DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1427 Bannock Street, Room 256 Denver, Colorado 80202 Phone: (303) 606-2300	DATE FILED: October 6, 2023 5:23 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 ▲
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COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S REPLY BRIEF TO THE SECRETARY OF STATE'S RESPONSE

The Colorado Republican Committee respectfully replies to the Secretary of State's response to the Motions to Dismiss. While mindful of the Court's orders to avoid undue prolixity

in briefing, the Secretary has raised additional issues that require further response. The Secretary's argument that this matter is a proper § 1-1-113 proceeding fails to properly recognize the distinction between her true ministerial duties enumerated in C.R.S. § 1-4-1204 and the discretionary authority she purports to possess.

But before that, her introductory paragraph neatly captures a fatal legal flaw with both Petitioners' case and the Secretary's position, a flaw which cannot be ignored. According to the Secretary, "the Election Code does not explicitly give the Secretary independent authority to determine whether a candidate is disqualified from holding office under Section 3 of the Fourteenth Amendment." Sec'y Resp. to Mots. to Dismiss 1. Intervenor fully agrees. She then makes the odd contention that she "therefore welcomes the Court's involvement and direction on this important matter." *Id.* But that makes no sense: *§ 1-1-113 only gives this Court the ability to order the Secretary to do that which the Election Code requires*. In other words, if the Election Code does *not* require it, this Court *cannot* order the Secretary to do it. If the Election Code requires it, she must do it even without a Court's § 1-1-113 order, or in case of nonfeasance the Court can order her to comply with the Election Code.[1] In Petitioners' own words, that is the only remedy available in this case.[2] Whereas Petitioners seek to impose on the Secretary an additional power and duty not contained in the statutory list – namely, to review eligibility under Section Three of the Fourteenth Amendment – this case is not a legitimate § 1-1-113 case, and it must be dismissed. Indeed, this case should be dismissed *now*, before the parties incur significant expense at a trial.

The Secretary asks this Court to import Section Three of the Fourteenth Amendment to the United States Constitution into Colorado's Election Code as an item enforceable in a § 1-1-113

[1] *See* § 1-4-1204 (enumerated list of "shalls" not "mays"); Intervenor's Mot. to Dismiss, 8-9.
[2] *See* Pet'rs' Mot. to Dismiss Intervenor's Count I, 2 ("In expedited proceedings under the Election Code, the Court has jurisdiction only over claims alleging breaches of duty under the code."); Sec'y Resp. to Mots. to Dismiss 3.

proceeding. If the Court does so, will it be a mandatory code provision? Only the mandatory ("shall") Election Code provisions may be enforced in such a proceeding. But this imported Fourteenth Amendment provision would have to be discretionary because, after all, the Secretary would get to make the complex, subjective determination whether a candidate committed insurrection. And if it is discretionary power, it is as a general matter unreviewable. *Indus. Commn. of Colo. v. Arteaga*, 735 P.2d 473, 478 (Colo. 1987) (quoting *Holley v. Lavine*, 553 F.2d 845, 850 (2d Cir. 1977)) ("[T]here is a legion of adjudicated cases which recognize that the prosecutor or like enforcing official may exercise a discretionary power, virtually unreviewable by a court, not to enforce a statutory command, and not to seek the imposition of penalties or other sanctions upon a known violator.").

And if the Court imports that power for the Secretary of State into the Election Code, she will be empowered to enforce a federal criminal sentencing punishment, 18 U.S. C. § 2383, without either a criminal trial or due process, and here, without even an indictment. If her position is correct, she would be *obligated* to hold quasi-criminal insurrection trials regarding each and every political candidate in the state as long as *someone* thinks a candidate committed or incited insurrection. And she would have the discretionary, unreviewable power to impose that part of the federal criminal sentence – all based on an *implied* provision of the Colorado Election Code she asks this Court to incorporate for the first time.

And that's not all. The Secretary herself embraces the idea of this disqualification power extending to whether a candidate is "a natural born citizen," Sec'y Resp. to Mots. to Dismiss 8, an issue that generated considerable attention over the presidential candidacies of Barack Obama, John McCain, and Ted Cruz. To embrace the theory Petitioners and the Secretary propose here

would be to open the door to similar litigation over such candidacies, a bipartisan can of worms if ever there were one.

I. ARGUMENT

A. The Colorado Republican Committee Remains a Party in This Case.

The Secretary, despite not moving to dismiss the Colorado Republican Committee's claims, argues that nonetheless the Colorado Republican Committee's claims should not be considered. Sec'y Resp. to Mots. to Dismiss 9 ("Both Petitioners and the Colorado Republican Party [sic] as intervenor have asserted claims for declaratory judgment. These claims should not be considered in a section 1-1-113 summary proceeding.") No party, including the Secretary, has filed any motion seeking to dismiss the Colorado Republican Committee from the case, nor has any party filed any motion to dismiss the Colorado Republican Committee's second and third Counts. And those Counts are claims that the Secretary lacks authority, statutorily or under the Constitution, to remove President Trump from the ballot as a result of this proceeding. Those claims are clearly direct mirrors of the very § 1-1-113 claims brought by the Petitioners. If the constitutional propriety of Intervenor's Fourteenth Amendment *claim* cannot be addressed in the context of a § 1-1-113 proceeding, then neither can the entirety of the Petitioners' Fourteenth Amendment *case*.

B. The Secretary of State's Arguments for the Application of § 1-1-113 in This Matter Fail, as the Secretary's Authority Does not Extend to the Application of Section 3 of the Fourteenth Amendment.

This matter is not a proper § 1-1-113 proceeding, and accordingly should be dismissed, for at least two independent, although supplemental, reasons. First, the Election Code does not vest authority in the Secretary to apply discretionary requirements like the Fourteenth Amendment provision upon which the entire ostensible § 1-1-113 proceeding is based; the authority of the

Secretary simply does not extend to quasi-criminal disqualification proceedings. Second, Section Three of the Fourteenth Amendment is not "self-executing;" specifically, this provision is enforced through the mechanisms *Congress* establishes, not through Colorado's Election Code or the limited judicial remedies available to state courts to enforce that Code.[3]

a. The Election Code does not give the Secretary authority to make discretionary election decisions.

The Secretary concedes in her Response that "the Election Code does not explicitly give the Secretary independent authority to determine whether a candidate is disqualified from holding office under Section 3 of the Fourteenth Amendment." Sec'y Resp. to Mots. to Dismiss 2. That concession is crucial. Section 1-1-113 is a mechanism only for requiring the Secretary to comply with her duties under the Election Code. Section 1-1-113 is the "exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." C.R.S § 1-1-113(4). The secretary repeatedly concedes that she lacks an explicit authority to act. "[T]he Election Code does not explicitly state that the Secretary must, or may, determine whether a candidate has violated Section 3 of the Fourteenth Amendment." Sec'y Resp. to Mots. to Dismiss 4. If she cannot point to any duty under the election code for her to enforce this provision of the Fourteenth Amendment, then the Petitioners' purported § 1-1-113 claim should necessarily be dismissed. Again, this Court adjudicating a § 1-1-113 proceeding may only force the Secretary to comply with something the Election Code itself requires of her. Even while couched in terms like "explicit" and "independent," she admits it does not.

[3] Additional reasons which have been briefed elsewhere also necessitate dismissal, including but not limited to the historical understanding that the President of the United States is not an "officer" within the meaning of Section Three of the Fourteenth Amendment.

The Secretary claims that she does, in fact, have an *implicit* duty to determine whether potential candidates violated Section Three of the Fourteenth Amendment (but apparently only if this Court orders her to). Beyond violating the Constitution in multiple ways, "insurrection" trials presided over by the Secretary for every potential political candidate would be a significant practical burden, never faced before – unless the implied rule only applies if someone accuses a candidate of insurrection. But if it is nondiscretionary or mandatory, she must apply it to every candidate. Indeed, as examples of the actual Election Code duties to which she likens the implied power she asks this Court to give her, the Secretary points to her duty to enforce *nondiscretionary* limitations like age and residency. Sec'y Resp. to Mots. to Dismiss 5 ("Just as a thirty-year-old should not be listed on a ballot for president because that would violate Section 1 of Article II, neither should a candidate who is determined to have violated Section 3 of the Fourteenth Amendment if that section applies to the candidate's request for ballot access."); *see also* Sec'y Resp. 8 ("Petitioners may challenge whether Mr. Trump is 'a qualified candidate entitled to participate' in Colorado's presidential primary election even if it requires determination of an underlying federal constitutional question. § 1-4-1203(2)(a). A contrary rule would bar courts from considering whether a candidate who is under 35 years old or is not a natural born citizen may be certified to the presidential primary ballot."). She likewise raises other nondiscretionary qualifications, like the signature requirements of state law, as justifications for her purported authority to enforce the Fourteenth Amendment.

If this lawsuit concerned President Trump's age, she would perhaps have a point worth exploring. But it does not, and the distinction between a requirement like age or residency and the Fourteenth Amendment provision at issue here is a significant one. As Intervenor already explained, "[t]he First Amendment to the United States Constitution, 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 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." Intervenor's Mot. to Dismiss12-13. The Secretary has been commanded by the Election Code to enforce ministerial, non-discretionary requirements, like age or residency. But that is a fundamentally different question from whether the Secretary has been given authority to make complex, discretionary, quasi-criminal determinations like whether an individual has committed insurrection. None of the arguments or assertions within the Secretary's Response identifies any statute or case that even remotely suggests the Secretary might possess authority to engage in disqualification proceedings. There are none.

Also of critical importance, the Secretary tellingly emphasizes examples of ministerial, non-discretionary determinations. She has ignored Intervenor's argument explaining the Secretary's ministerial authority does not encompass the ability to make discretionary decisions. To repeat, § 1-1-113 simply does not vest a court with the judicial authority to determine or compel the Secretary to bar a candidate who satisfies every qualification enumerated in the Election Code from the ballot, if the Secretary decides otherwise based on her interpretation of Section Three of the Fourteenth Amendment. The statute creating the office of the Colorado Secretary of State speaks of her 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); § 1-4-1204(1) (speaking only in terms of "shall" to command the Secretary's nondiscretionary functions). The role of the Secretary of State in an 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 ballots to the populace. The Secretary of State simply has no role in making discretionary or political decisions. In particular, she possesses no authority under any statute to disqualify candidates after a determination that they committed the criminal conduct of insurrection. She simply has not been given that authority.

One part of the Secretary's brief, comparing the non-discretionary age requirements she is required to enforce with the Fourteenth Amendment, inadvertently makes this point. She compares a thirty-year-old who should not be listed "because that would violate Section of Article II" with "a candidate *who is determined* to have violated Section 3." Sec'y Resp. to Mots. to Dismiss 5 (emphasis added). That comparison highlights the distinction between non-discretionary requirements and Section Three of the Fourteenth Amendment. It is clear and straightforward, *and non-discretionary*, to determine whether someone meets the age requirements; the issue can easily be resolved in a straightforward ministerial fashion. In contrast, even the Secretary acknowledges that for Section Three of the Fourteenth Amendment to be applied at all, it must be "determined" that a candidate violated the prohibitions contained in that Section.

As this litigation has highlighted, the scope and nature of that provision is heavily debated. And insurrection is a crime, described in 18 U.S.C. § 2383, and punishable upon a conviction obtained in compliance with the full procedural protections of the law. The Election Code does not vest in the Secretary the authority to determine whether candidates have committed criminal acts. If it did, the Secretary would have an affirmative obligation to try each and every candidate for insurrection; her obligation to apply qualifications like age requirements applies in every circumstance and there is no reason this purported requirement would not function the same way.

In other words, she cannot pick and choose. Her duty to apply the qualification requirements applies to each and every political candidate.

Section 1-1-113 simply cannot be used to obligate the Secretary to engage in an act that she lacks authority to undertake. And nothing in the Election Code vests in the Secretary the authority to determine whether individuals have been disqualified from office by Section Three of the Fourteenth Amendment. She concedes in her response brief that she lacks the explicit authority to do so. Nor does any statute gives her any implicit authority to do so. Her role in the election process is to strictly follow the Election Code itself, which contains no indication supporting any authority for her to make discretionary election decisions. Section 1-1-113 permits this Court to enforce only that which is already in the Code.

b. The Fourteenth Amendment does not give to the Secretary authority to make election decisions.

A second fundamental reason § 1-1-113 is not an available vehicle for this action is the that Section Three of the Fourteenth Amendment is not self-executing. Not only has the Secretary been given no authority to make determinations as to whether a candidate has engaged in insurrection, the Constitution has expressly reserved that authority to Congress. Section Three of the Fourteenth Amendment must be implemented by federal legislation – which Congress in fact accomplished by enacting 18 U.S.C. § 2383, a statute under which President Trump has not been charged, let alone convicted. The non-self-executing nature of the Fourteenth Amendment has been advanced already in response to Petitioners' claims. They likewise compel rejection of the Secretary's arguments, as Congress has most assuredly *not* given her the authority to enforce Section Three of the Fourteenth Amendment.

Beginning with the seminal decision in *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), courts have agreed that only Congress can provide the means of enforcing Section Three of the

Fourteenth Amendment. *Griffin* held that the provisions of Section Three may 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." *Id.* The case clearly held,

> 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's Case*, 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."). *Griffin's Case* clearly rejects all arguments that Section Three is self-executing or can be applied by the determinations of Secretaries of State; it can only be executed through congressional legislation.

Contrary to Petitioners' assertions that *Griffin* is an outlier, many subsequent cases have cited *Griffin*, agreeing with its conclusion that Section Three is not self-executing. *Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Ariz. Super. Ct. Apr. 21, 2022) (holding that there is no private cause of action in Section Three of the Fourteenth Amendment), *affirmed*, *Hansen v. Finchem*, 2022 Ariz. LEXIS 168, *3 (Ariz. May 9, 2022) ("We note that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"), which suggests that A.R.S. § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."); *Cale v. Covington*, 586 F.2d 311 (4th Cir. 1978) (citing *Griffin* and emphasizing

that its "contemporaneous understanding of the meaning of the Fourteenth Amendment, which we think coincided with the understanding of Congress, should be given consideration."); *In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same); *State v. Buckley*, 54 Ala. 599, 616 (1875) (Stone, J.) (same); *see also* Va. Att'y Gen. Op. No. 21-003, 2021 Va. AG Lexis 1, 2 n. 11 (January 22, 2021) ("[T]he weight of authority appears to be that Section Three of the Fourteenth Amendment is not 'self-executing'—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative." (citing *Griffin*)).

The *Hansen v. Finchem* court, affirmed by the Arizona Supreme Court last year, succinctly summarized other compelling reasons supporting the conclusion that Section Three is not self-executing. 2022 Ariz. Super. LEXIS at 8-10. Perhaps most important among those reasons is that Section Five of the Fourteenth Amendment expressly reserves to Congress the power of enforcement. Section Five provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.[4] When Congress wished to create a private right of action to enforce other provisions of the Fourteenth Amendment, it knew how to do so. *See, e.g.*, 42 U.S.C. § 1983; *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)

[4] According to the Maricopa County Superior Court in that case:

> 15. Congress has acted to create a private right of action to enforce other provisions of the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 1983.
>
> 16. Congress has not created a civil private right of action to allow a citizen to enforce the Disqualification Clause by having a person declared to be "not qualified" to hold public office.
>
> 17. Congress is presently considering legislation to enforce the Disqualification Clause. H.R. 1405 was introduced in the 117th Congress on February 26, 2021. The purpose of H.R. 1405 is "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States . . . ." This proposed legislation would apply to members of Congress as well as holders of state office. Notably, however, this proposed legislation does not create a private right of action; rather, the legislation proposes that "The Attorney General of the United States may bring a civil action for declaratory judgment and relief . . . ." The claim would need to be brought in federal court, and be "heard and determined [*10] by a district court of three judges . . . ." A heightened burden of proof - clear and convincing evidence - would be required. H.R. 1405 has not been enacted at this time.

Hansen v. Finchem, 2022 Ariz. Super. LEXIS 5, ¶15-17, **9-10 (Maricopa Cty. Sup. Ct. Apr. 21, 2022).

("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

Significantly, when Congress has adopted legislation enforcing Section Three, it has on each occasion chosen *not* to create a private right of action. Its first legislation enforcing Section Three was the Ku Klux Klan Act, Ch. 114, 16 Stat. 140 (1870), which provided for Fourteenth Amendment enforcement through official actions filed by the Department of Justice. Congress later enacted 18 U.S.C. § 2383, a criminal provision prohibiting insurrection with disqualification. And in 2021, *Congress considered but did not adopt* legislation authorizing the U.S. Attorney General to enforce the Disqualification Clause. *Hansen v. Finchem*, 2022 Ariz. LEXIS 168, *3 (Ariz. May 9, 2022). Intervenor finds no record of Congress ever having even considered authorizing a private remedy or a remedy enforceable by state officials.

The Supreme Court has regularly made clear that state officials lack authority to set the requirements for federal office. "In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810 (1995). Section Five of the Fourteenth Amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article," including Section Three. U.S. Const. amend. XIV, § 5. That Congress has not exercised that power to authorize state officials and courts to adjudicate Section Three means that this determination still belongs exclusively to Congress, which has the authority to set federal election requirements.

Congress has the authority to define the means whereby the Fourteenth Amendment is applied and enforced. And it has done so through the criminal code, by enacting 18 U.S.C. § 2383. That is the mechanism for disqualification from office for violating that provision. Congress has

declined to create any other mechanism. Accordingly, despite the Secretary's assertions to the contrary, § 1-1-113 does not provide a mechanism for challenging the Fourteenth Amendment qualifications of a presidential candidate.

In short, this is not a proper § 1-1-113 proceeding for at least two fundamental reasons. Colorado law has not given to the Secretary the authority to determine whether someone should be disqualified from office for the alleged criminal conduct of insurrection, and under § 1-1-113, this Court is not vested with the authority to direct her to. And Congress has not chosen to exercise its Fourteenth Amendment enforcement authority to give the Secretary that authority either.

Respectfully submitted,

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*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 October 6, 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*