DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: October 29, 2023 6:32 PM
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.	▲ COURT USE ONLY ▲
Attorneys for Petitioners: 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	Case Number: 2023CV032577 Division/Courtroom: 209

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

PETITIONERS' REPLY TO INTERVENOR TRUMP'S BRIEF REGARDING 3 U.S.C. § 15

Petitioners write in reply to Intervenor Donald Trump's brief regarding 3 U.S.C. § 15. Most of Trump's brief needs no reply as he makes no response to Petitioners' showing that the Twentieth Amendment expressly excludes pre-election disqualifications from its ambit, and he concedes that the Electoral Count Act, 3 U.S.C. § 15 "is not applicable" here. Trump Br. 10.

Petitioners reply here to new arguments, however, that Trump first raised, improperly, in his reply in support of his Fourteenth Amendment motion to dismiss and repeats here. He argues that Colorado may not exclude him from the ballot because his disqualification under Section Three only exists at the time he holds office and does not apply to him as a candidate running for office. Trump's novel reading conflicts with the plain language of Section Three and the precedent applying it. Rather, he is disqualified at this very moment, and Colorado may exclude him from the ballot.

A. Trump is Currently Disqualified From Office Under Section Three

The bulk of Trump's brief is devoted to arguing that Section Three does not disqualify him from the ballot because he might, in the future, get amnesty. That is not correct.

Section Three imposes a clear trigger for disqualification, providing that "[n]o person shall" hold an office under the United States who,

> …having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

U.S. Const. Amend. XIV, § 3. Congress "may by a vote of two-thirds of each House, remove such disability," which makes clear that there is a *present* disability that applies up until the moment Congress removes it. *Id.*

By the express terms of Section 3, then, one who has taken an oath is disqualified at the moment they "engag[e]" in insurrection. Thus, for example, a New Mexico Court ruled on September 6, 2022 that a state official who participated in the January 6 insurrection "became constitutionally disqualified … effective January 6, 2021," the moment at which he engaged in insurrection. *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *25 (D. Ct. N.M. Sept. 6, 2022). That is also why Congress could grant amnesty to former confederates *before* they held or sought office, and even before many petitioned for relief. *See Cawthorn v. Amalfi*, 35 F.4th 245, 248, 258 (4th Cir. 2022) (discussing Amnesty Act of 1872, noting it removes disabilities "that have already happened"; noting text of Amendment "connote[s] taking away something that already exists"). They could do that because the former confederates were, at that moment, disqualified by operation of Section Three, and, consequently, there was an existing "disability" that Congress could choose to "remove" by a two-thirds supermajority of both chambers. U.S. Const. Amend XIV, § 3.

Accordingly, Trump is disqualified from office *at this very moment*. Trump may no more run for the President today than he may take an appointed position as a state officer today. States may "protec[t] the integrity and practical functioning of the political process" by "exclude[ing]

from the ballot candidates who *are*" at that moment "constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir 2012) (Gorsuch, J.) (emphasis added); *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2002) (states have "far-reaching authority" to direct means for election of presidential electors).[1]

Section Three's immediate and persistent disqualification is further illustrated by contrast to other constitutional qualifications that have express *temporal* conditions. For example, the provision requiring residency by Representatives provides the express time at which that qualification is measured: "when [the Representative is] elected." U.S. Art. I, § 1, cl. 2 (emphasis added). Candidates' residency prior to that point does not impact their qualifications. A candidate for a House seat in California, for example, is not constitutionally disqualified from the office at the moment of nomination because they live in Nevada before the election—they are only disqualified if they live there at the time of election. *See Schaefer v. Townsend*, 215 F.3d 1031, 1032, 1036 (9th Cir. 2000) ("The specific time at which the Constitution mandates residency bars the states from requiring residency before the election."); *accord Campbell v. Davidson*, 233 F.3d 1229, 1231, 1234 (10th Cir. 2000) (same).[2] But Section Three has no such language—it does not,

[1] Trump's attempt to cabin *Hassan* and similar authority to cases where there is an "undisputedly disqualified candidate" is wrong. Trump Br 5. In essence, Trump is claiming that while states may exclude candid candidates who confess their ineligibility, states may not exclude perjurious ones. But Colorado does not require presidential primary candidates to affirm they "meet all qualifications" for office simply to create additional paperwork. Rather, the State cares that the responses are *truthful*. *See* C.R.S. § 24-12-102, 106 (requiring truthful affirmations and imposing penalties on individuals who make false affirmations). Moreover, while it may be that the Secretary typically does not look beyond the filed paperwork, it is also undoubtedly true that a *judicial* proceeding challenging candidate eligibility can and must do so. If this Court renders its decision for Petitioners, Trump will be "undisputedly disqualified" and the Colorado Secretary of State will not certify his name to the ballot. *See Kuhn v. Williams*, 2018 CO 30M ("Should the court determine that the petition is not in compliance with the Election Code, the election official would certainly 'commit a breach or neglect of duty or other wrongful act,' [C.R.S.]§ 1-1-113(1), to nonetheless certify that candidate to the ballot.").

[2] *See also Smith v. Moore*, 90 Ind. 294, 296 (1883) (interpreting provision of state constitution providing "No person elected to any judicial office shall, during the term for he shall have been

for example, disqualify only those who are disloyal and not granted amnesty "when inaugurated." *Cf.* Trump Br. at 6.

Nor does Section Three's mandated consequence for disqualification, that "No [disqualified] person shall ... hold any office," remove from states the power to keep disqualified candidates off the ballot. Trump's reading to the contrary would render much of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) superfluous. Rather than consider whether a term limit is an additional unconstitutional qualification, *see id.* at 783, the Court would simply have found the State could not limit ballot access for *any* qualification.

Similarly, the relief provision of Section Three, set off in a separate sentence from the disqualification provision, "gives Congress the ability to remove a constitutional disability" but "says nothing regarding what government body would adjudicate or determine such disability in the first instance," Order Re: Donald J. Trump's Mot. to Dismiss filed Sept. 29, 2023, at 17 (October 25, 2023), confirming the disability, once triggered by disloyalty, exists before any Congressional vote. Congress could not, after all, vote to "remove" a "disability" if that disability did not exist until the time of the vote. U.S. Const. Amend. XIV, § 3. That is why Congress could vote to remove disabilities from individuals without limit to those who sought relief from Congress, or who even held or sought office. *See Cawthorn*, 35 F.4th at 258 (removing disability "from all persons whomsoever" with a few exceptions).[3] Further, Section Three's high bar for amnesty, agreement by two-thirds of each chamber, would be fatally undermined if a bare majority

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elected, be eligible to any [other State] office" to not disqualify a judicial officer whose term will have expired before taking new office).

[3] Congress's grant of amnesty further illustrates why a state's adjudication of qualifications does not leave a candidate "without a chance of congressional override." Trump Br. 3 (quoting *Greene v. Sec'ty of Ga.*, 52 F. 4th 907, 915 (11th Cir. 2022) (Branch, J., concurring)). "If this Court were to disqualify Intervenor Trump, there would be nothing standing in the way of Congress immediately removing that disability. In fact, there is nothing standing in Congress's way of removing the disability prior to Secretary Griswold or this Court determining whether Intervenor Trump is disqualified in the first instance." Order at 17 n.4.

of either chamber could simply refuse to recognize the disqualification. Rather, the opportunity for Congressional relief only confirms that the disqualification precedes the relief and that it may be recognized by others outside Congress.[4]

Finally, accepting Trump's logic would mean there is *no* constitutional qualification that can be imposed. Every constitutional qualification is subject to relief: the Constitution could be amended to remove that qualification before the individual takes office. Colorado could then not exclude a foreign-born citizen from the ballot because it is possible an Amendment could remove that disability prior to the presidential inauguration. But that fact does not eliminate states' authority to "exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948.

Under Section Three, an oath-breaking insurrectionist is disqualified *immediately*. That disqualification exists and continues until Congress exercises its authority under Section Three to remove the disability by a two-thirds supermajority vote of both chambers, as occurred with the Amnesty Act of 1872. Given that, Colorado is not expanding on the Constitution's qualifications, it is enforcing one already in existence.

B. Colorado Has Chosen to Protect the Integrity and Practical Functioning of its Political Process

Trump's cases do not prove that Section Three's disqualification can never be operative to exclude a candidate from the ballot; they show only that some states have not chosen to enforce

[4] Similarly, the Governor's power to remove Colorado's disqualification for certain convicts at any time, see Colo Const. art. XII, § 4, C.R.S. § 16-17-103(1), does not preclude the Secretary of State from excluding unpardoned convicts from the ballot. *See, e.g.*, *Barbour v. Democratic Exec. Comm. of Crawford Cnty.*, 269 S.E.2d 433, 434 (Ga. 1980) ("conclud[ing] that it was the intent of the General Assembly to prohibit a convicted felon from running for the office of sheriff even though such person might obtain a pardon for the felony"); *Dorcy v. Cty. of Dorcy Bd. of Elections*, 1994 WL 146012 (Del. Super. Ct. Mar. 25, 1994) (same); *Touchet v. Broussard*, 31 So. 3d 986 (La. 2010) (same).

qualifications before an election. Colorado has made a different choice, and is entitled to have that choice respected.

Trump's cases concern what to do with a previously disqualified but *currently qualified* candidate after an election, and have no bearing on whether a State may permissibly enforce an existing disqualification in deciding whether to list the candidate on the ballot in the first place. In one case, the Kansas Supreme Court addressed a *quo warranto* action in which the incumbent defendant sought to defeat his electoral opponent's post-election quo-warranto challenge by asserting the plaintiff was disqualified from taking the office due to his disqualification under the state equivalent of Section Three, notwithstanding the fact that the state legislature had removed that disability after the election. *Privett v. Bickford,* 26 Kan. 52, 54–55 (1881). The Court held as a matter of state public policy that the "better doctrine" was to seat a candidate who won the election while disqualified but whose disqualification was "removed or cured" before he entered office. *Id.* In essence, the Kansas court was asked whether it must refuse to seat *a winning candidate who was now qualified* merely because, at time of election, the candidate was disqualified. Trump's other cases fare no better. In *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872), the Court addressed only whether, as a matter of state law, a defeated candidate could assume the office if the victorious candidate were disqualified. And similarly, in interpreting a State constitutional provision, the Court in *Smith v. Moore*, 90 Ind. 294, 303 (1883) noted Congress's practice to seat those who "were ineligible at the date of the election, but whose disabilities had been subsequently removed."

Each of these cases thus concerned state procedures for handling a challenge to a now-qualified (but previously disqualified) candidate after that candidate has won the election. None of them addressed whether a state could permissibly exclude a disqualified candidate from the ballot in the first place before the election, pursuant to appropriate state procedural law. None of these

cases addressed Colorado law, and they cannot displace the guidance by the Colorado Supreme Court in *Figueroa* and *Carson* which authorize timely *pre-election* challenges to keep a disqualified candidate from the ballot.

Colorado courts have long held that candidates who do not meet the qualifications for office should be barred by election officials from accessing the ballot. *Romero v. Sandoval*, 685 P.2d 772 (Colo. 1982) (the Colorado Supreme Court reviewed the secretary of state's decision to deny ballot access to a state senate candidate due to a failure to meet the residency qualification for office). Within the past ten years, the Colorado Supreme Court thoroughly analyzed this issue, including the timing of qualification challenges and relief available, in the *Hanlen v. Gessler*, 2014 CO 24, *Figueroa v. Speers*, 2015 CO 12, and *Carson v. Reiner*, 2016 CO 38, triumvirate of cases.

In *Figueroa*, the Court reviewed a circumstance in which a candidate submitted a "signed affidavit affirming that they met all the requisite qualifications to hold office," but neither "the sufficiency of Speers's petition nor her certification to the ballot was challenged within the respective five-day windows." *Figueroa*, ¶ 3. It was only due to the untimeliness of the challenge that the candidate "was not deemed unqualified by a court prior to the election" and denied access to the ballot. *Figueroa*, ¶¶ 6, 12-14 (noting post-election challenge to qualifications presented "entirely different question" than one brought prior to election, and "[n]o court declared [the defendant] legally ineligible prior to the election"). Similarly in *Carson*, another school district candidate submitted an affidavit "affirming that he met all qualifications." *Carson*, ¶ 4. In that decision, the Court made it clear that a timely challenge to a candidate who fails to meet all qualifications for office should be kept off the ballot. *Carson*, ¶ 8 ("when read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts, either immediately after certification to the ballot,

permitting an unqualified candidate to be barred from appearing on the ballot in the first place …"). In both cases, the Court affirmed that a properly timed qualification challenge would have barred the candidates from the ballot.

Because § 1-4-1203, C.R.S. (2023) grants "election officers … the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections," the Secretary of State necessarily has the power and duty to bar candidates who do not meet the qualifications for office from the Colorado ballot. Applying that power is how the Secretary created a presidential primary statement of intent form that adopts the rule contained in § 1-4-501(1) requiring that the "designated election official shall not certify the name of any designee or candidate who fails to swear or affirm under oath that he or she will fully meet the qualifications of the office if elected."

As of today, Trump is ineligible to hold public office as outlined in Section 3 of the 14th Amendment. Colorado has chosen to save its voters from disenfranchisement by wasted votes on disqualified Presidential candidates, and to exercise its constitutional authority to "protec[t] the integrity and practical functioning of the political process" by "exclud[ing] from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948.

Date: October 29, 2023 Respectfully submitted,

/s/ Jason Murray
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

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

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

Counsel for Petitioners

CERTIFICATE OF SERVICE

I served this document on October 29, 2023, by Colorado Courts E-filing and/or via electronic mail upon all parties and their counsel:

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

Attorneys for Secretary of State Jena Griswold in her official capacity as Colorado Secretary of State

Scott E. Gessler
Geoffrey N. Blue
Justin T. North
Gessler Blue LLC
gblue@gesslerblue.com
jnorth@gesslerblue.com
sgessler@gesslerblue.com

Jonathan Shaw
Mark P. Meuser
Jacob Roth
Dhillon Law Group, Inc.
jshaw@dhillonlaw.com
mmeuser@dhillonlaw.com
jroth@dhillonlaw.com

Attorneys for Donald J. Trump

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

Attorneys for Intervenor Colorado Republican State Central Committee

/s/ Jason Murray
Counsel for Petitioners