DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1427 Bannock Street, Room 256 Denver, Colorado 80202 Phone: (303) 606-2300	DATE FILED: September 22, 2023 8:07 PM
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP And **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, an unincorporated association	▲ COURT USE ONLY▲
Attorneys for Intervenor: Michael Melito, CO Reg. #36059 MELITO LAW LLC 1875 Lawrence St., Suite 730 Denver, Colorado 80202 Phone: (303) 813-1200 Email: Melito@melitolaw.com Robert Kitsmiller, Esq., Atty. Reg. #16927 PODOLL & PODOLL, P.C. 5619 DTC Parkway, Suite 1100 Greenwood Village, CO 80111 Tel: (303) 861-4000 Fax: (303) 861-4004 bob@podoll.net	Case No: 23CV32577 Division: 209

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S MOTION TO DISMISS PURSUANT TO COLORADO RULE OF CIVIL PROCEDURE 12(B)(5)

Movant, the Colorado Republican Committee, respectfully moves to dismiss the Verified Petition pursuant to Colorado Rule of Civil Procedure 12(b)(5). The undersigned counsel has

conferred with Petitioners' counsel regarding this motion. Petitioners oppose the relief sought herein.

Pursuant to the Court's direction at the Status Conference held September 18, 2023, concerning efficiency and avoidance of duplication, Intervenor hereby adopts Respondent President Donald Trump's Motion to Dismiss and Special Motion to Dismiss pursuant to Pursuant to C.R.S. § 13-20-1101(3)(a) (Anti-SLAPP).

I. ARGUMENT

A. Legal Standards

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted tests the formal sufficiency of a plaintiff's complaint." *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss[.]" *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2016)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* (quoting *Iqbal*, 556 U.S. at 678). "It is likewise settled that in considering a motion to dismiss for failure to state a claim, a court assesses the 'well-pleaded' factual allegations of a complaint and ignores conclusory allegations or allegations purporting to assert principles of law." *Id.* at 598; *see Gray v. Univ. of Colo. Hosp. Auth.*, 2012 COA 113, ¶ 37, 284 P.3d 191, 198 (noting that conclusory allegations are insufficient to defeat a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim).

B. The Petitioners' claims unlawfully impair the autonomy, prerogative, and rights of the Colorado Republican Party under the Constitution and Colorado election code.

The attempt by the Petitioners to prevent the Colorado Republican Committee, which was not even named as a party in this case and is only present by virtue of its intervention, from

choosing a political candidate of its choice is an infringement of the Colorado Republican Committee's First Amendment and statutory rights. Under Colorado law, specifically C.R.S. § 1-4-1204(1)(b), it is the Colorado Republican Committee, not the Secretary of State, that has the ultimate authority to determine whether an individual is a "bona fide candidate for president of the United States pursuant to political party rules." *Id.* It is the Colorado Republican Committee, not the Secretary, that sets those rules and determines the requirements for Republican nominees. The election code reflects the Colorado Republican Committee's constitutional right to freely associate and to exercise its political decisions. See U.S. Const. Amend. I; Co. Const. Art. I, § 10, § 5. And C.R.S. § 1-4-1204(1)(b)'s codification of the inherent authority of the Colorado Republican Committee prohibits the Secretary of State from interfering with the Party's autonomy by denying it the chance to put forward to the voters the candidates of its choice.

"The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983); *see also Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). "Restrictions on the access of political parties to an election ballot impinge on the fundamental rights of individuals to associate for political purposes and of qualified voters to cast their votes effectively." *Nat'l Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988).

Colorado's election code recognizes and applies this constitutional right to political association in a variety of ways. The election code only regulates "the holding and conducting of primary elections, canvassing the vote, preparing ballots and making nominations for political office." *People ex rel. Vick Roy v. Republican State Cent. Comm.*, 226 P. 656, 660 (Colo. 1924). The election code provides no authority to the Secretary of State, or even ultimately the courts, to

make the decisions for political parties. The Colorado Supreme Court has made clear that the election code is *not* designed to interfere in any way with the right to freely associate and select nominees for political purposes. "Any regulation that would have for its object the control of a political party concerning its own internal affairs or its own right of self-control and self-preservation, as an organization, would [be] . . . regulation of voluntary organizations in matters that in no wise tend to the purity and integrity of primary elections or nominations." *Id.* at 660-61.

As will be addressed below, the role of the Secretary of State in the election is purely ministerial, to ensure the basic filing requirements for ballot access (non-arbitrary, non-discretionary requirements like age, residence, or signature totals) are met and to disseminate the ballots to the populace. The Secretary of State simply has no role in making discretionary or political decisions on the behalf of political organizations. She certainly possesses no authority to determine in any discretionary way who shall be a party's nominees. Any attempt by the Secretary to do so, or any order by this Court to that end, would be ultra vires,[1] and would violate both the Colorado Republican Committee's First Amendment rights and the role recognized and protected by § 1204.

In 1896, an action was brought to compel the Secretary of State to certify the Republican nominees on the McKinley Republican Ticket: "[I]n order that the same may be printed upon the official ballots; the claim advanced being that this is a plain duty enjoined by law, *about which the secretary of state has no discretion*." *People ex rel. Hodges v. McGaffey*, 46 P. 930, 931 (Colo. 1896) (emphasis added). The Colorado Supreme Court agreed, concluding that "it is the plain duty

[1] "An ultra vires act is one that '[a] governmental agency lacks legal authority to perform.' 18 McQuillin Mun. Corp. § 53:77.28 (3d ed.). Under Colorado law, ultra vires acts are considered void." *In re Interrogatory on House Bill 21-1164 Submitted by the Colo. Gen. Assembly*, 487 P.3d 636, 648 n.1 (Colo. 2021) (Samour, J., concurring).

of the secretary of state to certify to the various county clerks the ticket." *Id.* at 932. The Court's explanation of the ministerial responsibility of the secretary of state well-nigh presages this current litigation:

> One of the great political parties, now struggling for control of the national as well as of the state government, will, if the decision of the secretary of state prevails, be deprived of the opportunity of placing its ticket before the people of the state of Colorado, for their suffrage at the approaching election, and the people will, to that extent, be disfranchised.

Id. at 159. The Court made clear that the Secretary of State lacks any discretion to deprive the people of their right to select the party of their choice.

The ministerial responsibility of the Secretary of State has not changed since 1896. Under C.R.S. § 1-4-1204(1)(b), it is the Colorado Republican Committee that determines who the Republican nominee will be on a ballot. It alone determines whether a candidate is a "bona fide candidate" for president and does so "pursuant to political party rules." *Id.*[2] The Secretary of State

[2] According to the statute:

> Not later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots. The only candidates whose names shall be placed on ballots for the election shall be those candidates who:
>
> (a) [Repealed]
>
> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

C.R.S. § 1-4-1204(1). The Secretary's role, and lawful authority, in placing a candidate on the ballot is limited to ensuring the satisfaction of these enumerated requirements.

plays no role in making this decision. The Secretary's role is only ministerial, providing to the people the Party's selection and ensuring compliance with basic formulistic requirements in preparing the ballot.

The statute explicitly vests authority in the Colorado Republican Committee to determine whether a candidate is a "bona fide candidate" for President, and to do so "pursuant to political party rules." C.R.S. § 1-4-1204(1)(b). In other words, the statute continues to reflect the fundamental authority of the Colorado Republican Committee to make its own decisions regarding its political associations, pursuant to its own rules and procedures. The Petitioners in this case are not seeking merely to prevent President Trump from being on a primary or general election ballot. They are seeking to prevent the Colorado Republican Committee from even having the ability, pursuant to its authority recognized in C.R.S. § 1-4-1204(1)(b), and its Party Rules, *see* Verified Petition in Intervention, ¶¶ 7, 16, 17, 20, and 28, to freely choose to associate and express its political will for the purpose of reelecting President Donald Trump – assuming President Trump satisfies the enumerated, formulaic requirements listed in the statute, namely, the candidate is a bona fide candidate of a major political party "pursuant to political party rules," C.R.S. § 1-4-1204(1)(b); and the submissions are timely, a notarized statement of intent is submitted, and the candidate pays the requisite fee or submits valid signatures of Colorado resident electors that comply with the law, C.R.S. § 1-4-1204(1)(c).

The Secretary has another ministerial role in this process, which is ensuring that "[t]he names of candidates appearing on any presidential primary ballot must be in an order determined by lot." C.R.S. § 1-4-1204(2). Colorado law requires that "[t]he secretary of state shall determine the method of drawing lots." *Id.* Once the enumerated threshold requirements of (b) and (c) are met, CRS § 1-4-1204(2)(b), (c), the Secretary shall place those names on the ballot. The Secretary

is *not* empowered to determine the names, or to block or bar the names, but instead, is empowered to "determine the method of drawing lots" which will determine the order in which the names appear on a presidential primary ballot.

There is no canon of statutory interpretation that supports a broader, undefined authority for the Secretary in this process. Moreover, canons of interpretation only matter where there is legitimate ambiguity. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."); *Dillabaugh v. Ellerton*, 259 P.3d 550, 553 (Colo. App. 2011) ("[W]here a word or phrase has a commonly understood meaning, *noscitur a sociis* and *ejusdem generis* cannot be applied to create ambiguity."); *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1232 (10th Cir. 2016) ("It is a well[-]established law of statutory construction that, absent ambiguity or irrational result, the literal language of a statute controls.") (quoting *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986)). There is no ambiguity here.[3] Every role the Secretary has in this process, listed above, is ministerial and non-discretionary in nature. The Colorado Supreme Court has held that where "[t]he Act provides a clear standard for the [state officials] to follow and admits of no discretion in its application," the officials' act is not discretionary. *Bd. of Cnty. Comm'rs v. Fifty-First Gen. Assembly*, 599 P.2d 887, 890 (Colo. 1979). This holds true even where the officials' actions "may be discretionary in some instances" not addressed in the particular statute at issue. *Id.* Likewise, the Colorado Court of Appeals described a statutorily prescribed duty as one which "is purely ministerial, and must be performed in obedience to the mandate of the law,

[3] Moreover, even if there were ambiguity, that would militate in favor of the Party's argument here, under the canon of constitutional avoidance. *See infra* note 6.

without regard to or the exercise of the officer's judgment upon the propriety of doing the act." *People ex rel. School Dist. No. Five v. Van Horn*, 77 P. 978, 982 (Colo. App. 1904). *See Bolt v. Arapahoe Cnty. Sch. Dist. No. Six*, 898 P.2d 525, 538 (1995) (Where a state official's role is prescribed with a "shall," it is ministerial and the state official "has no authority to modify.").[4]

The Colorado Secretary of State may possess some discretionary authority vested in that office by some other statute in other circumstances. But the statute creating the office of the Colorado Secretary of State speaks of its duties only in terms of "shall." C.R.S. § 24-21-101(1). This creates a logical and practical inference that the legislature's default for the Secretary is ministerial, unless a specific code section expressly operates otherwise and vests the office with discretionary authority for a task. *See id.* at § 24-21-101(2); *compare* § 1-4-1204(1) (speaking only in terms of "shall" to command the Secretary's nondiscretionary functions), *with* § 1-4-1203(6) (using "may" to vest the Secretary with discretion for the express, limited function of preventing confusion when a named candidate withdraws from candidacy). Her role here, expressly defined and commanded by § 1204, is only ministerial.

---

[4] Petitioners ask this Court to do that which it would not be allowed to do within a mandamus action. *See Brownlow v. Wunch*, 102 Colo. 447 (1938).

> The court in mandamus cases may compel the exercise of discretion or the performance of a ministerial act in favor of one clearly entitled to its performance, but we know of no power possessed by the court which it may exercise in a mandamus action, either on its own motion or when invoked by relators or by interveners if their petition in intervention be granted to prevent a ministerial officer from performing his duty, the subject of litigation, at any stage of the proceedings, regardless as to whether up to that point the proceedings have been favorable or unfavorable to respondent or even after they have terminated adversely to the relators. The judgment in a mandamus suit may be, that a ministerial officer -- where there is a clear legal duty -- *shall* perform, or, where the duty does not appear, that he *need not* perform; but never that he *shall not* perform.

Id. at 454-55. The requirements and purpose of § 1204, even ostensibly brought under an unripe § 1-1-113 challenge, are not in conflict with this principle. Further, the reason Petitioners could not seek mandamus underscore the flaw in their legal conclusions and demands in this action.

To the extent a legitimate ambiguity may exist so as to justify resorting to something other than the plain meaning of the legislative text, the express grant of a discretionary authority like that contained in other statutes underscores that the commands of § 1204(1) are, intentionally, *not* discretionary. The Secretary's role under § 1204(1) is expressly limited to confirming the satisfaction of certain express, set, commanded requirements, and speaks in terms of "shall" ("the secretary of state shall certify the names") – the language of ministerial function, and not that of discretion.[5] Shall requires obedience, not judgment. *See Ministerial*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "ministerial" as, "Of, or relating to, an act that involves obedience to instructions or laws instead of discretion, judgment or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance."). All the discretionary roles are left to the Party itself. Section 1201, the foundational declaration of the purpose of the election code, makes crystal clear the legislature's intent and "the intent of the People of the State of Colorado that the provisions of this

[5] This concept is fairly uniform nationwide. *See, e.g., Vowell v. Kander*, 451 S.W.3d 267 (Mo. Ct. App. 2014):

> As a ministerial officer, the Secretary of State is required to carry out his or her statutory duties to the letter of the law and must treat all persons filing properly executed legal documents with his office equally. *See In re Impeachment of Moriarty*, 902 S.W.2d at 274. "In elections particularly, the legislature has established specific criteria outlining the manner in which candidates declare for office and the time within which such declarations can be received by the Secretary of State." *Id.* at 277. As noted by our Supreme Court in a similar context, the legislature's limiting of the Secretary of State's role in election matters avoids "the assumption of judicial functions by ministerial officers," *Farris*, 150 S.W. at 1077, which in turn minimizes the partisan political mischief that can result from ministerial officers adjudicating candidate qualifications. In short, the plain language of § 115.387 does not reflect that the legislature intended the Secretary of State to judge a candidate's qualifications.

Id. at 275.

Part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." C.R.S. § 1-4-1201.

The Party's rules are clear, and are not in conflict with any law or constitution:

> The following sets forth requirements to have one's name placed on the Republican ballot as a U.S. Presidential candidate in Colorado and related matters.
>
> **Section 1: U.S. Constitutional Requirements – The candidate must:**
> - A. Be a natural-born citizen of the United States.
> - B. Be at least 35 years old.
> - C. Be a resident of the United States for 14 years.
>
> **Section 2: Federal Requirements – The candidate must:**
> - A. Have registered their Republican Presidential Committee with the Federal Election Commission.
>
> **Section 3: Colorado Republican Party Requirements – The candidate must:**
> - A. Announce their excitement to be on the Colorado ballot on X (formerly Twitter) and one other platform (while tagging the Party username), and directly encourage their followers to follow the Party's social media accounts for updates about the Party Primary and events.
> - B. Demonstrate viability, seriousness, and competitiveness by paying a nonrefundable filing fee to the Colorado Republican Party from one of the options below:
>   - a. Pay a non-refundable filing fee of $40,000 that is submitted along with the State Party approval application to demonstrate viability, seriousness, and competitiveness or;
>   - b. Visit Colorado at least once to a State Party sponsored event at a date and time mutually agreed to by the campaign and State Party for a non-refundable discounted rate of $20,000.00 or;
>   - c. Host a fundraising event for the benefit of the State Party in any state or location during a date and time, and venue, mutually agreed to by the campaign and State Party for a non-refundable discounted rate of $20,000.00.

Colorado GOP, Presidential Candidate Qualification Rules.

Removing the Colorado Republican Committee's ability to make its own decisions regarding its choices and procedures would be a radical usurpation of the Party's statutorily established authority in any circumstance, and it would purport to give the Secretary a power wholly ultra vires. But it would be particularly egregious here, based on these novel, untested, and

unreliable theories regarding the Fourteenth Amendment. As discussed in the forthcoming motions to dismiss based on constitutional grounds, incorporated herein by reference so as to avoid duplication pursuant to this Court's instructions, the Fourteenth Amendment only disqualifies those who serve in specific roles, such as in "any office, civil or military, under the United States." U.S. Const. amend. 14, § 3. The presidency is not any of the specific roles enumerated, nor is the President an officer under the United States. "The people do not vote for the 'Officers of the United States.' They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 498 (2010) (internal citations omitted).

> [U]nder the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

United States v. Mouat, 124 U.S. 303, 307 (1888); *see also* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment*, 15 N.Y.U. J. L. & LIBERTY 1 (2021).

Moreover, as will also discussed more fully in the forthcoming motions to dismiss based on constitutional grounds, incorporated herein by reference so as to avoid duplication, section 3 of the Fourteenth Amendment is *not* self-executing, applied on its own by anyone without congressional authorization. It must be enforced by congressional legislation, which Congress has in fact done through 18 U.S.C. § 2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both;

and shall be incapable of holding any office under the United States."), a statute under which President Trump has *not* been even charged or indicted.

Chief Justice Chase, riding circuit, explained that the provisions of § 3 can only be enforced by Congress. "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress." *Griffin's Case*, 11 F. Cas. 7, 26 (C.C. Va. 1869). He further explained that

> the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner."

Id. (emphasis added). *See Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin*, 11 F. Cas. at 26) ("[I]t has also been held that the fourteenth amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."). Accordingly, the provisions for disqualification contained in the Fourteenth Amendment do not disqualify anyone automatically, but instead, must be enforced through congressional legislation, *i.e.*, 18 U.S.C. § 2383.

The First Amendment to the United States Constitution,[6] and Colorado law, C.R.S. § 1-4-1204(1), work in tandem to protect the Party's and candidates' rights to freely associate for

[6] While the Party's First Amendment arguments are reserved for full presentation in the forthcoming motion to dismiss on constitutional grounds, the First Amendment's interrelation with § 1204(1) necessitates a brief assessment here. The Supreme Court of the United States recognizes political speech as an indispensable asset to free society, and as such affords political speech the broadest and most sacred of First Amendment protections. The Court traditionally refers to political speech as including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Indeed, "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas

purposes of engaging in political advocacy and expression – with certain enumerated, non-discretionary, compliance-confirming authorities reserved to the Secretary of State, and the discretionary authority reserved to the political parties. This statute was written this way on purpose. An effort to abrogate a party's political associational and expression rights by effectively transferring those rights from the party to the Secretary, a state-actor, would violate the First Amendment. Here, by attempting to take away from the Colorado Republican Committee its ability to make a political selection and express and associate itself and its members according to its political will, the Petitioners impermissibly ask this Court to direct the Secretary to commit an ultra vires act, to censor "core political speech," and violate the Party's statutory and constitutional rights.

For these reasons, even assuming the truth of all well-pleaded factual allegations in the Verified Petition, and disregarding untenable legal conclusions, the relief sought by Petitioners is simply not plausible and, as such, their Verified Petition must be dismissed as a matter of law.

---

hateful to the prevailing climate of opinion—have the full protection of the [First Amendment's] guaranties, unless excludable because they encroach upon the limited area of more important interests." *Roth v. United States*, 354 U.S. 476, 484 (1957). Political speech includes "[a]dvocacy of the election or defeat of candidates for federal office," "political policy," and "advocacy of the passage or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). The Party's selection of a candidate is thus core political speech, further described as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). The Colorado Constitution likewise prohibits infringements on the rights to freely exercise the right to vote. Colo. Const. Art. II, Section 5.

Accordingly, the canon of constitutional avoidance also militates in favor of intervenor's argument. Under that canon, where a statute is susceptible of alternate interpretations, the court should avoid embracing the construction that would raise serious constitutional issues. *Dominguez v. Denver*, 363 P.2d 661, 664 (Colo. 1961). Here, to construe the statute governing the Secretary's duties to include the authority to adjudicate the suitability of a party's nominee would raise the serious First Amendment issues described above. This Court should therefore avoid that construction, in the absence of clear legislative direction to the contrary.

Warne v. Hall, 373 P.3d 588, 591 (Colo. 2016) (reversing lower court and ordering dismissal of complaint for its failure to state a plausible claim).

Pursuant to C.R.S. § 1-1-113:

> When any controversy arises between any official charged with any duty or function *under this code* and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction *alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of *this code*. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

C.R.S. § 1-1-113 (emphasis added). Assuming the truth of the well-pleaded factual allegations, Petitioners fail to allege that the Respondent Secretary, "a person charged with a duty under this code . . . is about to commit a breach or neglect of duty or other wrongful act." *Id.* As such, this proceeding is *not* a statutorily defined §1-1-113 proceeding and this statutory mechanism for election code relief provides no basis for an evidentiary hearing, despite the Petitioners' unsupported and incorrect legal conclusions and assertions. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2016)); *id.* at 598 ("It is likewise settled that in considering a motion to dismiss for failure to state a claim, a court assesses the 'well-pleaded' factual allegations of a complaint and ignores conclusory allegations or allegations purporting to assert principles of law.").

Further, this code section expresses clearly in two material places that it is "*this code*" upon which the Secretary's duties are to be measured for lawfulness within the auspices of a §1-1-113 proceeding, *id.* ("official charged with any duty or function under this code"); *id.* ("the district

court shall issue an order requiring substantial compliance with the provisions of this code"); *see Carson v. Reiner*, 370 P.3d 1137, 1141 (Colo. 2016) (explaining that the statute "requires the district court, upon a finding of good cause, to issue an order requiring substantial compliance *with the provisions of the Colorado Election Code*." (emphasis added)). This code does not allow for a novel, arbitrary, untested, un-adjudicated opinion of the meaning and application of section 3 of the Fourteenth Amendment, and certainty not in the absence of even an indictment under 18 U.S.C. § 2383. Additionally, the Colorado Republican Committee has not yet designated any candidate for the presidential primary. *See* Verified Petition in Intervention, ¶¶ 20, 28, and 30. As such, it cannot be alleged that the Secretary "has committed or is about to commit a breach or neglect of duty or other wrongful act" under this code.

In sum, Intervenor objects to the instant proceeding being characterized and advanced as a § 1-1-13 proceeding. The Secretary has no authority, let alone a duty, to prevent political parties from exercising their political choices. Such an act would be ultra vires. As § 1204 makes clear, the parties have sole discretion to determine who their candidates will be, with no discretion vested in the Secretary to usurp those political decisions. The petitioners seek to force the Secretary to comply with a duty the law denies her; she has no duty to make the political decisions for political parties. And if the Secretary lacks a duty to act, the provisions of C.R.S. § 1-1-113, including its provision for expedited case resolution apart from the ordinary civil processes, are unavailable to the Petitioners.

WHEREFORE, Intervenor moves this Court to grant this Motion and dismiss this action in advance of the purported § 1-1-113 proceeding currently set to commence October 30, 2023; or, alternatively to set this Motion for hearing in advance of the purported § 1-1-113 proceeding

currently set to commence October 30, 2023, and decide this Motion in advance of the purported §1-1-113 proceeding.

Respectfully submitted,

/s/ *Michael Melito*
MICHAEL MELITO (CO Bar No. 36059)
MELITO LAW, LLC
1875 Lawrence St., Ste. 730
Denver, Colorado 80202
Telephone: 303-813-1200
Email: Melito@melitolaw.com

/s/ *Robert A. Kitsmiller*
Robert A. Kitsmiller (CO Bar. No. 16927)
Podoll & Podoll, P.C.
5619 DTC Parkway, Suite 1100
Greenwood Village, Colorado 80111
Telephone: (303) 861-4000
Email: bob@podoll.net

Counsel for Intervenor

JAY ALAN SEKULOW*
(D.C. Bar No. 496335)
JORDAN SEKULOW*
(D.C. Bar No. 991680)
STUART J. ROTH**
(D.C. Bar No. 475937)
ANDREW J. EKONOMOU**
(GA Bar No. 242750)
JANE SERENE RASKIN**
(FL Bar # 848689)
BENJAMIN P. SISNEY*
(D.C. Bar No. 1044721)
NATHAN MOELKER*
(VA Bar No. 98313)
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Avenue, NE
Washington, D.C. 20002
Telephone: (202) 546-8890
Facsimile: (202) 546-9309
Email: bsisney@aclj.org

*Admitted pro hac vice
**Not admitted in this jurisdiction; application for pro hac vice admission forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 22, 2023, a true and correct copy of the foregoing was served electronically, via the Colorado Courts E-filing system upon all parties and their counsel of record.

By: *s/Christa K. Lundquist*