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DISTRICT COURT, DENVER, COLORADO 1437 Bannock Street Denver, CO 80203	
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, and DONALD J. TRUMP.	**▲COURT USE ONLY▲** Case No. 2023CV32577 Courtroom: 209
PHILIP J. WEISER, Attorney General MICHAEL KOTLARCZYK, Senior Assistant Attorney General, Attorney Reg. No. 43250* GRANT SULLIVAN, Assistant Solicitor General, Attorney Reg. No. 40151* Colorado Department of Law Ralph L. Carr Colorado Judicial Center 1300 Broadway Denver, Colorado 80203 Telephone: (720) 508-6187 / 6349 Email: mike.kotlarczyk@coag.gov; grant.sullivan@coag.gov *Counsel of Record *Attorney for Respondent Jena Griswold*	

SECRETARY OF STATE'S OPPOSITION TO DONALD J. TRUMP'S MOTION TO REALIGN

Intervening Respondent Donald J. Trump requests that the Court "realign" the Secretary of State as a petitioner in this case, even though she asserts no

affirmative claim against any party and despite Petitioners' choice to assert claims against her. It remains unclear what utility granting Mr. Trump's request would generate or how it would aid the Court in deciding the important legal questions at stake. But in any event, realignment is not required by the law or facts of this case, for five reasons.

First, Petitioners hold discretion in naming those defendants or respondents that *they* believe are liable. "A plaintiff is the master of his complaint and has the option to name as defendants any or all potentially liable parties." *Suydam v. LFI Ft. Pierce, Inc.*, 2020 COA 144M, ¶ 48 (quotations omitted). Here, Petitioners exercised that discretion by naming the Secretary as a respondent, as was their right.

Second, not only were Petitioners entitled in their discretion to name the Secretary as a respondent, they were *required* to do so under state statute. Under section 1-1-113, the respondent must be the election official whose duty or wrongful act is questioned by the suit.

> 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.

§ 1-1-113(1), C.R.S. (emphasis added). Here, that election official is the Secretary of State. And unlike Petitioners, the Secretary has not filed any petition or complaint asserting affirmative claims against Mr. Trump or any other party. The Secretary must therefore remain a respondent under section 1-1-113.

Nor is the Secretary's posture in this case unusual in a section 1-1-113 action. The Secretary often appears in such cases as a nominal respondent while the petitioners and an intervenor party-in-interest dispute the merits. To name just a few examples from the last three years:

- *Schneider v. Griswold*, No. 2020CV31415, Denver Dist. Ct. The Secretary of State presented no evidence in an intraparty dispute about whether to list a candidate on the Republican Party primary ballot.
- *Miller v. Griswold*, No. 2022CV30855, Denver Dist. Ct. Same.
- *Elmore v. Griswold*, No. 2022CV32668, Denver Dist. Ct. The Secretary presented no evidence on a residency challenge to a candidate.

Here, too, while the Secretary is quite willing to make Colorado Department of State representatives available to the Court for testimony on the topics the Court believes to be important, the Secretary has no intention of affirmatively introducing evidence in her own right as a party in this matter. That is not unusual for section 1-1-113 cases.

Third, Mr. Trump alleges that the Secretary has "refused to fulfill her duty to execute Colorado's election laws" by not certifying Mr. Trump to the ballot. Mot. 4. This mischaracterizes both the facts and the law. For one, the Secretary has not "refused" to certify Mr. Trump to the ballot. To the contrary, the Notice she filed expressly says she "intends to hold Mr. Trump's application pending further direction from the Court." Notice (Oct. 11, 2023).

Furthermore, the Secretary has no "duty" to certify Mr. Trump to the ballot nearly two months before the ballot certification deadline. Certification must be made by January 5, 2024. *See* § 1-4-1204(1), C.R.S. Mr. Trump cites no authority that the Secretary has any duty under the Election Code to certify candidates before January 5. And Mr. Trump knows this. In his first motion to dismiss, he argued that Petitioners' § 1-4-1204 claim should be dismissed because the Secretary

> has not certified any candidates to the ballot. The Petitioners, Intervenors, and indeed the Secretary ***all agree that she currently has no duty to certify any candidate***, for two reasons: no candidate has yet submitted any paperwork, and the deadline to certify candidates is months away, on January 5, 2024.

Mot. to Dismiss 10 (Sept. 22, 2023) (emphasis added). Mr. Trump has now submitted his candidate paperwork, but the deadline to certify candidates is still months away and so the Secretary is still under no duty to certify him or anyone else to the ballot, as Mr. Trump has recognized.

Fourth, Mr. Trump makes much of public statements by the Secretary that he believes show "her belief that he instigated and engaged in an insurrection on January 6, 202[1], and her demand that he should be barred from running for reelection." Mot. 4. Mr. Trump's position is factually incorrect and legally irrelevant. As a factual matter, while the Secretary has undoubtedly stated her belief that Mr. Trump incited an insurrection, she has not taken the position that the Colorado Election Code prohibits listing him as a candidate on the ballot. To the contrary, the Secretary has recognized 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" and has "therefore welcome[d] the Court's involvement and direction" in this case to resolve whether Mr. Trump is "disqualified to appear on Colorado's presidential primary ballot." Sec'y of State's Resp. to Mots. to Dismiss 2 (Sept. 29, 2023); *see also* Notice (Oct. 11, 2023) ("the Secretary intends to hold Mr. Trump's application pending further direction from the Court").

And that is the fundamental legal question this litigation seeks to address: does Colorado law prohibit Mr. Trump from appearing on the ballot? None of the Secretary's public statements have taken a position on that question, and the Secretary continues to welcome this Court's involvement and direction.

As a corollary, Mr. Trump also argues that the Secretary has taken litigation positions consistent with Petitioners. But surely that does not mean the Secretary cannot be a respondent in this action—parties can agree and disagree with parties on either side of the "v" without requiring realignment. Nor have the positions of the Secretary and Petitioners been uniform. The Secretary has certainly agreed that this is a proper section 1-1-113 action, but the Secretary also expressly stated that the Petitioners could not bring their declaratory judgment claim. Sec'y Resp. to Mots. to Dismiss 9-11 (Sept. 29, 2023). Nor has the Secretary indicated any intention to offer proof in support of Petitioners' claims.[1]

Finally, Mr. Trump argues that practical trial management considerations counsel in favor of making the Secretary a petitioner. But the Court has already demonstrated it is fully capable of dealing with any such issues as they arise. The Court has stated it will assess any hearing time used by the Secretary against Petitioners—a practical solution that solves the trial management concerns raised

[1] Mr. Trump supplemented his motion to argue that the Secretary is advocating a double standard by opposing discovery but not opposing a trial preservation deposition of Mr. Trump. But such depositions are not discovery, but rather an alternate means of presenting trial evidence. *See, e.g.*, *Estenfelder v. Gates Corp.*, 199 F.R.D. 351 (D. Colo. 2001) (permitting trial depositions outside of discovery deadlines because they were not sought for discovery). In any event, the Secretary did not join the request to take Mr. Trump's trial preservation deposition; she simply did not oppose it. Petitioners are not seeking discovery under Rule 26 because a preservation deposition is not for the purpose of "discovery" but rather is for the purpose of trial pursuant to the party's unavailability under Rule 32(a)(3)(B). *See also Campbell v. Graham*, 357 P.2d 366, 369-70 (Colo. 1960).

by Mr. Trump. Any lingering concerns harbored by Mr. Trump do not justify disregarding the hornbook law that the plaintiff is master of their complaint.

CONCLUSION

Mr. Trump's motion to realign should be denied.

DATED: October 20, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I served a true and complete copy of the foregoing **SECRETARY OF STATE'S OPPOSITION TO DONALD J. TRUMP'S MOTION TO REALIGN,** upon all parties and their counsel of record by e-filing with the Colorado Courts E-Filing system maintained by the court.

/s/ Carmen Van Pelt