SUPREME COURT STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80202	DATE FILED: October 24, 2023 10:07 AM FILING ID: DC29D2C5D8466 CASE NUMBER: 2023SA279
Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577	
In Re: **Petitioners-Appellees:** **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**, v. **Respondents-Appellants:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, and **DONALD J. TRUMP** v. **Intervenors-Appellant:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, and **DONALD J. TRUMP.**	▲ **COURT USE ONLY** ▲
Attorneys for Respondent, Intervenor and Appellant, Donald J. Trump: Scott E. Gessler (28944), sgessler@gesslerblue.com Geoffrey N. Blue (32684) gblue@gesslerblue.com GESSLER BLUE LLC 7350 E Progress Pl., Suite 100 Greenwood Village, CO 80111 Tel: (720) 839-6637 or (303) 906-1050	Supreme Court Case Number: 21 SC _____
PETITION FOR RELIEF UNDER C.A.R. 21	

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The brief complies with C.A.R. 28(g).

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Scott E. Gessler

Scott E. Gessler, #28944

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INTRODUCTION

This case is about whether Colorado Republicans and unaffiliated voters will be denied their right to vote for Donald J. Trump as the Republican Party's presidential nominee. Several Colorado Electors ("Petitioners" in the proceeding below) argue that President Trump is barred from appearing on Colorado's ballot, alleging that he "engaged" in an "insurrection" under U.S. Const. amend. XIV, § 3, ("Section Three" or "Fourteenth Amendment"). Candidate access to the ballot affects not only the constitutional rights of candidates, but also the "right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."[1] This is a matter of great public importance.

President Trump moved to dismiss this matter on several grounds, each of which was denied or deferred by the district court.

[1] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

First, in his *Procedural Motion to Dismiss*[2], President Trump cited *Frazier v. Williams*[3] and *Kuhn v. Williams,*[4] as a bar litigating constitutional claims in a proceeding under C.R.S. § 1-1-113. But the district court improperly limited *Frazier* and *Kuhn* to apply only when a litigant challenges the constitutionality of the election code itself.[5]

Second, C.R.S. § 1-4-1204 requires the Secretary to certify candidates to the presidential primary ballot, and the Secretary herself admits that she has no authority to deny ballot access to a candidate under Section Three. But the lower court ruled that the enforcement subsection of Section 1204 incorporates the entire constitution, and that the scope of the Secretary's authority is a matter to be determined at trial.

Third, President Trump filed a *Special Motion to Dismiss* under Colorado's anti-SLAPP statute.[6] All of President Trump's actions alleged in the *Verified Petition* consisted of his public speech. President Trump's speech is protected First

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[2] Respondent Donald J. Trump's Motion to Dismiss, Denver District Court, Case No. 2023CV32577, September 22, 2023 ("*Procedural Motion to Dismiss").*

[3] *Frazier v. Williams (In re Frazier*), 401 P.3d 541 (Colo. 2017).

[4] *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018).

[5] Omnibus Ruling on Pending Dispositive Motions, (*"Order"*), October 20, 2023, 10.

[6] C.R.S. § 13-20-1101(1).

Amendment speech, under *Brandenburg v. Ohio*,[7] not unprotected "incitement" to violence. And "incitement" itself falls short of "engaging" in an "insurrection," as required by Section Three. But the lower court refused to consider the merits of this argument, holding that the anti-SLAPP statute is incompatible with a Section 113 proceeding, and that the statute did not apply because of public policy.

The district court has no jurisdiction to hold a hearing on whether Section Three applies to President Trump, yet the case moves forward at breakneck speed. A hearing is scheduled to begin October 30, 2023. This flawed process severely handicaps President Trump's ability to defend himself.

At nearly every step the lower court has interpreted Section 113 to allow the Electors wide latitude to develop and present their case. At nearly every step, the lower court has interpreted Section 113 to deny President Trump basic procedural protections and meritorious defenses. *Every* other court in the country that has considered similar Section Three claims against President Trump has first thoroughly and properly decided the jurisdictional questions. And *every* court decision rejected similar Section Three Claims. These proceedings are a national outlier.

As the General Assembly has made clear, "it is in the public interest to encourage continued participation in matters of public significance and . . . this

[7] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

participation should not be chilled through abuse of the judicial process."[8] The lower court has improperly assumed jurisdiction, contrary to statute and controlling case law. Instead, it should "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law."[9]

DISCUSSION

A. Identity of the Parties.

The Petitioner, President Donald J. Trump, is a former President of the United States and current candidate for President. He is an Intervenor in the case below.

Respondents (referred to as "Electors") are Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian. They are Petitioners in the case below.

Respondent Colorado Secretary of State is the state's chief election official. She is a Respondent in the case below, but as a practical matter she has aligned herself with the Electors.

The Colorado State Republican Central Committee is an Intervenor in the case below, aligned with President Trump.

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[8] C.R.S. § 13-20-1101(1)(a).

[9] C.R.S. § 13-20-1101(1)(b).

B. The court proceeding below.

The District Court for the City and County of Denver issued the orders challenged here, in the proceeding captioned *Anderson, et al., v. Griswold et al.*, Case Number 2023CV32577.

C. Parties against whom relief is sought.

Petitioner Donald Trump seeks relief against both the Electors and the Secretary.

D. The ruling below and requested relief.

On October 10, 2023, the lower court denied President Trump's *Special Motion to Dismiss*[10] without considering the merits of his *Brandenburg v. Ohio* arguments. She held that the Electors' claims were immune to an Anti-SLAPP motion because they were incompatible with a Section 113 proceeding, and because they fell under the public policy exception to the anti-SLAPP statute. But neither the Electors nor the court identified a "right" the Electors seek to protect. And no caselaw supports either ground for denial.

Further, on October 16, 2023, the lower court denied President Trump's *Procedural Motion to Dismiss*. That *Motion* sought dismissal of the *Verified Petition's* first

[10] Donald J. Trump's Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(A) ("*Special Motion to Dismiss")*, September 22, 2023.

claim under C.R.S. § 1-1-113 and § 1-4-1204(4). The court denied the *Procedural Motion to Dismiss*, reasoning that Section 113 does not bar the Electors from litigating their Fourteenth Amendment claim in this case, and because the scope of the Secretary's authority under Section 1204 is an issue to be determined at trial.

The Secretary refuses to place President Trump on the ballot because of the pending case.

President Trump seeks an order dismissing this case and directing the Secretary to place President Trump on the ballot.

E. Lack of available remedy.

If any case meets the Court's standards for granting a Rule 21 petition, this is it. This case presents a matter of first impression, on a matter of paramount importance, where President Trump faces a flawed and prejudicial trial, subject to inadequate appellate procedures**.**

Rule 21 petitions are granted "when an appellate remedy would be inadequate, … a party may otherwise suffer irreparable harm, or … a petition raises issues of significant public importance that [the Court has] not yet considered,"[11] or where the

[11] *People v. Cortes-Gonzalez*, 2022 CO 14, P21, *quoting People v. Sherwood*, 2021 CO 61, ¶ 13, 489 P.3d 1233, 1238 (in turn *quoting People v. Lucy*, 2020 CO 68, ¶ 11, 467 P.3d 332, 335) (ellipses in original).

trial court "is proceeding without or in excess of its jurisdiction."[12] President Trump meets all four standards.

First, whether President Trump may appear on the Colorado Primary ballot is of greatest importance. This judicial proceeding will impact not just all Coloradans, but all Americans. A majority of Colorado voters will lose their ability to vote for a leading candidate, which could also have significant, outsized impact in a closely contested national convention. And Colorado's courts have never addressed two of the issues raised in this appeal, while this Court has definitively ruled on the third—that the lower court does not have jurisdiction over this constitutional issue.[13]

Second, President Trump faces irreparable harm caused by the hearing itself. This Court recently held that the burden of participating in an improper trial was a harm and properly remedied in a Rule 21 proceeding. In *Polis*, this Court held that the Colorado Governor "should not be subject to the burdens of discovery and trial and that direct appeal would be an inadequate remedy in this instance because it

[12] *Weaver Constr. Co. v. District Court of El Paso County*, 545 P.2d 1042, 1044 (Colo. 1976).

[13] *People v. A.S.M.*, 2022 CO 47, ¶11.

would come only after his participation in these processes."[14] The same reasoning applies to President.

Furthermore, this case presents the very harm that this Court warned against in *Frazier v. Williams*. Sections 1-1-113 and 1-4-1204 provide an expedited procedure that falls outside the regular contours of litigation.[15] For example, the compressed timeline severely tilts the playing field against President Trump, because the Electors have spent ten months preparing their case,[16] giving them a massive advantage. The fact that they spent substantial preparation time is evident from 104-page *Verified Petition* and their repeated representations that they were prepared for trial five days after they filed this case. President Trump, on the other hand, has mere weeks to marshal evidence and witnesses to defend his rights. In fact, one rebuttal expert he sought to retain withdrew at the last moment due to the rushed nature of this case and the inadequate time to develop a rebuttal. President Trump has been denied the discovery tools and procedural protections afforded to other individuals forced to defend their constitutional rights.

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[14] *Id.*

[15] C.R.S. § 1-1-113(3) and § 1-4-1204(4).

[16] Electors' counsel stated that they warned President Trump that they were developing a case against him in November 2022.

Third, the court has greatly exceeded its jurisdiction. "The general function of a writ of prohibition is to enjoin an excessive or improper assumption of *jurisdiction*. It is designed to restrain rather than remedy an abuse of jurisdiction."[17] *Frazier* and *Kuhn* are dispositive: Colorado courts have no jurisdiction to hear constitutional issues in a Section 113 proceeding, in part because Colorado courts are limited to ordering compliance with the election code – not the Fourteenth Amendment, as the Electors demand. Furthermore, *every* other court that has ruled on a Section Three challenge to President Trump's eligibility to appear on a ballot has struck it down on jurisdictional grounds.[18] The Colorado district court is the *only* court in the nation to hold otherwise – which itself provides a good indicator that the lower court has exceeded its jurisdiction.

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[17] *Vaughn v. District Court of Second Judicial Dist.*, 559 P.2d 222, 223 (Colo. 1977).

[18] *See Castro v. FEC*, Case No. 1:22-cv-02176-RC (D.D.C. Dec. 6, 2022) (ECF No. 21), affirmed Case No. 22-5323 (D.C. Cir. Apr. 10, 2023); *Castro v. Trump*, Case No. 9-23-cv-80015-AMC (S.D. Fla. June 26, 2023) (ECF No. 33) writ before judgment denied – U.S. –, 2023 WL 6379034 (Oct. 2, 2023); *Caplan v. Trump*, Case No. 0:23-cv-61628-RLR (S.D. Fla. August 31, 2023) (ECF No. 17); *Schaefer v. Trump et al.*, Case No. 23-cv-1451 JLS (BLM), 2023 WL 6798507(S.D. Cal. Oct. 13, 2023) (ECF No. 6); *Sladek v. Trump*, Case No. 1:23-cv-02089-LTB-SBP (D. Colo. Oct. 18, 2023) (ECF No. 12); and *Clark v. Weber*, Case No. 2:23-cv-07489-DOC-DFM (C.D. Cal. Oct. 20, 2023) (ECF No. 35). *See* also Magistrate Judge's Order to Show Cause *Castro v. Oliver*, Case No. 1:23-cv-766-KK-GJF (D.N.M. Sept. 18, 2023) (ECF No. 5); and *Castro v. Weber*, Case No. 2:23-cv-2172-DAD-AC (E.D. Cal. Oct. 12, 2023) (ECF No. 6).

Last is the inadequate remedy. Again, in *Frazier* this court held that Section 113's trial and appellate procedures are contrary to the requirement of federal constitutional litigation.[19]

F. Issues presented for review.

1. In both *Frazier* and *Kuhn,* this Court held that Colorado courts lack jurisdiction under C.R.S. § 1-1-113 to consider constitutional claims about candidate eligibility requirements. The Electors seek to prove that President Trump is disqualified from appearing on Colorado's ballot under Section Three of the Fourteenth Amendment. May the Electors litigate that constitutional claim in a Section 113 proceeding?

2. Section 1204 sets forth the Secretary's authority to certify candidates to the presidential primary election ballot. Nonetheless, the lower court ruled that the scope of the Secretary's authority is an issue best reserved for trial. Is the Secretary's authority a legal issue to be resolved by courts in advance of trial, or is it a factual issue to be determined on the basis of evidence?

3. Section 1204 states three requirements: (1) state party certification; (2) affiliation with a major political party; and (3) submission with a statement of intent, along with a fee (or petition signatures). As the Secretary admits, it does not allow her

[19] *Frazier* at ¶ 18.

to bar a candidate under Section Three. Can President Trump nonetheless be forced to defend himself under Section Three in a Section 1204 action?

4. The *Verified Petition* identifies certain speech and alleges that President Trump "engaged" in an "insurrection" based on that speech, such as the admonition to "peacefully and patriotically" march to the Capitol. But the U.S. Supreme Court has repeatedly held that the First Amendment prevents government from penalizing political speech unless it (a) specifically advocates for listeners to take unlawful action, (b) is likely to produce *imminent* disorder—not merely illegal action at some indefinite future time, and (c) is made with specific intent equivalent to purpose or knowledge. Did President Trump's speech clear this very high, constitutionally mandated threshold?

G. Factual background.

The relevant facts are straightforward. President Trump gave a speech at the Ellipse in Washington D.C. on January 6, 2023, while Congress was convening to count electoral votes. His words are undisputed; during his speech, he gave the crowd a call to action, saying: "I know that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically* make your voices heard."[20]

[20] *See, generally, Transcript of Trump's speech at rally before US Capitol riot,* Associated Press, Jan. 13, 2021(emphasis supplied), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27

Both before and after his speech, violence erupted outside the U.S. Capitol, and a large number of people entered the Capitol and disrupted Congressional proceedings to count electoral votes. The extent and purpose of the violence on January 6th are disputed.

Following his speech and the outbreak of violence, President Trump urged protestors at the Capitol to be peaceful.[21] First, at 2:38 pm on January 6, 2023, he tweeted "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!"[22] Thirty-five minutes later, at 3:13 pm, he tweeted "remain peaceful."[23] And an hour later, at 4:17 pm, he released a video in which he concluded "I know how you feel, but go home and go home in peace."[24]

(last visited Sept. 22, 2023). The Electors cited to this transcript in their *Verified Petition* ¶ 279.

[21] Although "Twitter" and "Tweets" seem to be universally recognized, this short (and likely unnecessary) description is included for purposes of completeness; the company known in 2021 as "Twitter" allowed internet users to download an application through which the user could send and receive messages, known as "tweets."

[22] *Verified Petition*, ¶ 327.

[23] *Id.*

[24] *Id.*, ¶ 331.

The procedural history is more complex. Following their November 2022 threat to file this lawsuit against President Trump, the Electors' attorneys researched their legal arguments, gathered evidence, and prepared witnesses. Then, less than three months before the Secretary must certify the primary ballot, on September 6, 2023, they filed their *Verified Petition* against both the Secretary and President Trump, consisting of 104 pages, over 450 allegations, and two counts for relief. Count I combined C.R.S. § 1-1-113 and § 1-4-1204. Count II sought a declaration that President Trump "engaged" in an "insurrection," and thus was disqualified from holding office under Section Three. The Electors demanded a hearing within five days of filing the *Verified Petition*.

President Trump immediately removed the matter to federal court. The Electors moved to remand, arguing in part that the federal court did not have subject matter jurisdiction. Importantly, the Electors admitted they did not have a "concrete and particularized" injury that would confer jurisdiction under Article III.

After remand and the initial status conference, the district court granted intervention to the Colorado Republican Party (over the Secretary's partial objection) and scheduled a five-day hearing to commence on October 30, 2023. President Trump objected to a hearing date prior to resolution of any motions to dismiss.

President Trump has filed four motions to dismiss:

First, Count I fails because the court does not have jurisdiction under Section 113 to consider the Electors' Fourteenth Amendment claim, and because Section 1204 provides no authority for the Secretary to bar a presidential candidate under Section Three. In addition, Count II fails because the Electors have no standing to seek declaratory relief directly under Section Three, in light of their admission that they do not have a concrete and particularized claim.

In response, the Electors voluntary withdrew their request for declaratory relief. They argued that Count I was only directed against the Secretary, requiring President Trump to intervene with respect to Count I. The Secretary also opposed the *Procedural Motion to Dismiss*, but in doing so she admitted that she has no authority under Section 1204 to bar President Trump on Fourteenth Amendment grounds.[25]

Second, President Trump filed an anti-SLAPP *Special Motion to Dismiss*, seeking dismissal because the only actions that Electors allege are President Trump's public communications. Under the well-established standards set forth in *Brandenburg v. Ohio* and its progeny, President Trump's words cannot be considered incitement, even assuming *arguendo* that the phrase "engage" includes "incitement." The district court dismissed the *Special Motion to Dismiss* without reaching the merits. Following

[25] Secretary of State's Omnibus Response to Motions to Dismiss ("*Omnibus Response")*, Sept. 29, 2023, at 2.

dismissal, President Trump re-filed his arguments as a "Fourth" *Motion to Dismiss*,[26] advancing the arguments that underpinned the *Special Motion to Dismiss*.

Third, President Trump moved to dismiss this matter based on substantive federal law. That *Third Motion to Dismiss* seeks dismissal because:

(1) Colorado may not enforce Section Three, because that constitutional provision is not self-executing;

(2) Colorado is pre-empted from enforcing Section Three;

(3) the issue presents a political question;

(4) Section Three cannot bar a presidential from holding office, based on the plain language, legislative history, and historical usage;

(5) the events of January 6th did not constitute an insurrection, and

(6) even if they did constitute an insurrection, President Trump did not "engage" in an insurrection.

The lower court has not yet ruled on this *Third Motion to Dismiss*. On October 11, President Trump submitted his statement of intent to appear as a candidate on the Republican Party presidential primary ballot. The Secretary refuses to place him on the ballot, citing the lower court proceeding.

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[26] Respondent Donald J. Trump's Motion to Dismiss ("*Third Motion to Dismiss")*, September 29, 2023.

H. Argument.

1. The Electors cannot litigate a constitutional claim in a Section 113 proceeding.

This is not a close call. This Court has already ruled twice on the matter.

Section 113 is limited to wrongful acts under the Colorado Election Code. Its plain language applies exclusively to claims "alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty" and that such breach or neglect be remedied by a court order "requiring substantial compliance with the provisions of this code."[27] "[W]hen section 1-1-113 repeatedly refers to 'this code,' it is referring to the Colorado Election Code, and thus, claims brought pursuant to Section 1-1-113 are limited to those alleging a breach or neglect of duty or other wrongful act under the Colorado Election Code."[28] In other words, "all three grounds for a section 1-1-113 claim – that is, breach of duty, neglect of duty, or other wrongful act – all refer to acts that are inconsistent with the Election

[27] *Id.*

[28] *Frazier v. Williams (In re Frazier*), 401 P.3d 541, 543 (Colo. 2017) ("See § 1-1-101 (defining "this code" as the Uniform Election Code of 1992")).

Code."[29] For these reasons, a litigant may not raise constitutional issues regarding ballot access requirements.[30]

The lower court has acknowledged that this case has "constitutional implications."[31] But this is a Fourteenth Amendment case that goes well beyond "implications."

While the Electors plead their claim as a violation of Colorado law,[32] in fact their *Verified Petition* makes plain that the Colorado statutes are nothing more than a procedural vehicle for advancing a claim to deny President Trump's ability to hold office under the Fourteenth Amendment's "Disqualification Clause."[33] The very structure of the Electors' *Verified Petition* demonstrates that the Electors seek to litigate constitutional issues.

The *Verified Petition*'s introduction not only presents President Trump through the lens of the Fourteenth Amendment ("[Trump's efforts culminated on January 6,

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[29] *Id.* at 545.

[30] *Kuhn v. Williams*, 2018 CO 30M, ¶ 58.

[31] *Order* at 10.

[32] *See Verified Pet.* at 100, 103.

[33] U.S. Const. amend. XIV, § 3.

2021, when he … engaged [in an] insurrection"[34]), but it also immediately declares that it is the Electors' intent to invoke "Section 3 of the Fourteenth Amendment" to prohibit President Trump "from being President and from qualifying for the Colorado ballot for President in 2024."[35] Next, the *Verified Petition* proceeds to a "factual background" that has nothing to do with violations of Colorado's election code, but rather spends 68 pages discussing years of activity prior to January 6th, 2021. Then comes the legal argument: "Former President Trump is Disqualified Under Section 3 of the Fourteenth Amendment." The *Verified Petition* then concludes by utilizing Colorado procedural vehicles to bring the Electors Fourteenth Amendment case. In 450 paragraphs, the Electors refer to the Fourteenth Amendment nearly 50 times, while making scant reference to Colorado election law.

Finally, the hearing in this case revolves solely around the Fourteenth Amendment. There are no factual disputes about the application of Section 1204. All evidence is relevant for one issue, and one issue only – whether President Trump "engaged" in an "insurrection." The evidence involves Section Three, except for

[34] *Verified Pet.* at ¶ 1.

[35] *Id.* at ¶ 2.

President Trump's *Motion to Dismiss*, all substantive legal arguments involve Section Three, and the district court's specific concerns revolve around Section Three.[36]

Directly controlling precedent from this Court bars the *Electors'* attempt to shoehorn constitutional claims into a Section 113 proceeding.

In *Frazier v. Williams,* a U.S. Senate candidate challenged the Secretary of State's determination that he did not gather sufficient signatures to appear on the Republican Party primary ballot.[37] Frazier brought both statutory and constitutional claims in a Section 113 proceeding, and after the election the Secretary challenged Frazier's ability to litigate a constitutional claim, "arguing that federal claims such as section 1983 may not be brought in summary proceedings under section 1-1-113."[38]

The Supreme Court agreed with the Secretary and dismissed Frazier's constitutional challenge in the Section 113 proceeding for two reasons. First, "the last sentence of section 1-1-113 makes clear that section 1983 claims cannot be adjudicated through section 1-1-113 proceedings" because the "last sentence provides the remedy available in a section 1-1-113 proceeding, namely, that upon a finding of

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[36] *Topics for the Court's October 30, 2023*, *hearing*, October 18, 2023.

[37] *In re Frazier*, 401 P.3d, at 542.

[38] *Id.*

good cause, the district court shall issue *an order requiring substantial compliance with the provisions of this code*."[39]

Second, the Court held that Section 1-1-113 does not provide an appropriate procedure for adjudicating Section 1983 claims due to "inconsistencies between section 1983 and a section 1-1-113" proceeding. This includes expedited procedures that do not allow proper consideration of constitutional issues, and a limitation on appellate review, by creating a three-day deadline and making the district court's decision which is "final and not subject to further appellate review" if the Supreme Court declines to review the proceedings."[40]

One year later, the Supreme Court again prohibited using Section 113 to assert constitutional claims. In *Kuhn v. Williams*, the Supreme Court considered whether the Secretary could certify a U.S. Representative on the 2018 Republican primary ballot.[41] That case again attempted to raise both statutory and constitutional claims under Section 113. Relying on *Frazier v. Williams*, the Court summarily dismissed the constitutional claims, holding "Finally, to the extent the Lamborn Campaign

[39] *Id.* at 545 (emphasis provided in original).

[40] *Id.*

[41] *Kuhn v. Williams*, 418 P.3d at 480.

challenges the constitutionality of the circulator residency requirement . . . this court lacks jurisdiction to address such arguments in a section 1-1-113 proceeding."[42] Thus, constitutional claims involving ballot access requirements, as in two recent cases, mandate dismissal of this action.

The lower court unduly limited this Court's rulings in *Frazier* and *Kuhn*, writing that Frazier stands only for the proposition that a court "cannot consider independent claims in a C.R.S. § 1-1-113 proceeding based on a violation of constitutional rights" and that a petitioner can seek compliance when the Colorado election code "requires that an election official verify constitutional qualifications for office"[43] But this Court never limited Frazier's reasoning to "independent claims," nor did it require a constitutional claim to be based on a "violation of constitutional rights." Rather *Frazier* and *Kuhn's* reasoning and holding bar the litigation of constitutional issues in a Section 113 proceeding.

And importantly, this case is not about the Secretary "verifying" constitutional qualifications. First, nothing in the Election Code requires presidential candidates to set forth Section Three qualifications. Second, the Secretary has

[42] *Id.* at 489.

[43] *Order* at 11-12.

admitted that she has no authority to bar a presidential candidate from the ballot under Section Three. And third, Section Three does not set forth a qualification for appearing on the ballot. Rather, if certain conditions in Section Three are met, a person *may* subsequently be disqualified from *holding* specified offices (which do not include the presidency).[44]

This case exemplifies the unfairness of allowing a party to litigate constitutional issues under Section 113's expedited procedures that so troubled the *Frazier* court. Here, the Electors seek to use Section 113 against a private citizen, to terminate his right to run as a candidate, without basic, well-established protections required by due process:

- First is the burden of proof. Section 1204(4) states that "[t]he party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." Yet both the U.S. Supreme Court and this Court have held that due process considerations require a higher standard of proof when the state seeks to strip a person of constitutional rights.[45] And here, Electors seek to strip President

[44] These issues are the subject of a pending motion to dismiss in the lower court and are not part of this *Petition*.

[45] *See Santosky v. Kramer*, 455 U.S. 745, (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Addington v. Texas*, 441 U.S. 418 (1979); *A.M. v. A.C.*, 2013 CO 16, ¶ 32.

Trump of his right to run for office, as well as the right of individuals to vote for him.[46]

- C.R.C.P. 12 allows a defendant to test the legal sufficiency of a complaint, *before* proceeding with litigation. Under the current procedure, President Trump would be denied his right to weed out meritless claims prior to discovery, development of his entire evidentiary case, and perhaps a hearing.
- C.R.C.P. 7 prohibits discovery and litigation until after C.R.C.P. 12 motions are decided. But the Electors are forcing an immediate hearing.
- C.R.C.P. 26(a)(2) requires a plaintiff to disclose relevant documents and persons with knowledge about a claim. But here, President Trump must scramble to prepare for a hearing without knowledge of the evidence arrayed against him, benefit of broad disclosure to develop evidence, or adequate time to investigate potential witnesses.
- C.R.C.P. 26 requires a plaintiff to disclose experts, provide a report of expert opinions, give the defendant adequate time to obtain rebuttal experts, and affords the opportunity to depose experts. The Electors seek to call experts to offer opinion testimony (and likely rely on hearsay evidence) without affording President Trump any of these protections. Further, undersigned counsel attests that one

[46] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

rebuttal expert withdrew on the deadline to disclose rebuttal experts, specifically citing the inability to develop a report due to the compressed timelines.

- C.R.C.P. 56 affords a defendant an opportunity to obtain a ruling on the facts, to prevent an unnecessary, expensive, and in this case a politically charged trial. But President Trump cannot use this basic procedure to stop an unwarranted political trial, based on a 104-page *Verified Petition* spanning six years of activities.
- Of critical importance, C.R.C.P. 56(h) explicitly allows a party to seek a legal ruling in areas of unclear or ambiguous points of law. This tool is particularly important here, when the Electors seek to use the Fourteenth Amendment as a sword, relying on unique and controversial legal theories, to prohibit President Trump from running for office.
- The short timelines are untenable. President Trump had exactly ten days to identify and disclose rebuttal fact witnesses, following disclosure of the Electors' witnesses. He had 18 days to identify rebuttal experts for Electors' three experts. He had ten days to identify exhibits, following the Electors' disclosure of exhibits.[47] By contrast, Electors had nearly a year to prepare their case.

[47] *Minute Orders*, September 22, 2023.

This is no way to litigate complex constitutional issues of first impression, regarding events that happened thousands of miles away, with the potential consequence of barring a leading presidential candidate from the ballot.

2. Section 1204 does not provide grounds to challenge a candidate under the Fourteenth Amendment.

Section 1204 is a short statute that imposes three separate duties on the Secretary. She must:

- "[C]ertify the names and party affiliations of the candidates to be placed on any presidential primary election ballots" sixty days before the election.[48]
- Remove from the ballot a candidate who has filed an affidavit requesting his or her name be removed from the ballot;[49]
- Determine the method for drawing lots to place candidates' names on the ballot.[50]

Only the first duty is contested.

As an initial matter, the lower court erroneously ruled that the Secretary's authority is an issue best reserved for trial, to be determined following evidence about

[48] C.R.S. § 1-4-1204(1).

[49] C.R.S. § 1-4-1204(1.5).

[50] C.R.S. § 1-4-1204(2).

the Secretary's past practices.[51] But the scope of an official's legal authority is *always* a question of law, and this Court should resolve this issue before the lower court conducts a flawed and unnecessary trial.

The statute does not allow the Electors to challenge a candidate on Fourteenth Amendment grounds, because Section 1204 sets forth three – and only three – criteria for inclusion on the presidential primary ballot, none which includes Section Three.

First is whether the candidate is "seeking the nomination for president of a political party as a bona fide candidate . . . pursuant to political party rules." Here, Colorado law expressly vests authority with a political party to determine any candidates' bona fides, and members of the Colorado Republican Party determine whether a self-proclaimed candidate is a "bona fide candidate." Nowhere does this provision give the Secretary or the Electors authority to disqualify President Trump on Fourteenth Amendment grounds.

Second is whether the candidate's political party "received at least twenty percent of the votes…in the last presidential election." This is a simple factual determination and again does not provide authority to challenge a candidacy under the Fourteenth Amendment.

[51] *Order* at 15.

Third is whether the candidate has submitted a "notarized candidate's statement of intent together with either a…filing fee…or a petition."[52] Again, this provision does not provide grounds for a Fourteenth Amendment challenge, even if one looks at the statement of intent.[53] That form requires a candidate to affirm he or she meets that qualifications set forth in Article II of the U.S. Constitution: age, years of residency, and natural-born citizenship. The statute itself says nothing about disqualification under the Fourteenth Amendment, and the Electors have no basis to bring a Fourteenth Amendment challenge, even under the long-established forms promulgated by the Secretary.

The lower court, however, improperly held that Section 1204 is not, in fact, limited to the textual requirements of Section 1204. Specifically, the court cited to the enforcement provision in subsection 1202(4), which states "[a]ny challenge to the listing of any candidate on the presidential primary election ballot must be made in writing" and "the district court shall hear the challenge and assess the validity of all alleged improprieties."[54] But the enforcement provision of Section 1204 is limited to

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[52] C.R.S. § 1-4-1204(1)(c).

[53] **Ex. 1,** *Major Party Candidate Statement of Intent or Presidential Primary*.

[54] *Order* at 15-16.

Section 1204 itself. It does not supersize Section 1204 into a grant of authority to trawl the Election Code, Colorado statute, the Colorado Constitution, and the U.S. Constitution in search of a provision to enforce. And no court should import the entire U.S. Constitution into Section 1204, strike a candidate from the ballot, and challenge fundamental constitutional rights, through a strained implication.

Likewise, the Secretary argues that she has broad latitude to disqualify candidates because she has taken an oath "to uphold the U.S. Constitution and to effectuate its requirements."[55] This position has been properly ridiculed as an unwarranted distortion (and expansion) of the Secretary's oath of office under Article VI of the U.S. Constitution.[56] And no court has ever held that the Article VI oath confers authority to enforce every conceivable provision of the U.S. Constitution.

This argument finds no authority in the text of Section 1204. seeks to grant the Secretary authorities through implication.

The academic literature is rife with debate over whether states have authority to enforce any qualification for presidential candidates. (To be clear, President Trump's position is that they do not.) For example, one commentator stated that "[Asking for

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[55] *Omnibus Response* at 5.

[56] Muller, Derek, *Does a five-day hearing to adjudicate a presidential candidate's qualifications pass scrutiny under Anderson-Burdick?,* Election Law Blog, Oct. 19, 2023, available at https://electionlawblog.org/?p=139195.

birth certificates is] reason to be skeptical of claims that any state election official can investigate qualifications, as the consequences do sweep far more broadly than the Section 3 issues relating to former President Trump."[57] But regardless of whether Colorado *can* enforce Section Three of the Fourteenth Amendment, the Colorado General Assembly has *not* passed a statute enforcing Section Three. Neither the Secretary nor the Electors have authority to investigate or presumably enforce Section Three. Simply put, the Electors have no right to bring their Fourteenth Amendment claim under the plain language of Section 1204. Whatever authority the General Assembly may or may not have had to enforce Section 3 of the Fourteenth Amendment, the legislature did not use that purported authority in Section 1204.

3. The Electors cannot litigate constitutional claims under Section 1204, because that section explicitly relies on Section 113 procedures.

As discussed above the Electors may not litigate the Fourteenth Amendment in a Section 113 proceeding. And that prohibition applies to enforcement of duties under Section 1204, because the enforcement subsection explicitly relies on Section 113 procedures. Indeed, the reasoning in *Frazier v. Williams* fits precisely. *Frazier* limited Section 113 litigation to violations under the election code, and Section 1204

[57] Muller, Derek, *States have the power to judge the qualifications of presidential candidates and exclude ineligible candidates from the ballot, if they want to use it*, Election Law Blog, Aug. 15, 2023, available at https://electionlawblog.org/?p=138062 (last visited Sept. 22, 2023).

litigation is likewise limited to specific, statutory duties under Section 1204. Those duties do not include or invoke Section 3 of the Fourteenth Amendment.

Section 1204 provides no relief for the Electors, and they must pursue their claims, if at all, under a different source of authority. And in fact, they tried – Count II sought declaratory relief directly under Section Three. But they voluntarily withdrew that claim -- having admitted, in federal court, that they had no concrete and particularized claim sufficient to confer standing on them.

4. The *Brandenburg v. Ohio* test shows that President Trump cannot be disqualified under Section Three, based on his actual speech.

"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."[58] Moreover, "[t]he arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'"[59] And, "[w]here the First Amendment is implicated, the tie goes to the speaker."[60]

A well-developed body of law exists to guide this Court in determining what type of speech may be regulated by the disqualification clause of Section Three, as

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[58] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (quotation marks omitted).

[59] *Id.* at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

[60] *Fed. Election Comm'n v. Wisc. Right to Life*, 551 U.S. 449, 474 (2007).

"engaging" in an insurrection, and what type of speech is protected by the First Amendment. Put another way, the test in *Brandenburg v. Ohio* harmonizes the First and Fourteenth Amendments. Specifically, speech cannot be sanctioned as incitement to riot unless: (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the speaker intends that his speech will result in the use of violence of lawless action; and (3) the imminent use of violence or lawless action is the likely result of his speech."[61] This test "helps prevent a law from deterring 'mere advocacy' of illegal acts—a kind of speech falling within the First Amendment's core."[62] President Trump's speech fell well short of this standard, and therefore cannot be used as a basis to disqualify him under Section Three.

All of President Trump's speech contained in the *Verified Petition* falls well short of *Brandenburg's* requirements. President Trump's speech prior to January 6, 2021, fails *Brandenburg's* imminence requirement: it all took place well before January 6, 2021, before the assemblage of any crowd in Washington, D.C., and indeed before any rally or event had even been scheduled. Likewise, no evidence exists showing that speech

[61] *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (quoting *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc)).

[62] *Counterman v. Colorado*, 143 S. Ct. 2016, 2115 (2023).

prior to January 6, 2021, contemplated any action on January 6, 2021, let alone encouraged people to engage in violence on that day.

And on January 6, 2021, President Trump's speech did not encourage violence or lawless action, either explicitly or implicitly. Rather, he explicitly advocated non-violence, declaring "I know that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically* make your voices heard."[63] As a District of Columbia Circuit judge observed, "you just print out the speech…and read the words…it doesn't look like it would satisfy the [*Brandenburg*] standard."[64]

a) President Trump's speech prior to January 6, 2021, fails the imminence requirement.

The Petition recites at length statements by President Trump, beginning as far back as 2016.[65] But the Electors' lengthy recitation of what they consider unflattering speech (often taken out of context) does not enable them to overcome First Amendment protections and punish President Trump for speech. To be sure, they attempt a narrative that President Trump's speech was part of a deep, multi-year plan

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[63] *See, generally, Transcript of Trump's speech at rally before US Capitol riot,* Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27 (last visited Sept. 22, 2023). The Electors cited to this transcript in their *Verified Petition* (*Verified Pet.*, ¶ 279).

[64] Tr. of Argument at 64:5-7 (Katsas, J.), *Blassingame v. Trump*, No 22-5069 (DC Cir., Dec. 7, 2022).

[65] *Verified Pet.*, ¶ 448.

to incite insurrection. But they can cite nothing that actually meets applicable legal standards, and the fact remains that President Trump's speech was unlikely to result, in *imminent*, lawless action. It is therefore protected under the First Amendment.[66]

The imminence test "must require at least some showing of temporal imminence, lest the word be rendered linguistically incoherent,"[67] and "most commentators have had little or no trouble concluding that the Court's opinion in *Brandenburg* adopts a highly protective imminence test."[68]

The Supreme Court refined the "imminence" test in *Hess v. Indiana*, where it held that, because "there was no evidence, or rational inference from the import of the language, that [defendant's] words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State…."[69] As

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[66] *Nwanguma*, 903 F.3d at 609; *see also McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002).

[67] Calvert, 51 Conn. L. Rev. at 132, *citing* Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 730 (2012-2013).

[68] Calvert, 51 Conn. L. Rev. at 132, *citing* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. Cin. L. Rev. 9, 65 (2004).

[69] *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (emphasis added).

the Ninth Circuit concluded from *Hess*, "a state cannot constitutionally sanction advocacy of illegal action at some indefinite future time."[70]

As the Ninth Circuit noted, imminence required speech that advocated specific action. It held that the speech in question was "[f]ar from demonstrating a specific intent to further illegal goals; [the] speech appears to fit more closely the profile of mere abstract advocacy of lawlessness."[71] The court focused on a complete lack of evidence showing that the speaker advocated the commission of a crime.[72]

Here, the Electors have not cited to a single statement by President Trump before January 6, 2021, advocating storming the capital or stopping the counting of the electoral ballots. And they cannot identify any such speech because President Trump never made any statement advocating storming the Capitol or forcibly stopping the electoral vote count.

Indeed, the Electors cite speech that happened *before* an action on January 6, 2021, could have been contemplated, *i.e.*, before the 2020 election. They theorize that President Trump's statements before January 6th gradually undermined his supporters'

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[70] *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (internal quotes omitted).

[71] *Id.*

[72] *Id.*

inherent belief in the rule of law to the point that they were willing to break the law on January 6, 2021, and engage in violence. But the Sixth Circuit has soundly rejected this theory of causation:

> Even the theory of causation in this case is that persistent exposure to the defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. *This glacial process of personality development is far from the temporal imminence that we have required to satisfy the Brandenburg test.*[73]

Just the court rejected the theory that Meow Media's speech that purported to groom Carneal to violence, so must this court reject the Electors' theory that President Trump's speech "groomed" his supporters to storm the Capitol on January 6th.

For these reasons, President's Trump's statements prior to January 6, 2021, could not, under directly controlling Supreme Court precedent, incite or instigate anything. They don't meet the imminence test and are protected speech under the First Amendment.

[73] *James v. Meow Media, Inc.,* 300 F.3d 683, 698 (6th Cir. 2002) (emphasis added) *citing Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 253 (2002).

b) President Trump's speech on January 6, 2021, did not encourage the use of violence or lawless action.

President Trump's January 6, 2021, speech did not encourage the use of violence or lawless action.[74] The *Verified Petition* quotes President Trump's January 6, 2021, speech, but, importantly, not a single statement in that speech advocated storming the Capital, rioting, or preventing the counting of the electoral votes.[75] Even the Electors' own interpretation of the speech cannot find a single part that even *implicitly* suggested storming the Capitol. Their claims otherwise depart far from the ordinary and commonly accepted usage of the English language.

For example, the Electors complain that President Trump discussed Vice-President Pence, stating his hope that the Vice-President would be courageous, do the right thing, and stand up for the Constitution:

1. "I hope Mike is going to do the right thing. I hope so. I hope so. Because if Mike Pence does the right thing, we win the election";

2. "The states got defrauded … Now they want to recertify. … All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people";

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[74] *See, generally, Transcript of Trump's speech at rally before US Capitol riot,* Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

[75] Petitioners' Opposition to Respondent Trump's Anti-SLAPP Motion to Dismiss ("*Response to Anti-SLAPP Motion*"), Oct. 4, 2023, at 25-27.

3. "I just spoke to Mike. I said: 'Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage.' And then we're stuck with a president who lost the election by a lot and we have to live with that for four more years. We're just not going to let that happen";

4. "And Mike Pence is going to have to come through for us, and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution";

5. "[Pennsylvania] want[s] to recertify. But the only way that can happen is if Mike Pence agrees to send it back. Mike Pence has to agree to send it back";

6. "And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories"; and

7. "So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to."[76]

None of the statements advocate, explicitly or implicitly, that the listeners attack Vice-President Pence or the Capitol. The Electors want this Court to read into these statements things that were *not* said. Indeed, one cannot reasonably infer from President Trump's statements about Vice President Pence that President Trump implicitly encouraged storming the Capitol.

The Electors then challenge President Trump's exhortation to fight: "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a

[76] *Verified Pet.* at ¶ 279.

country anymore"[77] to suggest that President Trump was "plausibly" encouraging his supporters to literally "fight." There is nothing "plausible" about the Electors' interpretation.

In *Hess v. Indiana*, the Supreme Court found the statement "[w]e'll take the f[***]ing streets later (or again)" while the speaker stood in front of a crowd of antiwar demonstrators after a number of demonstrators had just been forcibly removed from the street was protected speech.[78] Similarly, in *Nwanguma*, the Court found that exhorting a crowd to "get 'em out of here" several times in reference to a protestor at a political rally was neither an explicit nor implicit exhortation to violence, particularly when coupled with the admonition "don't hurt 'em."[79] President Trump's actual words on January 6th are less inflammatory than those at issue in *Hess* or *Nwanguma*, and do not qualify as "implicit" incitement.

The Electors also ignore the full textual context of President Trump's words, which the Supreme Court has admonished courts *not* to do.[80] President Trump's use

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[77] *Verified Pet.* at ¶ 281. Plaintiffs highlight his words in the speech to make it seem like President Trump himself was emphasizing the words beyond normal.

[78] *Hess*, 414 U.S. at 107.

[79] *Nwanguma*, 903 F.3d 60, 611–12 (6th Cir. 2018).

[80] *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011).

of the word "fight" was clearly metaphorical, referring to a political "fight," not a literal fistfight or other violent interaction. For example, he stated, in reference to Rudy Giuliani, "He's got guts. He fights, he fights."[81] No reasonable listener would understand that metaphorical statement to suggest that Mr. Giuliani, a 76-year-old man, was getting into fist fights. Similarly, President Trump referred to Jim Jordan and other Congressmen, stating "they're out there fighting. The House guys are fighting."[82] Rep. Jordan is no Preston Brooks – he is not caning people on the House floor; his "fight" is political. In reference to the press, President Trump stated "it used to be that they'd argue with me. I'd fight. So I'd fight, they'd fight, I'd fight, they'd fight. Pop pop. You'd believe me, you'd believe them. Somebody comes out. You know, they had their point of view, I had my point of view, but you'd have an argument."[83] President Trump did not engage in physical fights with the press—such "fights" were verbal sparring. Whatever political anger may exist, no one has plausibly claimed that President Trump and his antagonists in the press have come to physical blows. The verb "fight" has multiple meanings, only a minority of which refer to a

[81] *Transcript of Trump's speech at rally before US Capitol riot*, Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

[82] *Id.*

[83] *Id.*

physical altercation. But the Electors want the word to mean physical combat, when President Trump has never used it in that manner. Historically, he has consistently used the word "fight" to mean "to oppose the passage or development of"[84] or "to engage in a quarrel; argue,"[85] to use two commonly understood meanings. When read in context, President Trump's exhortation to "fight" is unambiguously a reference to applying political pressure, not engaging in illegal or violent activity. Combined with his instruction on January 6, 2021, for the crowd to "peacefully and patriotically" march to the Capitol, no reasonable interpretation can view it as an exhortation to commit violence.

Ultimately, there is no implicit or explicit exhortation to violence in President Trump's speech.[86] The plain language of President Trump's speech was not "incitement" under *Brandenburg*.

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[84] *Merriam-Webster.com Dictionary*, s.v. "fight," https://www.merriam-webster.com/dictionary/fight (last visited Sept. 21, 2023).

[85] The American Heritage® Dictionary of the English Language, 5th Edition, available at https://www.wordnik.com/words/fight (last visited Sept. 21, 2023).

[86] *Transcript of Trump's speech at rally before US Capitol riot*, Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

c) President Trump did not intend for his speech to incite violence.

Finally, President Trump's speech contains no indication that he intended his supporters to riot and invade the capital building. *Brandenburg* holds that before a court can penalize someone for their speech, they must show intent on behalf of the speaker.[87] Even statements that advocate the use of force or breaking of the law are protected absent such intent. No statement the Electors cite in their *Verified Petition* shows President Trump intended to encourage or incite his followers to riot, storm the Capital, and prevent the counting of the electoral votes. Nothing in his words encouraged them to commit violence, storm the Capitol, or stop the counting of the electoral ballots.

The Supreme Court recently underscored the centrality of the intent component of the *Brandenburg* analysis when it made clear that even recklessness was insufficient to support an incitement claim:

> When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. Such protests gave rise to all the cases in which the Court demanded a showing of intent. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy

[87] *Brandenburg*, 395 US at 447.

> of force or lawbreaking from legal sanction. A strong intent requirement was, and remains, one way to guarantee history was not repeated.[88]

None of President Trump's pre-January 6, 2021, statements show any intent to encourage his supporters to resort to violence, much less the "purpose or knowledge" to storm the Capitol that *Counterman* makes clear is required. Even allegedly provocative language falls within the First Amendment.[89] Indeed, *Brandenburg* specifically held that the First Amendment prevents government from punishing "advocacy of the use of force or of law violation *except where such advocacy is directed to* inciting or producing imminent lawless action and is likely to incite or produce such action." Here, President Trump's speech did not even approach that standard.

Further, the full context of President Trump's January 6, 2021, speech shows that he had no intent to encourage violence. Instead, he advocated a peaceful march to the capital and a rally there:

1. Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.

2. we're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them.

3. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

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[88] *Counterman*, 143 S.Ct. at 2118 (internal citations omitted).

[89] *Brandenburg*, 395 US at 447.

4. Today we will see whether Republicans stand strong for integrity of our elections.

5. Today we see a very important event though. Because right over there, right there, we see the event going to take place. And I'm going to be watching. Because history is going to be made. We're going to see whether or not we have great and courageous leaders, or whether or not we have leaders that should be ashamed of themselves throughout history, throughout eternity they'll be ashamed. And you know what? If they do the wrong thing, we should never, ever forget that they did. Never forget. We should never ever forget.

6. So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to.

7. So we're going to, we're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give.

8. The Democrats are hopeless, they never vote for anything. Not even one vote. But we're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country.

9. So let's walk down Pennsylvania Avenue.[90]

He advocated "cheer[ing] on our brave senators and congressmen and women" who are on his side. He advocated for people to "peacefully and patriotically" make their voices heard. He advocated giving the Republicans he considers weak, "the kind

[90] *Transcript of Trump's speech at rally before US Capitol riot*, Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

of pride and boldness that they need to take back our country." He also urged people to "see" what the Senators and Congressmen would do, which would logically be impossible if people invaded the Capital and prevented Senators and Congressmen from counting the electoral votes.

In other words, both the text and the context make clear that President Trump listed his policy and political goals, and that he did not advocate violence or blocking the counting of the electoral ballots. The *Verified Petition* does not allege sufficient to prove the requisite intent to incite his listeners to violence or a violation of the law.

CONCLUSION

This is a political lawsuit meant to prevent President Trump from standing for election and to block Colorado voters from having the opportunity to vote for him. The Electors may not bring a constitutional claim in an expedited election proceeding, and Colorado statute provides no basis for barring a presidential candidate under the Fourteenth Amendment. And President Trump never advocated for or incited violence on January 6, 2021. This Court should promptly dismiss this matter.

FOR THESE REASONS, the court should issue a rule to show cause as to why the Court should not reverse the trial court, dismiss the *Verified Petition*, and order the Secretary to put President Trump's name on the primary ballot.

LIST OF SUPPORTING DOCUMENTS

No.	Description	Date
1	Omnibus Ruling on Pending Dispositive Motions	Oct. 20, 2023
2	Order Re: Donald J. Trump's Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(A)	Oct. 11, 2023
3	*Major Party Candidate Statement of Intent or Presidential Primary (Ex. A)*	
4	Verified Petition Under C.R.S. § 1-4-1204, § 1-1-113, § 13-51-105, and C.R.C.P. 57(a)	Sept. 6, 2023
5	Respondent Donald J. Trump's Motion to Dismiss, Exhibits A & B	Sept. 22, 2023
6	Donald J. Trump's Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(A)	Sept. 22, 2023
7	Minute Orders	Sept. 22, 2023
8	Respondent Donald J. Trump's Motion to Dismiss with Exhibits A-D	Sept. 29, 2023
9	Petitioners' Opposition to Respondent Trump's Anti-SLAPP Motion to Dismiss with Exhibits 1-72	Oct. 4, 2023
10	Topics for the October 30, 2023 Hearing	Oct. 18, 2023

Respectfully submitted 23rd day of October 2023,

GESSLER BLUE, LLC

By: s/ *Scott E. Gessler*
Scott E. Gessler

Attorney for Donald J. Trump

CERTIFICATE OF SERVICE

I certify that on this 23rd day of October 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

LIST OF PARTIES:

The Honorable Sarah B. Wallace
Denver District Court
1437 Bannock Street
Denver, CO 80202

Attorneys for Petitioners NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN:

Mario Nicolais, Atty. Reg. # 38589
KBN Law, LLC
7830 W. Alameda Ave., Suite 103-301
Lakewood, CO 80226
Phone: 720-773-1526
Email: mario@kbnlaw.com

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
Phone: 303-356-4870
Email: mtierney@tls.legal

Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC 700 17th Street, Suite 1600
Denver, CO 80202
Phone: 303-535-9151
Email: eolson@olsongrimsley.com
Email: sgrimsley@olsongrimsley.com
Email: jmurray@olsongrimsley.com

Donald Sherman* Nikhel Sus* Jonathan Maier*
Citizens for Responsibility and Ethics in Washington 1331 F Street NW, Suite 900
Washington, DC 20004
Phone: 202-408-5565
Email: dsherman@citizensforethics.org
Email: nsus@citizensforethics.org Email: jmaier@citizensforethics.org

Attorneys for Secretary of State Jena Griswold in her official capacity as Colorado Secretary of State:
Michael T. Kotlarczyk

Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office
mike.kotlarczyk@coag.gov
grant.sullivan@coag.gov
leeann.morrill@coag.gov

Attorneys for Intervenor Colorado Republican State Central Committee:
Michael William Melito
Melito Law LLC
melito@melitolaw.com

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
bob@podoll.net

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow
Jane Raskin
Stuart J. Roth
American Center for Law and Justice
bsisney@aclj.org
nmoelker@aclj.org
jordansekulow@aclj.org
sekulow@aclj.org
Andrew J. Ekonomou
aekonomou@outlook.com

By: *s/ Joanna Bila*
Joanna Bila, Paralegal