DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: October 29, 2023 4:30 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

PETITIONERS' OPPOSITION TO INTERVENOR COLORADO REPUBLICAN CENTRAL COMMITTEE'S RULE 702 MOTION TO EXCLUDE THE TESTIMONY OF [redacted]

This Court has invited expert testimony on the "history and application of Section 3 of the Fourteenth Amendment." Topics for the October 30, 2023 Hearing, at 2 (Oct. 18, 2023). [redacted] will ably fulfill that role: [redacted] is a leading expert on the history of the Fourteenth Amendment [redacted]. That event has thrust Section 3 into the national spotlight for the first time in more than 150 years and unearthed scores of commenters, but few with demonstrable historical expertise.

Nonetheless, Intervenor Colorado Republican State Central Committee (the "State Party") moves to exclude [redacted] testimony, claiming it would be "improper" for [redacted] to opine on "legal issues." Mot. at 3. The State Party misstates both the proposed testimony

and the governing law. [redacted] will offer opinions not as a "legal expert," but as an expert in constitutional history. Courts in Colorado and elsewhere have permitted such testimony. And as this Court recently reminded the parties, expert testimony is "more likely to be admitted" in bench trials, "with the court assessing its weight and discounting it where appropriate." Order: Motion for Extension of Time to File 702 Motions Challenging Certain of Petitioners Proposed Expert Witnesses (Oct. 17, 2023) (citing *People v. Hall*, 2021 CO 71M, ¶ 36).

Because [redacted] testimony will "assist" the Court "to understand the evidence or to determine a fact in issue," C.R.E. 702, the State Party's motion should be denied.

Legal Standard

Colorado Rule of Evidence 702 governs the admissibility of testimony by expert witnesses. In making that determination, a trial court focuses on "the reliability and relevance of the proffered evidence." *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). In determining whether the evidence is reliable, the court should "apply a liberal standard that only requires proof that the underlying scientific principles are *reasonably* reliable." *Kutzly v. People*, 2019 CO 55, ¶ 12 (citing *Shreck*, 22 P.3d at 77). In determining whether the evidence is relevant, the court considers "whether the testimony would be useful to the [finder of fact]." *Shreck*, 22 P.3d at 77.

While Rule 702 applies in bench trials, "the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial." *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009). Rather, "[i]n a bench trial … 'there is a presumption that all incompetent evidence is disregarded by the court in reaching its conclusions.'" *Hall*, 2021 CO 71M, ¶ 36. "[A] judge conducting a bench trial" thus has "greater leeway in admitting questionable evidence, weighing its persuasive value

upon presentation." *Tyson Foods*, 565 F.3d at 780.

Argument

The State Party does not challenge [redacted] qualifications or the reliability of [redacted] testimony. Instead, it claims [redacted] improperly opines on pure "legal issues." Mot. at 3. That is wrong. [redacted] will opine on the "history and background" of Section 3 of the Fourteenth Amendment, the "historical application of that provision," and "how the events of January 6, 2021, compare to insurrections that would have served as the historical examples informing the drafters of" Section 3. Ex. 1, [redacted] Report at 1. Professor [redacted] is an expert in constitutional and legal history [redacted] *See id*. at 42–46. [redacted] expert opinions draw on that wealth of knowledge and experience and will be "useful to the fact finder," *People v. Ramirez*, 155 P.3d 371, 381 (Colo. 2007), as it considers novel questions about a constitutional provision that has rarely been litigated since Reconstruction. Indeed, the Court has expressly sought such testimony to aid its deliberations. *See* Topics for the October 30, 2023 Hearing, at 2 (Oct. 18, 2023).

Courts holding bench trials in Colorado and elsewhere have considered testimony by experts in constitutional history. *See, e.g.*, *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶¶ 14, 21 (noting the district court in a bench trial "consider[ed] expert testimony from both sides regarding Colorado constitutional history" and "ruled there was no historical basis to conclude that the framers of article II, section 13 [of the Colorado Constitution] intended to preclude" a state law regulating ammunition magazines); *Lobato v. State*, 2013 CO 30, ¶ 50, 304 P.3d 1132,

1144 (Bender, C.J., dissenting) (citing bench trial testimony of "Professor Tom Romero, an expert in Colorado constitutional history," regarding the Colorado Constitution's Education Clause); *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) (relying on expert testimony of constitutional historian Mark Graber on the historical application and original public meaning of Section 3 of the Fourteenth Amendment); *see also* Joseph Blocher and Brandon L. Garrett, *Originalism and Historical Fact-Finding*, Georgetown L. J. (forthcoming 2023), at 43, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4538260 (noting "historians have long played an important role in trial-level litigation in a range of legal contexts," including in constitutional, civil rights, and treaty rights litigation) (citing cases).

Such expert testimony has become increasingly common in the wake of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* declared that courts' "reliance on history to inform the meaning of constitutional text" is both "legitimate" and "administrable," and that courts interpreting the Second Amendment are "entitled to decide a case based on the historical record compiled by the parties." *Id.* at 2130 & n.6. Courts have read *Bruen* as an invitation to accept expert testimony on historical questions relating to the Second Amendment. *See, e.g.*, *United States v. Daniels*, 77 F.4th 337, 360–61 (5th Cir. 2023) (Hingginson, J., concurring) ("*Bruen* requires … an evidentiary inquiry" of the "historical record" that is "subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion."); *United States v. Yates*, 2023 WL 5016971, at *4 (D. Idaho Aug. 7, 2023) (inviting the filing of an expert historian report in a Second Amendment challenge and noting that such "[e]xperts can be a helpful tool in th[e] toolbelt"). The same reasoning applies in the Fourteenth Amendment context—particularly for a

provision that has rarely faced judicial scrutiny in the past 150 years.[1]

The State Party erroneously claims that Professor [redacted] testimony "consists entirely of legal conclusions" and would "usurp" the role of the Court. Mot. at 5. In reality, the Professor's opinions reflect [redacted] *historical* investigation of legislative materials from the 39th Congress, Reconstruction-era newspaper articles and books, records [redacted] retrieved from the National Archives, presidential papers, antebellum dictionaries, and other historical documents and authorities. *See* Ex. 1, [redacted] Report at 4–39; 49–50. Based on that investigation and his years of scholarly research, Professor [redacted] offers opinions on how the terms used in Section 3 *were understood by Americans in the nineteenth century*. *See id.* at 1–2. This is a proper application of Professor [redacted] expertise and will be useful to the Court.

Petitioners wholeheartedly agree with the State Party that "[t]he United States Constitution is … the supreme law of the land," and that "[i]nterpreting its meaning is *part of this Court's fundamental responsibility*." Mot. at 7 (emphasis added); *accord* Pet'rs' Opp. to Intervenor Trump's Third Mot. to Dismiss, at 9–11 (Oct. 6, 2023) (making the same argument in explaining why this Court must hear Petitioners' claim). But the "parties … have a variety of ways and means to present their respective positions to the Court," including through expert testimony on relevant historical issues. *Yates*, 2023 WL 5016971, at *3. It remains "the judge's duty to determine the law using as many, or as few, of those means as he or she deems necessary to fairly and impartially adjudicate the controversy." *Id.*; *see also Bruen*, 142 S. Ct. at 2130 n.6.

[1] Professor [redacted] previously provided expert testimony [redacted] Report at 3. Although the administrative law judge limited aspects of Professor [redacted] testimony, he did so without the benefit of prior briefing on the propriety of expert testimony on matters of constitutional history, [redacted]

This Court is fully capable of doing so without allowing its role to be "usurp[ed]." Mot. at 2.

The State Party's cited cases either are irrelevant or undermine its position. *See* Mot. at 2–7. Many of the cases were *jury* trials,[2] and in some of those cases, experts were *permitted* to testify on matters within their expertise even if they were closely adjacent to the ultimate factual and legal issues in the case.[3] As noted, "a judge conducting a bench trial maintains greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation." *Tyson Foods*, 565 F.3d at 780; *see also Hall*, 2021 CO 71M, ¶ 36. Other cases addressed expert opinions that were pure legal conclusions.[4] None of the cases concerned an expert in

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[2] *See Grogan v. Taylor*, 877 P.2d 1374, 1384 (Colo. App. 1993), *rev'd on other grounds*, 900 P.2d 60 (Colo. 1995); *People v. Lesslie*, 939 P.2d 443, 450 (Colo. App. 1996); *Town of Breckenridge v. Golforce, Inc.*, 851 P.2d 214, 216 (Colo. App. 1992); *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 494 (7th Cir. 2009); *United States v. Arutunoff*, 1 F.3d 1112, 1117 (10th Cir. 1993); *Specht v. Jensen*, 853 F.2d 805, 806 (10th Cir. 1988); *United States v. Curtis*, 782 F.2d 593, 594 (6th Cir. 1986); *Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 506 (2d Cir. 1977); *King v. McKillop*, 112 F. Supp. 2d 1214, 1222 (D. Colo. 2000); *Franco v. Jay Cee of New York Corp.*, 36 A.D.3d 445 (N.Y. Sup. Ct. 2007); *see also France v. S. Equip. Co.*, 689 S.E.2d 1, 14 (W. Va. 2010) (court granted summary judgment in matter to be tried to jury).

[3] *See Lawrence v. People*, 2021 CO 28, ¶ 36-7 (affirming in securities fraud jury trial admission of expert testimony by Colorado Securities Commissioner on "the ultimate issues of whether [an] investment was a security and whether the facts that [the defendant] failed to disclose to her were material"); *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011) (rejecting argument that a medical expert "opined on the ultimate legal issue and thereby usurped the jury's role as a fact finder"); *see also Hines v. Denver & Rio Grande Western R.R. Co.*, 829 P.2d 419 (Colo. App. 1991) (no err in allowing expert to opine that plaintiff's conduct was negligent).

[4] *See Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000) (expert offered legal conclusion that police "officer's actions were 'reckless in nature and disregarded the safety of [other] individuals'"); *Renfroe v. Parker*, 974 F.3d 594, 598 (5th Cir. 2020) (expert opined that police officer's use of force was "unreasonable" under the Fourth Amendment); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (expert opined on the proper "interpretation of a contract," which is "an issue of law"); *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (expert opined on "reasonableness and foreseeability" of reliance for promissory estoppel claim, which were "matters of law for the court's determination"); *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1050 (C.D. Cal. 2013) (expert offered "legal conclusions regarding the application of [the Foreign Sovereign Immunities Act] to the facts of this case"); *Wildearth Guardians v. Pub. Serv. Co. of*

constitutional history such as Professor [redacted] and each case pre-dated the Supreme Court's 2022 decision in *Bruen*. In short, the State Party cites no authority holding that an expert cannot provide historical testimony that might *inform* the Court's ruling on ultimate legal questions.

Conclusion

Because Professor [redacted] proposed expert testimony is relevant and reliable, the State Party's motion should be denied.

Date: October 27, 2023

Respectfully submitted,

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Colorado, 853 F. Supp. 2d 1086, 1090 (D. Colo. 2012) (expert opined on "what he considers to be relevant regulations and his interpretation of them"); *CIT Grp./Bus. Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011) (expert "opine[d] as to whether certain events constituted a material breach of" contract).

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