report generated by Congress, which they said laid out a clear timeline of Trump's actions driving the attack. Trump's attorneys repeatedly tried to get this document thrown out, calling it a political hit piece and not the result of a serious, objective investigation. Judge Sarah Wallace admitted chunks of the report as evidence and noted Trump didn't really introduce his own evidence to refute the findings. The judge analyzed Trump's speech as prepared, along with the additions he made on the fly, little rants about Mike Pence and the like. Trump's team also submitted a reel from Democratic lawmakers encouraging supporters to fight, fight for your vote, fight for your life, arguing that the things he said on January 6th were protected political speech and common rhetorical moves. His attorneys also cited two interesting cases: the 1969 Supreme Court decision in *Brandenburg v. Ohio*, which found the state violated the rights of a KKK leader who had wanted to broadcast a rally. Trump's attorneys also pulled parallels between the facts in the ballot case and a 2016 case against Trump, *Nwanguma v. Trump*, where a Kentucky judge declined to hold Trump responsible for the actions of supporters who assaulted a protester he demanded be removed from a campaign event. Trump's lawyer said if the court doesn't accept, quote "Get them out of here" as incitement, then quote, "Fight for your country" and quote, "Let's walk down to Pennsylvania Avenue," can't possibly rise to incitement either.

KR: Trump's lawyer, Jonathan Mitchell, refused to call January 6th an insurrection during oral arguments, referring to it as a riot in an exchange with Justice Ketanji Brown Jackson.

Ketanji Brown Jackson: What is your argument? That it's not? Your reply brief says that it wasn't, because I think you say it did not involve an organized attempt to overthrow the government.

JM: That's one of many reasons, but for an insurrection there needs to be an organized, concerted effort to overthrow the government of the United States through violence and this riot...

KBJ: So, the point is that a chaotic effort to overthrow the government is not an insurrection?

JM: No, we didn't concede that it's an effort to overthrow the government either, Justice Jackson. Right, none of these criteria were met. This was a riot. It was not an insurrection. The events were shameful, criminal, violent, all of those things, but it did not qualify as insurrection as that term is used in Section 3.

KR: Trump attacked the state court's finding before the Supreme Court, telling the justices that a candidate's eligibility for president shouldn't hinge on testimony from a sociology professor opining on coded messages from the president to his supporters. Trump also resisted claims that he did not try hard enough to stop the violence at the Capitol by stating that inaction does not equate to engaging in an insurrection.

AP: The Colorado voters stood by the state court's findings, telling the Supreme Court that the 14th Amendment doesn't give a free pass to insurrectionist presidents. Once again, they argued presidents hold office and are therefore officers under Section 3. The voters came back to Section 3's original intent to keep oath-breaking insurrectionists from walking right back into power.

KR: Here's Jason Murray, who argued in favor of the Colorado voters before the Supreme Court.

Jason Murray: We are here because, for the first time since the War of 1812, our nation's capital came under violent assault. For the first time in history, the attack was incited by a sitting president of the United States to disrupt the peaceful transfer of presidential power by engaging in insurrection against the Constitution. President Trump disqualified himself from public office.

KR: It's important to contextualize the Supreme Court's role in reviewing determinations by trial courts. Appellate courts are only supposed to overturn trial court determinations if the court's finding of fact is clearly erroneous. Colorado voters point to the extensive review by the trial court and all the evidence supporting the determination that Trump engaged in an insurrection on January 6.

AP: There's one argument for keeping Trump on the ballot that I have been struggling with. Why can't voters just decide who they want to choose for president? That's why we have elections. If the evidence pointing to Trump's involvement in the insurrection is so clear, why not get voters a chance to push him out on their own?

KR: The group that brought this case says Section 3 should apply just as any other presidential qualification. Here's Martha Tierney, an attorney supporting the voters before the court.

Martha Tierney: There are many qualifications in the Constitution. I might like to vote for Barack Obama for president again, but I can't because he's not qualified. I might want to vote for Taylor Swift for president, but she's not 35, so I can't vote for Taylor Swift. I might want to vote for Arnold Schwarzenegger for president, but I can't because he is not a natural born citizen. So, these are qualifications in the Constitution, and Section 3 of the 14th Amendment is just one more. So, to say that we should ignore it is inconsistent with following the rule of law. We have a Constitution and we follow it in this country, and so, while I understand that people, there will be people who are disappointed, I don't think that we can just throw out or willy nilly pick which provisions of the Constitution we're going to abide by and others we're going to ignore. That's just not how it works.

KR: The Supreme Court's decision comes on the eve of Super Tuesday. Although voters will have little notice on Trump's eligibility, his name still appears on Colorado's ballot because the state high court ruling was put on pause while the justices decided this case. The nine justices agreed to reverse Colorado's ruling but there was division on Section 3's enforcement. In an unsigned opinion, five of the justices said Section 3 could only disqualify state office holders, not federal candidates. While the ruling is unsigned, the decision comes from Chief Justice John Roberts, along with Justices Clarence Thomas, Samuel Alito and Neil Gorsuch. Those justices said that only a united voice could decide federal offices and allowing states to enforce Section 3 would create a patchwork of election results. The justices said nothing in the Constitution requires that chaos. However, the five justices did not stop there, which is the point of contention for the other four justices. The majority strictly limited Section 3's enforcement, writing that disqualification can only occur using congressional legislation. Justice Amy Coney Barrett broke with her conservative colleagues on this point. Barrett said she would have limited the court's ruling to reversing Colorado's decision and finding that states lacked the power to enforce Section 3. Barrett said the justices who disagreed with the rest of the opinion had to decide how to respond. Barrett wrote that now was not the time to amplify disagreement. She said in political rulings such as this one, the court needed to turn the national temperature down, not up. Justices Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson wrote separately to criticize the majority's ruling. Unlike Barrett,

the liberal justices were not shy about their disagreement with the majority ruling, which they said lacked judicial restraint. The liberal justices said the court should not have opined on Section 3 enforcement and they said by doing so, the court had essentially insulated all alleged insurrectionists from future challenges to their holding a federal office. The justices said the majority had decided novel constitutional questions when it should have only decided Trump's disqualification. The impact of the Supreme Court's ruling in the near future is easier to predict than how this ruling could be viewed in the decades to come. Graber errs on the side of caution, preferring to predict the past over the future.

MG: I am just extraordinarily good, I'm great at predicting the past. I'm willing to bet on last year's Super Bowl. I'll give you odds. I'm less good at predicting the future, and I said it's a very messy case and there are lots of alternatives. And the only thing I will say with a great deal of confidence is everyone will try to spin whatever the court does as a reason to vote for them. So, we'll see lots of spin and we really won't know its historical significance until years from now. People will no doubt get on the media and tell you its historical significance five seconds after the decision is handed down, but we don't know that.

KR: Thank you, listeners, for joining us for this breaking news update. For more news from the Supreme Court and across the nation, check out [courthousenews.com](https://www.courthousenews.com). And if you liked this episode and wanted to share your thoughts, leave us a review on Apple Podcasts. Finally, check out our social media pages for more from your favorite legal news outlet. See you next time.