DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: October 20, 2023 5:02 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 **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP.	▲ COURT USE ONLY ▲
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**Pro hac vice* admission pending

RESPONSE TO INTERVENOR TRUMP'S MOTION TO REALIGN THE SECRETARY OF STATE AS A PETITIONER

Petitioners object to Intervenor Donald J. Trump's *Motion to Realign the Secretary of State as a Petitioner*. The filing by Trump is not grounded in sound case law and amounts to nothing more than an attempt to frame this matter as solely a political dispute. As such, the Court should deny Trump's Motion to Realign.

Argument

I. The Secretary is not a petitioner, nor is she aligned with Petitioners.

As a threshold matter, this case is brought by Petitioners against the Secretary of State as Colorado's chief election official charged with certifying the presidential primary ballot. *Pet.* ¶

42. Petitioners allege that the Secretary has "not committed to excluding Trump from the presidential primary ballot" and seek an order directing her to do so. *Pet.* ¶¶ 433-48. The sole relief in this matter is against the Secretary. She is the sole respondent[1] and is being sued both by Petitioners and Intervenor Colorado Republican State Central Committee (the "State Party"). While Trump contends to be the real party in interest – and Petitioners did not object to him re-entering as an intervenor – the relief sought cannot be issued against him. Section 1-1-113 only applies when "any controversy arises between any official charged with any duty or function under this code and … any eligible elector" and states that any "order shall require the person charged to forthwith perform the duty." § 1-1-113, C.R.S. (2023). Trump, of course, cannot perform the duty because Trump is not charged with overseeing the presidential primary election. That is the sole purview of the Secretary.

Moreover, the Secretary cannot be a "petitioner" because she asserts no affirmative claims for relief. And at no point has the Secretary asked the Court to grant Petitioners' requested relief. Nor would such a request make sense: Petitioners seek an order directing *the Secretary* to comply with the Election Code. Trump's proposed "realignment" of the Secretary as a co-petitioner would effectively force the Secretary to *sue herself*. That proposal is absurd and Trump cites no case supporting it.

Trump argues that Colorado courts may "realign the parties when the antagonism between the parties shows that they are not properly aligned." *Mot*. to Realign, at 2. That characterization is in error and should not be condoned by this Court. The rationale to realign parties does not extend to simple disagreement on non-central issues or personal opinion.

[1] The caption in this matter lists Trump as both an intervenor and a respondent for consistency purposes only. Petitioners stipulated to dismissal of their declaratory judgment claim, the only claim to which Trump was a proper respondent. Subsequently, Trump filed and was granted an unopposed motion to intervene. Trump is no longer a substantive respondent to the sole claim remaining.

As the basis for his argument, Trump cites multiple cases where nominally opposed parties had aligned financial incentives. For example, Trump cited multiple times to *City of Indianapolis v. Chase National Bank*, in which the U.S. Supreme Court reviewed the financial interests of the parties to resolve a question of diversity jurisdiction. *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69, 73-74 (1941) (noting there was "no doubt that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City"). Consequently, the Court dismissed the case for lack of diversity jurisdiction. *Id.* at 74-76. Likewise, Trump's reliance on *Pine v. Duhon*, Case No. 13CV30948, Colo. Dist. LEXIS 3059, is misplaced. The El Paso County District Court addressed a shareholder derivative claim, briefly analyzed party realignment in generic terms and noted that "a shareholders' derivative action must … be free from economic interests that are antagonistic to the interests of the class." *Id.* at ¶¶ 17-18 (El Paso Cnty. June 27, 2014). Furthermore, the Court did not realign the parties; the original complaint itself listed the company as both a plaintiff (on a derivative basis) and as a nominal defendant which the Court confirmed as appropriate in the circumstances.

Similar factual scenarios where opposing parties shared financial incentives played out in every case cited by Trump. Not a single case relied on, or even mentioned, antagonism over the parties' general disagreement or dislike as a cause for realignment. But that is precisely what Trump complains about in his Motion to Realign. He cites multiple public statements made by the Secretary and her procedural posture on several issues before this Court as the basis for his motion. Neither are grounds for realignment.

Contrasted to the cases discussed above, the Secretary has not taken a position antagonistic to – and certainly does not have an economic conflict with – Trump in this case. On multiple occasions the Secretary has told the Court that she does not intend to put on an

affirmative case. While the Secretary may have made public statements regarding her personal opinion, she has never made similar statements in her official capacity during these proceedings. In fact, her public statements are only before this Court because both Intervenors choose to include them in pleadings. *See Colo. Repub. State Central Comm.'s Mot. for Judgment on the Pleadings Under Rule 12/Judgment as a Matter of Law Under Rule 56*, at 3.

To the extent Trump complains about the legal positions taken by the Secretary in this case, the Secretary was not siding with Petitioners just to side with Petitioners. She was stating her positions on the law–the correct positions, ones Petitioners happened to share. For example, Trump removed to federal court without obtaining the consent of the Secretary as the other named respondent, a clear violation of the Federal Rules of Civil Procedure. Petitioners noted Trump's error. The Secretary, and a federal judge, agreed. Similarly, the Secretary's objections to expanded discovery do not indicate some clandestine partnership with Petitioners, but presumably the Secretary's interest in maintaining the standard practice applied in past actions and avoiding a new, time-consuming, costly practice in future actions. Finally, Trump submitted a supplemental argument alleging the Secretary undermined its previous discovery opinion by not opposing Petitioners' request for trial preservation deposition. Again, Trump fails to draw a fundamental distinction: a *trial preservation* deposition, intended to substitute for trial testimony Trump's own counsel has said he will not provide, is entirely different from a *discovery* deposition intended to allow counsel to pose questions to a witness before that same witness eventually testifies in court.

II. The Secretary has stated that she will abide by this Court's decision.

Trump alleges that the Secretary "refuses to fulfill her statutory duty and accept President Trump's Statement of Intent." This argument is nothing more than gamesmanship. A simple timeline review demonstrates the point: Petitioners initially noted that the Secretary did not

commit to excluding Trump to the presidential primary, *Pet.* ¶ 446; Trump and the State Party both argued that Petitioners' complaint was not ripe because Trump had not filed a statement of intent yet, *Respondent Donald J. Trump's Mot. to Dismiss*, at 9-14; *Colo. Repub. State Central Comm.'s Mot. to Dismiss Pursuant to Colo. Rule of Civil Procedure 12(b)(5)*, at 6, 15; then Trump filed his statement of intent, *Secretary of State's Notice Regarding Receipt of Candidacy Materials for Donald J. Trump*; and now Trump argues that the Secretary refuses to fulfill her statutory duty to accept his statement of intent. This despite the deadline for the Secretary to certify names on the presidential primary ballot is not until January 5, 2024. That date falls after the scheduled trial, a decision, and appeals will be complete in this matter. Trump is simply wasting the Court's time with such games.

In contrast, the Secretary has been very clear that she intends to abide by this Court's decision. Petitioners previously noted this fact when the State Party made the argument Trump makes now. The Secretary has refused to unilaterally determine Trump is disqualified from accessing the Colorado ballot. In response to this challenge, she welcomed "the Colorado Court's substantive resolution of the issues" and hoped the Court would "provide guidance to election officials on Trump's eligibility as a candidate for office." *Response to Intervenor Colo. Repub. Central Comm.'s Mot. for Judgement on the Pleadings Under Rule 12 / Judgment as a Matter of Law Under Rule 56*, at 5-6 (quoting Press Release, *Colo. Secretary of State, Colorado Secretary of State Jena Griswold Issues Statement on Lawsuit Pertaining to 14th Amendment and Access to Colorado's Ballot* (Sept. 6, 2023)).

Looking to the Court for guidance is precisely what Colorado law requires of the Secretary. In *Hanlen v. Gessler*, the Colorado Supreme Court made clear that "the election code requires a court, not an election official, to determine the issue of eligibility" of a candidate. *Hanlen v. Gessler*, 2014 CO 24, ¶ 40. Two years later, the Colorado Supreme Court reaffirmed

that position and again declared, "when read as a whole, the statutory scheme evidences an intent that challenges to qualifications of a candidate be resolved only by the courts." *Carson v. Reiner*, 2016 CO 38, ¶ 8. Two years after that, the Colorado Supreme Court noted that while the paper record submitted to an election official may appear sufficient on its face, courts retained the power to review extrinsic evidence in a challenge to qualifications. *Kuhn v. Williams*, 2018 CO 30, ¶¶ 39-46. These cases make it clear that it is the duty of courts, not elections officials, to review and decide qualification challenges.[2]

That is precisely the position the Secretary finds herself in here. Petitioners have filed a challenge to Trump's qualifications to access the ballot with this Court and the Secretary is awaiting a decision before acting. Any other action while this case is pending, including accepting Trump's statement of intent or certifying him to the ballot, would be in error and contrary to Colorado law. In effect, the Secretary is not aligned with Petitioners, she is instead waiting for them to make their affirmative case and allowing the Court to decide. Consequently, Trump's Motion to Realign should be denied.

III. Realignment is not necessary to facilitate the presentation of evidence in this case.

Nor is realignment necessary to ensure the "orderly presentation of evidence." *Cf.* Motion to Realign at 7. This concern is irrelevant because the Secretary has stated that, "[c]onsistent with the Secretary of State's practice in other challenges to a candidate's qualifications to appear on the ballot, the Secretary does not anticipate presenting any affirmative evidence in this case."

[2] The history of Colorado's presidential primary elections statute, § 1-4-1204, C.R.S. (2023), confirms that the General Assembly wanted courts, not the Secretary, to resolve ballot access challenges to presidential primary candidates. The statute originally charged the Secretary with adjudicating any "challenge to the listing of any candidate on the presidential primary election ballot," with the "secretary of state's decisions upon matters of substance … open to review, if prompt application is made, as provided in section 1-1-113." CO Laws 2016, I.P. 140 (Proposition 107), § 2, eff. Dec. 27, 2016. In 2017, however, the General Assembly amended the statute to require that challenges be made directly with the district court rather than the Secretary. *See* CO Laws 2017, Ch. 216, § 4, eff. Aug. 9, 2017; § 1-4-1204(4), C.R.S. (2023).

Secretary of State's Omnibus Response to Motions to Dismiss, at 2 (Sept. 29, 2023). Even if the Secretary changes her mind and decides to present an affirmative case, it will not prejudice Intervenors. The Court has already set time limits for trial presentation and ordered that any time used by the Secretary will be counted against Petitioners. If anything, Petitioners have been burdened by losing valuable time to any presentation made by the Secretaryin Petitioners' own action.

Conclusion

Intervenor Trump has not provided any reason for this Court to realign the parties. His Motion to Realign should be denied.

Respectfully submitted this 20th day of October 2023.

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CERTIFICATE OF SERVICE

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