

CHAPTER 2:

STATE REGULATION OF CANDIDACIES AND CANDIDATE BALLOT ACCESS

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I. INTRODUCTION

It is axiomatic that before a candidate can be elected to office, the candidate's name must appear on the ballot, or she must be allowed to mount a write-in candidacy. States may regulate candidate ballot access or write-in candidacies as part of their general regulatory power over federal, state or local elections¹ as long as the regulations comport with federal and state

¹ Lubin v. Panish, 415 U.S. 709, 715 (1974) (noting the importance of limiting ballots to a reasonable size and serious candidates with some prospects of public support was not open for debate although the method by which a candidate's seriousness was tested might be).

constitutional protections.² These protections exist because the state's interest in limiting ballot access is contrary to both the interests of potential candidates and voters who share an interest in expanding ballot access.

States regulate candidate ballot access to further their interests in:

- holding orderly elections with serious, rather than frivolous, contenders,
- promoting electoral integrity
- limiting voter confusion caused by lengthy ballots,
- preventing fraud
- enhancing political stability by increasing the likelihood that the winner receives a majority of the votes, and
- supporting finality by reducing the need for run-off elections.³

A state may regulate both primary and general election ballot access and may set stricter standards for the general election because of the state's legitimate interest in reserving the general election for major political struggles.⁴

Candidates have an interest in ballot access because without it their candidacies are difficult or impossible to maintain. The right to be recognized as a candidate is a privilege of state, not national, citizenship. Indeed, the federal constitution does not recognize a fundamental right to candidacy.⁵ Thus, the legal effect of a candidate's ballot access interest varies by state and depends on whether the state constitution recognizes a fundamental right to candidacy.⁶

Voters have an interest in candidate ballot access requirements because voting for their preferred candidate is one means through which voters exercise their constitutionally-protected interest in associating with politically like-minded individuals.⁷ This protected interest is burdened if the state ballot access laws are overly restrictive and few candidates gain ballot access. State ballot access requirements must not restrict the right to vote by so heavily burdening prospective candidates that few candidates (or only those candidates affiliated with the major political parties) qualify for ballot access.⁸ In recognition that state candidate ballot

² III. *State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (“[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973))). *But see Anderson v. Celebreeze*, 460 U.S. 780 (1983) (noting that a state's interest in regulating ballot access for a nationwide Presidential election is not as strong as when it regulates elections for state and local offices).

³ See *Panish*, 415 U.S. at 715-16 (recognizing a state's legitimate interest in offering “ballots of a reasonable size limited to serious candidates with some prospects of public support”).

⁴ *Storer v. Brown*, 415 U.S. 724, 735 (1974).

⁵ *Snowden v. Hughes*, 321 U.S. 1 (1944) (noting state constitutions may recognize a right to candidacy).

⁶ See *White v. Manchin*, 318 S.E.2d 470 (W.Va. 1984) (noting the state constitution recognized a fundamental right to candidacy).

⁷ See *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (requiring that states must examine candidate access restrictions by the extent and nature of the impact they have on voters). See also *Panish*, 415 U.S. at 716 (commenting on the intertwining of candidates' and voters' rights and interests).

⁸ See *Williams v. Rhodes*, 393 U.S. 23 (1968) (finding it necessary to assess the “totality of the [] restrictive laws”).

access laws implicate voters' rights,⁹ when courts involved in a ballot access lawsuit weigh the competing interests, they generally weigh the state's interests against the voters'—not the candidate's—interests.

To qualify for ballot access, candidates usually need to satisfy a number of state statutory requirements. Some of these requirements—such as age, residency, citizenship, and education—are personal to the prospective candidate. Other requirements—such as those relating to petition signatures or political party nominations—are intended to demonstrate that the candidate has public support. Finally, before the state grants ballot access, the prospective candidate may need to pay a filing fee, resign from a current office, or satisfy other criteria.

The next section discusses the most common criteria state statutes require prospective candidates to personally satisfy to gain ballot access, followed by a discussion on public support requirements. Miscellaneous qualification requirements are discussed in the final ballot access criteria section. Legal challenges specific to a given ballot access requirement are addressed in the section discussing the requirement; a separate section is devoted to general legal challenges. Because candidates are not always able to maintain their candidacies through Election Day, the chapter concludes with a discussion on candidate withdrawal and substitution.

II. BALLOT ACCESS QUALIFICATION REQUIREMENTS

Many state candidate ballot access requirements concern qualities that are personal to the candidate, such as:

1. education or experience,
2. minimum age,
3. residency,
4. citizenship, and
5. qualified elector.

A. EDUCATION OR EXPERIENCE REQUIREMENTS

Education or experience requirements are common qualification criteria for ballot access by candidates who wish to run for judicial or prosecutorial offices as well as candidates for sheriff.¹⁰ The state constitution or state statutes may specify (or courts may need to ascertain):

- the deadline by which the requirements must be met,¹¹

⁹ *Storer*, 415 U.S. at 756; see also *Celebreeze*, 460 U.S. at 786 (noting the lack of a neat separation between the rights of candidates and the rights of voters because the laws affecting candidates have a “theoretical, correlative effect on voters” (quoting *Bullock*, 405 U.S. at 143)).

¹⁰ *Bowring v. Dominguez*, 44 P.2d 299 (Cal. 1935) (judgeship); *Gazan v. Heery*, 187 S.E. 371 (Ga. 1936) (judgeship); *Gamble v. White*, 566 So.2d 171 (La. Ct. App. 1990) (judgeship); *Hannett v. Jones*, 722 P.2d 643 (N.M. 1986) (judgeship); *State ex rel. Willis v. Monfort*, 159 P. 889 (Wash. 1916) (judgeship).

¹¹ See *Sears v. Bayoua*, 786 S.W.2d 248 (Tex. 1990) (measuring experience from Election Day, not at the time the winner would take office); *Bowring*, 44 P.2d 299 (holding that different statutory language meant

- whether the requirements are currently satisfied,¹² and
- whether the experience must be uninterrupted or whether earlier episodes can be “tacked” onto more recent ones to achieve the relevant amount of experience.¹³

B. MINIMUM AGE REQUIREMENTS

Many states have established minimum age requirements for candidates for state or local offices.¹⁴

Many age-related candidate qualification challenges concern the date the candidate must satisfy the requirement when the statute does not clearly specify one. The most common measuring dates or events are:

- the petition filing deadline,
- the date of the primary election,
- the date of the general election,
- the date the election results are certified, or
- the date the winner is sworn into office.

When statutes do not specify the date or event when the candidate must attain the required age, the court will need to determine it.¹⁵

C. RESIDENCY REQUIREMENTS

State-imposed candidate residency requirements are important derivative rights of voters because they protect voters from fraudulent candidacies.¹⁶ Residency requirements improve the likelihood that voters will have an opportunity to get to know all the candidates before selecting amongst them in the election. Residency requirements are also intended to ensure that candidates are familiar with the local political climate and can identify important constituent concerns.

Candidate residency requirements may contain 1) geographical and 2) durational components. Geographic requirements usually require the candidate to live in the political district served by

judicial candidates must satisfy experience requirements by the date of the election even though land surveyors and sheriffs had until the date they took office to gain the necessary experience).

¹² See *Monfort*, 159 P. 889 (holding that an attorney whose license to practice was suspended was ineligible to run for a judgeship). See also *Gamble*, 566 So.2d 171.

¹³ See *Hannet*, 722 P.2d 643 (holding that, notwithstanding plain statutory language, residency and legal practice requirements must be satisfied by the time “next preceding” the election and not aggregated over the candidate’s lifetime).

¹⁴ The Constitution establishes minimum age requirements for members of Congress and the President.

¹⁵ See *State ex rel. Sullivan v. Hauerwas*, 36 N.W.2d 427 (Wis. 1949) (holding, in the absence of statutory language specifying a date or event, that the candidate must satisfy the age requirement by Election Day).

¹⁶ *White v. Manchin*, 318 S.E.2d 470, 478-79 (W.Va. 1984).

the office to which the candidate aspires. Durational residency requirements specify the length of time the candidate must have resided in the specified district before she can run for office.

1. Geographical Residency Requirements

The concept of domicile is frequently used to assess whether a candidate whose residency has been challenged satisfies the residency requirement. Domicile is generally defined as the combination of:

- maintaining a residence—or presence—in a place, and
- the intent to remain in the location.¹⁷

Individuals may have more than one residence, but can only have one domicile at a time.¹⁸ When the domicile of a candidate with multiple residences is disputed, courts analyze the following factors to determine which location is the domicile:

- the physical character of each residence,
- the candidate's division of time between the residences,
- the candidate's actions in each location, and
- whether the candidate demonstrates an intention to return to the original domicile.

Once established, domicile presumably continues until a change is demonstrated. To establish a new domicile, the candidate must have:

- abandoned the old residence—that is, left it without a present intent to return to it as a primary residence, and
- acquired a new residence with the intent to remain.¹⁹

When a candidate whose residency is challenged claims that she has established a new domicile, courts must weigh the factors relating to each location to determine if a new domicile has supplanted the previous one. No single factor is conclusive, but if the prospective candidate lives and votes in the same location, that location is presumed to be his domicile.²⁰

If the candidate lives apart from her family, then the domicile inquiry focuses on the candidate's claimed residence and not where the candidate's family lives.²¹

District boundaries for state and local offices may shift, especially if they are based on congressional district boundaries that undergo redistricting every decade. These boundary shifts may leave prospective candidates who did not move in a new district where they may not

¹⁷ See *Manchin*, 318 S.E.2d at 482 (borrowing domicile definition from state divorce statutes when candidate qualification statutes do not define domicile), and *Darnell v. Alcorn*, 757 So. 2d 716, 719 ((La. App. 4 Cir. 1999) (finding actual domicile necessary to meet residency requirements; fictitious domicile insufficient).

¹⁸ BLACK'S LAW DICTIONARY 1335 (8th ed. 2004).

¹⁹ See *Oglesby v. Williams*, 812 A.2d 1061, 1069 (Md. 2002) (per curiam).

²⁰ *Id.* at 1069.

²¹ *Noble v. Meagher*, 686 S.W.2d 458, 462 (Ky. 1985).

meet residency requirements.²² When a candidate's residency has been involuntarily shifted between political districts, courts may be asked to determine which district boundaries apply and how residency requirements should be measured under the circumstances.

2. Durational Residency Requirements

Durational residency requirements specify the length of time candidates must live in the political jurisdiction they wish to serve before they run for office.²³ Durational residency requirements provide voters an opportunity to get to know the prospective future candidate and ensure that prospective candidates have an opportunity to familiarize themselves with local political concerns.²⁴

Courts have consistently upheld durational residency requirements for state-wide offices.²⁵ Durational residency requirements for local offices receive greater scrutiny than those for statewide offices because the two-way informational exchange used to justify them occurs more quickly in smaller political subdivisions.²⁶

In the absence of statutory language defining how to measure durational residency, courts may be asked to determine:

- the point in the election cycle a candidate must satisfy the durational residency requirement, or
- if the durational period must be met by uninterrupted residence or if interruptions are allowed.

D. CITIZENSHIP REQUIREMENTS

States can deny ballot access to non-citizens without violating the Constitution.²⁷

²² See *Clayton v. Kiffmeyer*, 688 N.W.2d 117, 124 (Minn. 2004). The court waived the geographical residency requirement for one election cycle for an incumbent judge attempting to qualify for ballot access for re-election who, after the judicial boundaries were shifted, no longer met the residency requirements for the office. The court held that no Equal Protection violation occurred when the challenger had to meet residency requirements but incumbent judicial candidate did not. In addition, because the office was judicial and not legislative, the court considered residency requirements to be less important because constituent representation was not involved.

²³ Note that durational residency requirements for voters are reviewed more strictly than durational residency requirements for candidates. See *infra* Chapter 5: State Regulation of Voters for additional information on durational requirements imposed on voters.

²⁴ *White v. Manchin*, 318 S.E.2d 470, 489-491 (W. Va. 1984) (upholding one year durational residency requirement for state senate).

²⁵ *Id.* at 489 (listing numerous cases upholding state durational residency requirements for state offices).

²⁶ *Id.* at 488 (listing long line of cases invalidating durational residency requirements for local offices).

²⁷ *Sugarman v. Dougall*, 413 U.S. 634, 650 (1973) (Rehnquist, J., dissenting).

E. QUALIFIED ELECTOR REQUIREMENTS

States sometimes require candidates to be “qualified electors”²⁸—that is, registered and eligible voters in the jurisdiction—before they can obtain ballot access. Prospective candidates can be denied ballot access if they are not registered voters, their voter registration information is not current, they have been disqualified from voting because of a felony conviction, they have been adjudicated incapacitated, or any other circumstance that impacts their qualified elector status.

III. PUBLIC SUPPORT REQUIREMENTS

Public support requirements further the state’s interests in limiting voter confusion brought about by cluttered ballots, enhancing political stability and promoting electoral integrity by reducing the number of spurious candidates on the ballot. Generally, states may constitutionally require third party, minor party, or independent candidates who do not qualify for automatic ballot access²⁹ to demonstrate a “sufficient modicum of support,”³⁰ or make a “preliminary showing of substantial support,”³¹ before receiving ballot access, even though these requirements burden voters’ associational rights. States may also require major political party-affiliated candidates, who usually receive automatic general election ballot access when they win the party’s nomination or prevail in a party caucus, to demonstrate some level of public support to qualify for the primary election ballot. States may also require major political party-affiliated candidates to satisfy any party-imposed qualification criteria.³²

A. PETITION SIGNATURE REQUIREMENTS

Many states require prospective candidates to demonstrate the seriousness of their candidacy by collecting a specified number of qualified voters’ signatures on petitions of support. The number of supporting signatures required is commonly a specified percentage of the state’s registered voters, a percentage of the voters who participated in a specified recent election, a percentage with a maximum cap, or a fixed number of signatures. Petition signature requirements that are too high may burden voters’ associational rights too severely to pass constitutional muster.³³

In addition to specifying the minimum number of supporting signatures the candidate needs to qualify for ballot access, state statutes usually regulate additional aspects of petition signature gathering, such as:

²⁸ See VA. CONST. art. IV, § 4 (listing candidacy qualifications for a seat in the General Assembly).

²⁹ The major political parties—the Democratic and Republican—as well as non-major political parties may qualify for automatic ballot access, although the specific candidate who will represent the party may not be known until decided by or through a party primary, convention, or nominating caucus.

³⁰ *Jenness v. Fortson*, 403 U.S. 431 (1971).

³¹ *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983).

³² See *infra* Chapter 3: State Regulations that Affect Political Parties for additional information on political parties.

³³ See *Storer v. Brown*, 415 U.S. 724 (1974).

- the maximum number of signatures a campaign may submit,
- who may sign the petition,³⁴
- who may circulate the petition,³⁵
- the time frame in which the petitions can be circulated, and
- the deadline for submitting the petitions.

Statutes may also regulate the wording and format of petitions as well as require witness or attestation statements.

Once prospective candidates submit their supporting petitions (and any other required paperwork) to election officials, election officials must review them for compliance to decide whether the candidate is granted³⁶ or denied ballot access. The review is an administrative process that may be subject to completion deadlines. With the passing of the petition submission deadline, state statutes may prohibit prospective candidates from filing alterations, corrections, supplements, or new petitions.³⁷ Thus, if enough signatures are disqualified³⁸ during the administrative review process to drop the candidate beneath the minimum number necessary for ballot access, the candidate may be prevented from submitting additional signatures and may fail to gain a spot on the ballot.³⁹

The state's interest in limiting voter confusion and enhancing political stability is not strong enough to justify all candidate ballot access restrictions. At some point, the burden placed on voters' associational rights by the candidate ballot access restrictions can be severe enough to outweigh the state's interest. In general, states unconstitutionally burden voters' associational rights when the state requires candidates⁴⁰ to provide more supporting signatures than the amount necessary to demonstrate a reasonable level of public support, if the petition filing deadlines occur so early in the election cycle that the issues and interests of the electorate have not yet crystallized,⁴¹ or if the totality of the petition requirements are overly restrictive. State

³⁴ States commonly require the petition signer to be a registered voter and live in the jurisdiction subject to the office. They may also require the signer to forego participating in another nominating process, such as a primary election.

³⁵ See *Ryan v. Bd. of Elections of City of New York*, 426 N.E.2d 739 (N.Y. 1981) (per curiam) (finding the redistricting plan that placed petition circulator's home 125 feet outside the redrawn boundary operated to invalidate the nominating petitions he circulated for lack of compliance with circulator residency requirements).

³⁶ If independent candidates satisfy ballot access requirements, state statutes might allow them to designate a political party label to run under. See *Greene v. Slusher*, 190 S.W.2d 29 (Ky. 1945) (upholding candidate's right to seek office under the "Law and Order Party" notwithstanding that no such party existed).

³⁷ See *State ex rel. Sturgill v. Lorain County Bd. of Elections* 164 Ohio App. 3d 272, 2005-Ohio-5660, 842 N.E.2d 78 (Ohio Ct. App. 2005) (per curiam); *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004).

³⁸ Disqualification requirements vary by state.

³⁹ See *Blankenship v. Blackwell*, 103 Ohio St. 3d 567, 2004-Ohio-5596, 817 N.E.2d 382.

⁴⁰ The burden might fall most heavily on independent candidates because, by their nature, they do not qualify for automatic ballot access as is frequently the case for a candidate running under a major political party label.

⁴¹ See *Anderson v. Celebreeze*, 460 U.S. 780, 790-92 (1983) (noting the difficulties early petition filing deadlines present to independent candidates, at least in a presidential election).

signature requirements are also unconstitutional when independent candidates must meet stricter requirements than those imposed on new political parties.⁴²

No bright-line rule distinguishes constitutional signature requirements from unconstitutional ones, although statutes that require prospective candidates to submit petitions signed by one percent or less of the locality's electorate appear to be allowable.⁴³ Instead, courts evaluate the constitutionality of petition signature requirements by assessing the interaction of a number of factors, such as the following:

- the number of signatures required to gain ballot access as a candidate for a given office,
- how the petition signature requirements for a given office compare to those for other offices in the same political subdivision,⁴⁴
- the amount of time candidates have to gather the signatures,
- how the petition signature deadlines for an independent candidacy compare with dates or deadlines applicable to party-supported candidates, such as the primary election, nominating convention, party caucus, or the date the party's nominee must be submitted to election officials,⁴⁵
- the extent to which the state restricts who may sign the petition,⁴⁶
- the level of support other states require prospective candidates to demonstrate to gain ballot access for comparable offices, and

⁴² See *Storer v. Brown*, 415 U.S. 724, 745-46 (1974) (noting independent candidates may be independent because they do not wish to be a part of a party structure and organization and thus should not be forced to adopt party attributes to be eligible for office).

⁴³ See *Jenniss v. Fortson*, 403 U.S. 431, 442 n.28 (1971) (citing *Williams v. Rhodes*, 393 U.S. 23, 47 n.10 (1968) (Harlan, J., concurring in result)). In addition to Justice Harlan's concurrence, the opinion itself noted that forty-two states required third parties to obtain supporting signatures from 1 percent or less of the electorate to achieve ballot access. See *Williams*, 393 U.S., at 33 n.9. See *infra* Chapter 3: State Regulations that Affect Political Parties for additional information on the constitutional aspects of public support requirements.

⁴⁴ Non-uniform petition signature requirements are ripe for attack. The ceiling, if one exists, on the signatures required to run for office in a large county should not be lower than the signature requirement resulting from an application of a percentage formula in smaller counties. See *State ex rel. Newell v. Brown*, 122 N.E.2d 105 (Ohio 1954) (finding unconstitutional a provision that required an independent candidate to meet a 7 percent signature requirement in eighty-seven counties but capping the number of signatures needed in the remaining county—the state's largest—with a fixed number that approximated a signature requirement of less than one-half of one percent).

⁴⁵ *Celebrezze*, 460 U.S. at 790-92 (1983). The court held that the requirements for independent or third party candidates to meet earlier petition filing deadlines than the deadlines applicable for candidates affiliated with political parties that are granted automatic ballot access are unconstitutional burdens on the voting and associational rights of the independent or third-party candidate's supporters, *id.* After the primary elections, voters know their options and if they would prefer additional candidates. If petition deadlines are before the primary elections, voters who are dissatisfied with the results of the primary are unable to seek an alternative candidate who more closely aligns with their political philosophy, *id.* at 804-05.

⁴⁶ See *Storer*, 415 U.S. at 740-41 ("[A] State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.").

- whether the state's ballot access regulations effectively limit ballot access to the two major political parties.⁴⁷

Because the totality of a state's ballot access regulations is important, petition signature requirements that exceed generally approved limits⁴⁸ may nonetheless be valid if they are mitigated by overall flexibility in the state's plan. For example, the U.S. Supreme Court upheld a state's ballot access regulations that required independent candidates or third parties to submit petitions with signatures of 5 percent of the total number of voters eligible to participate in the last election for the office the prospective candidate was seeking. While noting that the signature percentage requirement was higher than what many states require,⁴⁹ the court found the requirement constitutional because:

- the state's overall ballot access scheme was flexible,
- voters could sign a nominating petition even if they had already voted in a primary election, and
- voters could sign more than one candidate's nominating petition.⁵⁰

B. ADVANCEMENT FROM PRIMARY TO GENERAL ELECTION REQUIREMENTS

Although major political parties may be granted automatic access to both the primary and general election ballots as a matter of course, independent and third-party candidates may need to receive a specified level of support in a primary election to advance to the general election, as long as the requirements are constitutionally reasonable.⁵¹

Some states do not include the names of unopposed primary election victors on the general election ballot. This is an acceptable approach for state and local election, but unacceptable for federal elections because omitting even unopposed federal candidates from the ballot violates the requirement that federal officers are elected on a Uniform Federal Election Day.⁵²

IV. MISCELLANEOUS CANDIDACY REGULATIONS

In addition to meeting personal requirements and demonstrating public support for their candidacy, many states also require candidates to pay filing fees and regulate candidacies by limiting the ability of a candidate to change political parties, run for more than one office at a time, or run for new elective office while holding a government job. This section discusses the

⁴⁷ See *Celebreeze*, 406 U.S. 780.

⁴⁸ The Supreme Court appears to approve of 1 percent signature requirements. See *Jenniss v. Fortson*, 403 U.S. 431, 442 n.28 (1971) (citing *Williams v. Rhodes*, 393 U.S. 23, 43 n.10 (1968)).

⁴⁹ *Id.*

⁵⁰ *Id.* The court also noted that write-in votes were not limited, the petition submission deadline was the same as the deadline for political party's to submit the name of their nominee, and independent candidates had 180 days to circulate their petitions.

⁵¹ *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

⁵² See *Foster v. Love*, 522 U.S. 67 (1997).

most common additional restrictions placed on a candidate's ballot access and the legal issues that might arise with respect to those restrictions. As with the previous section, when challenges to these regulations involve special considerations, they will be discussed along with the regulation.

A. FILING FEES

Prospective candidates must usually pay a filing fee before their candidacy application is processed. In two 1970's-era decisions, the Supreme Court struck down the challenged filing fees as unconstitutional burdens on the associational rights of indigent voters.⁵³ The Court held that a candidate's wealth—as reflected by the candidate's ability to pay the substantial filing fees⁵⁴—had no direct bearing on the seriousness of the candidacy, his public support,⁵⁵ or his qualifications for the office;⁵⁶ thus, the filing fees did not support the state's interest in limiting ballot access to only serious candidates.

The unconstitutional filing fees exhibited the following characteristics:

- they were based on the salary for the office being sought,⁵⁷
- they covered the entire costs of the primary election without any contribution from taxpayer funds,⁵⁸ and
- they could not be waived even if a prospective candidate was unable, rather than merely unwilling, to pay them.⁵⁹

Although nominal filing fees appear to be constitutional, no bright line exists between nominal and overly burdensome filing fee requirements. What is certain, however, is that if a state's candidate filing fee regime does not allow for alternate means of ballot access it is vulnerable to a constitutional challenge,⁶⁰ and will be analyzed under heightened scrutiny.

⁵³ *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974). The court found that the filing fees meant that indigent voters were unlikely to be able to support an indigent candidate because the high filing fees would prevent the indigent candidate from qualifying from office.

⁵⁴ The filing fee at issue in *Bullock* was \$8900 in 1972, or the equivalent of more than \$40,500 in 2005, *Bullock*, 405 U.S. at 145. The filing fee at issue in *Lubin* was less, only \$875 in 1972 (or the equivalent of \$4470 in 2005), *Lubin*, 415 U.S. at 710. *Lubin* wanted to run for Los Angeles County supervisor, which required the payment of a non-refundable fee of \$701.60 (equivalent to \$3,200.07 in 2005) before the clerk would supply the forms necessary to begin the process. *Id.* See S. Morgan Friedman, The Inflation Calculator, <http://www.westegg.com/inflation/infl.cgi> (last visited December 6, 2006) for the inflation calculator used to obtain the updated dollar amounts.

⁵⁵ *Panish*, 415 U.S. at 717.

⁵⁶ *Bullock v. Carter*, 405 U.S. at 149.

⁵⁷ *Id.* at 138, 148-49; *Panish*, 415 U.S. at 710.

⁵⁸ *Bullock*, 405 U.S. 134.

⁵⁹ *Panish*, 415 U.S. 709 (noting that petition signatures could not substitute for the filing fees and that write-in candidacies also required payment of the filing fee or else the votes cast for the write-in candidate would not be counted); *Bullock*, 405 U.S. 134 (noting that neither write-in voting nor petition signatures substituted for payment of the filing fee).

⁶⁰ *Panish*, 415 U.S. at 718 (noting that requiring indigent candidates to pay filing fees they cannot pay is unconstitutional without other means of ballot access). Some states allow candidates to file additional supporting signature petitions in lieu of paying the filing fee. Whether the opportunity to mount a write-

B. DISAFFILIATION PERIODS

Some states require prospective candidates to officially disaffiliate from their previous political party before they may run for office under a different political party label or as an independent. States rely on their interest in supporting political stability to prevent party-splitting and excessive factionalism to justify disaffiliation requirements.⁶¹

Although disaffiliation requirements bar candidacies of individuals who do not decide to run for office early enough in the election cycle to comply with disaffiliation requirements, a failure to comply is nonetheless a valid absolute bar to ballot access.⁶² Disaffiliation requirements are independent of other candidacy qualification provisions and are not included in a “totality of the circumstances” analysis.⁶³ Presumably the length of time a disaffiliation statute requires a candidate⁶⁴ to abstain from running for office as an independent or under a new political party label can become excessively burdensome, but a constitutional upper limit on disaffiliation periods has not yet been identified. Instead, disaffiliation periods of six months,⁶⁵ one year,⁶⁶ and four years⁶⁷ have been upheld.

C. “SORE LOSER” LIMITATIONS

States legitimately use primary elections to winnow candidates, sort out intra-party differences, and reduce intra-party competition.⁶⁸ Through this use of the primary, states reserve the general election for the resolution of “major struggles” between political parties,⁶⁹ and justify their “sore loser” statutes.

Not all states have “sore loser” statutes, but in those that do, these statutes most commonly prohibit losing primary candidates from running for an office in the general election. The loser

in candidacy is an adequate substitute for ballot access conditioned on filing fees has not yet been determined. *See id.* at 719 n.5 (stating the dubiousness of suggesting a write-in candidacy option would be a reasonable alternative to a filing fee requirement in the absence of alternate means to get the candidate’s name on the ballot). *But see id.* at 723 (Blackmun, J., concurring) (suggesting that a filing fee might be constitutional if the state allowed write-in candidacies as a no-fee required alternative).

⁶¹ *See Storer v. United States*, 415 U.S. 724, 736 (1974).

⁶² *Id.* (finding the state’s interest in the integrity of its political process justified a one year party disaffiliation requirement before a candidate could gain ballot access to different party’s primary).

⁶³ *Id.* at 737 (noting why the *Williams* aggregation of election codes does not apply).

⁶⁴ Voters who wish to participate in a party primary may also need to satisfy disaffiliation requirements, although voter-targeted disaffiliation requirements are scrutinized more closely than those applicable to candidates. *See infra* Chapter 5: State Regulation of Voters for additional information on voter disaffiliation requirements.

⁶⁵ *Polly v. Navarro*, 457 So.2d 1140, 1143 (App. Ct. Fla. 1985) (upholding a six month disaffiliation requirement because it was less restrictive than *Storer*).

⁶⁶ *Storer*, 415 U.S. 724.

⁶⁷ *See State ex rel. Graham v. Board of Elections*, 397 N.E.2d 1204 (Ohio 1979) (per curiam) (upholding application of the state’s four year disaffiliation requirement in the absence of specific requirements in the charter city’s regulations).

⁶⁸ *Storer*, 415 U.S. at 735.

⁶⁹ *Id.*

of the primary may be prohibited from gaining ballot access to the general election ballot as an independent candidate or otherwise.

States without explicit “sore loser” statutes may nonetheless have other candidacy requirements that operate in a similar fashion. In one instance, a court found that a losing gubernatorial primary election candidate was ineligible to mount an independent general election candidacy because his primary candidacy was conditioned on his oath to abide by the primary election results.⁷⁰

D. FUSION CANDIDACIES

Fusion candidacies occur when the same individual runs as the nominee of more than one political party, generally a major party and a third-party. In usual practice, the third-party nominates a candidate who has already been selected as the major party’s nominee.⁷¹

Many states prohibit fusion candidacies. These prohibitions are constitutional because the character and magnitude of their burden on voters’ associational rights does not outweigh the state’s interest in political stability and ballot integrity.⁷² In addition, the restriction does not prevent multiple parties from endorsing the same candidate; it only limits the candidate’s name to appearing on the ballot under only one party’s label.⁷³

E. LIMITS ON THE NUMBER OF SIMULTANEOUS CANDIDACIES

Some states limit candidates to running or seeking nomination for only one office at a time,⁷⁴ including any combination of state, federal, and local offices.⁷⁵

F. RESIGNATION REQUIREMENTS

“Resign to run” statutes require current elective office holders to resign their office before they become candidates for a different elective office.⁷⁶ These statutes are constitutional because the

⁷⁰ Putnam v. Pyle, 232 N.W. 20, 24 (S.D. 1930) (per curiam) (noting it made no difference that the petitions supporting his independent candidacy were circulated by third-parties).

⁷¹ Fusion candidacies benefit both the third party and the major party. The third-party benefits from the increased visibility and influence it receives when the joint candidate receives votes under the third party label. If these vote totals are high enough, the party may qualify for automatic ballot access in a future election. The major party benefits because sharing its candidate reduces the number of competing candidacies even as it increases the overall number of voters who are attracted to the candidate, thereby increasing its candidate’s chance of winning the election.

⁷² Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369-370 (1997).

⁷³ *Id.*

⁷⁴ See OHIO REV. CODE ANN. § 3513.052 (LexisNexis 2007). See also MO. REV. STAT. § 115.351 (West 2007).

⁷⁵ See OHIO REV. CODE ANN. § 3513.052 (LexisNexis 2007).

⁷⁶ See TEX. CONST. art. XVI, § 65 (stipulating that some officeholders automatically resign when they announce their candidacy for another office if their unexpired term of office is greater than one year).

Constitution does not recognize a fundamental right to candidacy;⁷⁷ thus, they do not violate a political party's right to associate with the candidate of its choice. In addition, "resign to run" statutes place fewer restrictions on election officials than constitutional restrictions on civil servants' political activity in general.⁷⁸

If a state's constitution recognizes a right to candidacy, then a "resign to run" statute may violate the state constitution.

G. "INCREASED EMOLUMENTS" LIMITATIONS

State statutes or the state constitution⁷⁹ may prohibit individuals who in their previous position increased the "emoluments" or compensation of an office from seeking that position. Courts may be asked to determine if the prospective candidate's actions render her unable to qualify for ballot access because of these prohibitions.⁸⁰

H. TERM LIMITS

Term limits for elective federal offices other than the presidency are unconstitutional.⁸¹ States may, however, adopt term limits for state and local offices absent contrary provisions in the state constitution.

I. ELECTION CODE VIOLATIONS

State statutes may prohibit or restrict candidacies by individuals who violated election statutes during previous candidacies. Prospective candidates may sue over the applicability of these restrictions or their length.

One court upheld a five-year statutory candidacy ban a prospective candidate incurred for failing to file timely campaign finance reports following an earlier election.⁸² Another court held that the state's statutory lifetime ban on candidacies by individuals found guilty of fraud, bribery or willful violations of the election code was a legitimate *effect* of the punishment and was not itself additional punishment.⁸³

⁷⁷ *Clements v. Fashing*, 457 U.S. 957 (1982) (plurality).

⁷⁸ *Id.*

⁷⁹ See ALA. CONST. art. IV § 59.

⁸⁰ See *State ex rel. Todd v. Reeves*, 82 P.2d 173 (Wash. 1938) (finding that an increase in judicial pensions was not an "emolument," thus a legislator who voted for the increase was not prohibited from running for a judgeship).

⁸¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

⁸² *State ex rel. Lukins v. Brown*, 298 N.E.2d 132 (Ohio 1973).

⁸³ *Faust v. Fitzpatrick*, 2002 WL 1019059 (E.D. Pa. 2002).

J. WRITE-IN CANDIDACIES

Although many states may allow candidates who fail to gather sufficient petition signatures⁸⁴ to qualify for ballot access to mount a write-in candidacy, states can constitutionally prohibit write-in voting if their overall ballot access scheme is constitutional.⁸⁵ For example, a state that provided “easy access” to the ballot survived a constitutional challenge to its statutes that prohibited write-in voting in primary and general elections.⁸⁶

V. LEGAL ISSUES

Candidate ballot access-related lawsuits are generally either:

- compliance-based challenges, or
- constitutional challenges.

Compliance-based challenges allege that election officials erred when they granted or denied ballot access to a particular candidate. These lawsuits are based on the candidate’s compliance (or lack thereof) with state statutes governing candidacies and ballot access. Depending on whether the plaintiff is the spurned prospective candidate or an opponent of the candidate, the court is asked to add the candidate’s name to the ballot or to order it removed from the ballot. Constitutionally-based challenges target a specific state ballot access requirement or the state’s overall ballot access scheme. In these lawsuits, the petitioner asks the court to overrule the requirement(s) on state or federal constitutional grounds.

A. COMPLIANCE-BASED CHALLENGES

Compliance-based candidate ballot access challenges usually occur in one of two forms. First, a prospective candidate could sue on her own behalf, alleging she was denied ballot access even though she satisfied all ballot access requirements, and asking the court to order election officials to place her name on the ballot. Second, a voter, political party, or opposing candidate⁸⁷ could sue, alleging an ineligible candidate was granted ballot access, and asking the court to order election officials to remove the allegedly unqualified candidate’s name from the ballot or asking the court to enjoin election officials from counting ballots cast for the candidate if his name cannot be removed.

Under either circumstance, the plaintiff may need to pursue administrative remedies with the local board of elections, or its equivalent, before filing a lawsuit. Challengers may also need to file within a statute of limitations period or else lose the opportunity to challenge the decision.

⁸⁴ Or who decide to become candidates after petition or other deadlines have passed.

⁸⁵ See *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁸⁶ *Id.* at 436 (concluding the three separate methods to obtain ballot access in Hawaii resulted in “easy access”).

⁸⁷ State statutes may define who is an appropriate party to bring this type of lawsuit.

Courts prefer to hear and resolve candidate qualification challenges before the election. Settling these disputes early limits the instability that occurs when a winning candidate's qualifications for office are challenged post-election. The preference for pre-election resolution is so strong that some courts apply laches⁸⁸ to dismiss post-election candidate qualification challenges filed by opposing candidates who wait for the election's outcome and sue only if their opponent wins.

Any and all candidate requirements can be the focus of a compliance-related lawsuit. The error election officials' are most likely alleged to have made involves correctly ascertaining a candidate's compliance with one or more of the following ballot access requirements:

- nominating petitions,⁸⁹
- residency,
- experience, or
- non-affiliation or "sore loser" restrictions.

In general, courts interpret candidate qualification statutes reasonably and without burdensome "ultra-technical[ity]" because they impact voters' rights.⁹⁰ Because courts interpret election laws to "promote rather than defeat" candidacies,⁹¹ doubt about whether a candidate satisfies the qualifications is usually resolved in the candidate's favor.⁹² For example, one court decided the prospective candidate substantially complied with nominating petition requirements because the obsolete petition form he used contained all the required information, albeit in different locations.⁹³

The prospective candidate who challenges election officials' denial of her ballot access bears the burden of proving her ballot eligibility by a preponderance of the evidence. Likewise, the individual who sues to block or reverse a candidate's ballot access must prove the candidate's disqualification⁹⁴. A disqualification based on the candidate's alleged inability to satisfy

⁸⁸ Laches is an equitable doctrine (sometimes called an equitable defense) that courts use at the defendant's request to dismiss lawsuits where the plaintiff's delay in bringing the lawsuit prejudiced another party. See *infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

⁸⁹ Nominating petition problems include problems with the petition circulator's qualifications, insufficient signatures, improper signature or address information, and incomplete or incorrect information on the petition itself.

⁹⁰ *Heleringer v. Brown*, 104 S.W.3d 397, 405-06 (Ky. 2003) (Wintersheimer, J., concurring). See also *Nolan v. Cook County Officers Electoral Bd.*, 768 N.E.2d 216 (Ill. App. Ct. 2002) (noting courts take a cautious approach in interpreting statutes that set candidate ballot access requirements); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125, 1126 (Okla. 1991) (noting qualifications for ballot access were limited to the statutory language, thus the incumbent candidate's infirmities were insufficient reasons to remove his name from the ballot).

⁹¹ *Russell v. Goldsby*, No. 00-2595, p. 4 (La. 9/22/00); 780 So. 2d 1048, 1051 (2000).

⁹² *Id.*

⁹³ *Nolan v. Cook County Officers Electoral Bd.*, 768 N.E.2d 216, 220 (Ill.App. 2002) (noting it was not making a "sweeping statement" that substantial compliance would "satisfy all certification requirements" in the Election Code).

⁹⁴ *Goldsby*, 780 So. 2d 1048.

residency requirements, however, must be proven by clear and convincing evidence⁹⁵ because filing a false candidacy certification may subject the candidate to criminal penalties.⁹⁶

The outcome of the candidate compliance challenge may hinge on how or when the candidate's compliance is measured. Specifically, the candidate's compliance may depend on his status on a particular date, and the court may need to determine the appropriate measuring date.⁹⁷ Candidate qualifications are generally either measured in a "snapshot" or as an ongoing requirement.⁹⁸

Under a "snapshot" approach, candidate qualification criteria must be satisfied at a fixed moment in time. The most common measuring dates or events by which candidates must meet certain candidacy requirements are:

- the petition filing deadline,
- the date of the primary election,
- the date of the general election,
- the date the election results are certified, or
- the date the winner is sworn into office.

An alternative approach considers candidate qualification requirements to be ongoing requirements that must be satisfied throughout the election cycle. Under this approach, a candidate who satisfied qualification requirements when he filed his candidacy papers may fail to satisfy them at a later date by —perhaps by losing a required professional license or moving outside the political subdivision⁹⁹—and may find his candidacy challenged because of this later failure.

If state statutes do not specify whether the challenged qualification is measured at a fixed point or is an ongoing requirement, then the challenge's resolution may depend on the approach the court selects. For example, if candidates must satisfy qualification criteria on an ongoing basis rather than a single, fixed moment in time, it may be more difficult for the defendant to have the challenge dismissed because of laches as a result of his ongoing ineligible status was a continuing violation.¹⁰⁰

⁹⁵ Darnell v. Alcorn, 757 So.2d 716, 719 (La. Ct. App. 1999).

⁹⁶ See *In re Evans*, 547 A.2d 344 (N.J. Super. Ct. Law Div. 1988).

⁹⁷ See *State ex rel. Reynolds v. Howell*, 126 P. 954 (Wash. 1912) (acknowledging different ideas about when a candidate's eligibility is measured before deciding on the "majority view" that in the absence of specific language to the contrary, eligibility is measured at the time of election).

⁹⁸ State statutes may specify which approach to use. In addition, some requirements may be measured by the "snapshot" approach and others may be ongoing.

⁹⁹ Note that even if the first approach would allow a candidacy to continue if the candidate who initially qualifies later fails to meet the qualifications for office, if the candidate win the election, the candidate's qualifications to hold office can likely be challenged through a quo warranto action. See *infra* Chapter 11: Extraordinary and Equitable Relief for additional information on quo warranto.

¹⁰⁰ See *Polly v. Navarro*, 457 So.2d 1140, 1143 (App. Ct. Fla. 1985) (noting the candidate was not prejudiced in a seventy-four day delay in filing the challenge because if his candidacy is illegal now, he was never eligible for the office and has not been prejudiced by noting its illegality). Courts may also find laches inapplicable because if the candidate was ineligible for failure to meet a qualification requirement, then the plaintiff's delay in suing did not prejudice him. See *Melendez v. O'Connor*, 654

The remedy pool for most compliance-related candidate ballot challenges is limited, even for pre-election challenges. Assuming laches does not apply, all procedural requirements have been satisfied, and the challenger wins, courts will generally issue a writ of mandamus to:

- order election officials to add the qualified candidate's name to the ballot,¹⁰¹ or
- order election officials to remove or omit the unqualified candidate's name from the ballot.¹⁰²

If insufficient time exists to remove an ineligible candidate's name from the ballot, the court might instead declare the candidate ineligible to take office or advance to the next election stage should the candidate win the forthcoming election.¹⁰³ On occasion, courts have reserved the right to make a final determination on a candidate's eligibility until *after* the upcoming election has occurred.¹⁰⁴ When used sparingly, this practice avoids a pressured and hasty decision, and avoids the expense of rerunning the election.¹⁰⁵

N.W.2d 114, 117 (Minn. 2002) (per curiam) (holding that moving outside the district one wishes to represent leads to candidate ineligibility regardless of the timing of the eligibility challenge); *see also* *White v. Manchin*, 318 S.E.2d 470,479 (W.Va. 1984) (holding that delay of seven weeks in bringing challenge was insufficient to uphold a laches claim where any prejudice to the candidate was dwarfed by prejudice to the public if the candidate won the primary and was later determined to be ineligible).

¹⁰¹ Note that in a pre-decision order, Justice Stewart ordered Ohio to print a second set of ballots that included the one of the plaintiff's names (the other plaintiff applied too late for this remedy) for use if the plaintiff won ballot access because otherwise the Court's decision might come too late to allow for a meaningful remedy. *See Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968).

¹⁰² Note that making changes to the ballot takes time, whether the ballot is paper or electronic. In addition, absentee ballots are frequently mailed one month or more before Election Day and should reflect the ballot in use on election day. In practice, absentee ballot-related deadlines operate as unofficial deadlines for many other decisions that impact elections.

¹⁰³ *See Melendez v. O'Connor*, 654 N.W.2d 114 (Minn. 2002) (per curiam) (holding that a candidate who was declared ineligible because he did not meet statutory residency requirements would remain on the primary ballot because of time constraints, but his name could not be placed on the general election ballot if he won the primary); *see also Manchin*, 318 S.E.2d 470 (ordering certification of candidacy voided and no votes counted for the challenged candidate if his name could not be removed from the ballot where the candidate failed to meet durational residency requirements).

¹⁰⁴ *See Noble v. Meagher*, 686 S.W.2d 458 (Kent. 1985) (Stephens, C.J., dissenting). *See also Shelby County Election Commission v. Turner*, 755 S.W.2d 774 (Tenn. 1988) for an example of how a court used stays and other procedural devices to keep certain options available to it as the case progressed.

¹⁰⁵ Of course, if the court can determine the candidate's eligibility before the election, that outcome is preferred because it avoids rerunning the election. However, when the court cannot make an eligibility determination before the election (generally postponing the election is not feasible), then allowing the candidacy to continue while reserving the right to determine the candidate's eligibility after the election has a three-in-four chance of not requiring a new election. This occurs because the possible election outcomes are as demonstrated in the following table:

	CANDIDATE IS INELIGIBLE	CANDIDATE IS ELIGIBLE
CANDIDATE WINS	Results invalid; Rerun election	Results stand
CANDIDATE LOSES	Results stand	Results stand

One potential downfall to allowing the election to proceed without determining if a participant is eligible until after the election is that it creates the possibility that the electorate will not believe the court's post-election eligibility determination was not influenced by the election's outcome. In addition, if more than

B. CONSTITUTIONAL CHALLENGES

As indicated earlier in this chapter, the Supreme Court recognizes that states have an interest in establishing candidate ballot qualification standards that limit ballot length to a reasonable size and populate it only with serious candidates who have some prospects of public support.¹⁰⁶ Nonetheless, overly restrictive individual state ballot access regulations may violate the Constitution, as may the totality of the state's regulations.¹⁰⁷

When the constitutionality of a state's candidate ballot access law is challenged, courts must individually analyze the regulations at issue because no "litmus-paper test" exists to separate valid from invalid regulations.¹⁰⁸ Courts use the following process to analyze the challenged regulation(s):

- identify the character and magnitude of the burden the challenged regulation(s) place(s) on the plaintiff's First and Fourteenth Amendment rights,
- identify and evaluate the precise state's interest(s) used to justify the regulation's burden,
- determine the legitimacy and strength of each of the state's interests,
- consider whether the state's interest(s) justify the burden placed on the plaintiff's rights, and
- weigh the above factors to decide whether the challenged provision is unconstitutional.¹⁰⁹

Even though all candidate ballot access regulations burden constitutional rights to some extent because *some* voter's preferred candidate is unlikely to meet them, most ballot access regulations receive rational basis scrutiny. Only regulations that implicate wealth-based classifications (such as filing fees) or the associational rights of political parties or voters (such as petition requirements) receive heightened or strict scrutiny.¹¹⁰

Under rational basis review, courts uphold a state regulation's constitutionality if the challenger cannot prove the regulation is *not rationally related* to a legitimate governmental objective. This burden is difficult to meet—thus most challenged ballot access regulations that undergo rational basis scrutiny will be upheld—because states have an acknowledged legitimate interest in electoral integrity, orderly elections, limiting voter confusion, and supporting the finality and stability of the political process, and most ballot access regulations can be justified on one or more of these grounds.

two candidates are running for the vacant office or if more than one seat is available, then allowing the challenged candidate's name to appear on the ballot can have a greater effect on the election's outcome than the table above suggests should he later be found ineligible and if he did not poll the least number of votes.

¹⁰⁶ See *Lubin v. Panish*, 415 U.S. 709, 715-16 (1974).

¹⁰⁷ Ballot access regulations may also violate state constitutional protections.

¹⁰⁸ *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

¹⁰⁹ *Id.*

¹¹⁰ Courts in states that recognize a fundamental state constitutional right to candidacy may need to conduct a strict scrutiny analysis of all candidate ballot access regulations.

Under strict scrutiny, the state bears the burden of proving that the challenged statute is the least restrictive, narrowly tailored, means possible to achieve a compelling governmental objective. Most regulations subject to strict scrutiny are unable to satisfy this standard and are declared unconstitutional.

VI. CANDIDATE REMOVAL OR SUBSTITUTION

Candidates who have gained ballot access sometimes die, withdraw their candidacy, or become disqualified before an election or between the primary and general election. Under these circumstances,¹¹¹ they (or others) may seek to remove their names from the ballot and may also request a substitute candidate's name be included on the ballot.

In general, a candidate's pre-election death, withdrawal, or disqualification does not automatically remove the candidate's name from the ballot. Instead, state statutes govern the circumstances under which a withdrawal is allowed, who may make a withdrawal request, and when the withdrawal request must be received. State statutes may also specify the administrative processes that must be followed to effectuate the removal of the candidate's name from the ballot as well as the substitution process, if any.¹¹²

Courts become involved in candidate withdrawal and replacement issues when state statutes do not address the current circumstances or when an administrative decision granting or denying candidate withdrawal or replacement is challenged. Under these circumstances, the court may be asked to order election officials to remove a dead, ineligible, or withdrawn candidate's name from the ballot and allow a replacement's name to be added, or to prohibit a withdrawal or replacement. Withdrawal and substitution requests received close to the election may be impossible to honor because substitution deadlines may have passed, absentee ballots may have been mailed, or it may be too late to create a new ballot.

The court may also be able to consider the public and candidate interests in allowing the substitution.¹¹³ When only one candidate in a slate -- such as a joint governor/lieutenant governor ticket—is ineligible or seeks to withdraw, the court may be able (or required) to

¹¹¹ Occasionally, a court may be asked to declare an election premature and remove the elective office itself from the ballot. See *Sprague v. Casey*, 550 A.2d 184 (Pa. 1998).

¹¹² For example, statutes may require an election board to certify the victory of a withdrawn primary candidate before the political party is allowed to name a substitute for the general election ballot. See *State ex rel. White v. Franklin County Bd. of Elections*, 600 N.E.2d 656, 660 (Ohio 1992) (per curiam). Withdrawal and substitution requests are not automatically linked. This uncoupling discourages the last-minute switching out of candidates whose candidacies fail to capture the public's interest.

¹¹³ *Heleringer v. Brown*, 104 S.W.3d 397, 404-05 (Ky. 2003) (Stumbo, J., concurring) (noting the candidate's investment in advertising and voter contact and the public's investment in the election process as shown through ballot order determinations and printing had been made, absentee ballots mailed, primary election just a few days off as consideration in deciding that gubernatorial candidate could replace his disqualified lieutenant governor running mate in party primary so as to not render the public's investment in the election and his candidacy a nullity); *Schundler v. Paulsen*, 774 A.2d 585, 591 (N.J. Super. App. Div. 2001) (justifying a candidate substitution made after the deadline for the same had passed on the public policy preference for contested elections).

consider whether the running mate was complicit in the circumstances that prompted the substitution request.¹¹⁴ In addition, the court may be asked to determine if the entire slate is affected when one slate member is disqualified or withdraws. Finally, when doubt exists as to whether state statutes require an ineligible candidate's name to be stricken from the ballot, courts generally prefer to continue the candidacy.¹¹⁵ If a candidate voluntarily withdraws from his candidacy, the candidacy is usually terminated¹¹⁶ regardless of whether the candidate's name is removed from the ballot. If the withdrawn candidate wins the election, she is unable to take office.¹¹⁷

¹¹⁴ *Helering*, 104 S.W.3d at 405 (Wintersheimer, J., concurring) (determining the remaining candidate was an innocent party who had made a "sufficiently extensive investigation" into his running mate's qualifications, thus he should be allowed to substitute a new candidate rather than forego his candidacy).

¹¹⁵ *Id.* at 404.

¹¹⁶ *State ex rel. White v. Franklin County Bd. of Elections*, 600 N.E.2d 656, 660 (Ohio 1992) (per curiam).

¹¹⁷ *Id.* (holding the certification of withdrawn candidate's victory creates a vacancy that is filled as the law directs).