

**THE SUPREME COURT OF THE STATE OF
COLORADO**

2 E. 14th Avenue
Denver, CO 80203

Appeal Pursuant to § 1-1-113(3), C.R.S.
District Court, City and County of Denver,
Case No. 2023CV032577
Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:
NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER, KATHI
WRIGHT, and CHRISTOPHER CASTILIAN,

v.

Respondent-Appellee:
JENA GRISWOLD, in her official capacity as Colorado
Secretary of State,

and

Intervenor-Appellee:
COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE,

Intervenor-Appellee/Cross-Appellant:
DONALD J. TRUMP.

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Case No. 2023SA300

SECRETARY OF STATE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of the November 28, 2023 Secretary of State's Motion for Leave to File Answer Brief, the Order granting the same, and all formatting requirements set forth in C.A.R. 28 and C.A.R. 32. Specifically, the undersigned certifies that:

- The brief complies with the word limit in the November 28 Motion.
 - It contains 2,991 words.
- The brief complies with the content and form requirements in C.A.R. 28.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements in of C.A.R. 28 and C.A.R. 32.

/ s/ Michael Kotlarczyk
MICHAEL KOTLARCZYK

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INTRODUCTION

The Secretary of State is a respondent here in her capacity as the state’s chief election official responsible for certifying the presidential primary ballot. In that role, the Secretary has taken no position on whether former President Donald J. Trump should appear on the ballot. The Secretary thus does not address all the issues raised in the parties’ briefs. Instead, the Secretary addresses only those issues in which she has particular institutional interests and expertise.

The Secretary’s overriding concern is that Colorado courts and election officials continue to be empowered to ensure the integrity of the ballot. The interpretation of the Uniform Election Code of 1993, § 1-1-101, *et seq.*, C.R.S. (2023) urged by Intervenors—Trump and the Colorado Republican State Central Committee (“Colorado GOP”)—would remove this authority from Colorado courts and create voter confusion by allowing disqualified candidates on ballots. Because such an interpretation is contrary to the Election Code and caselaw, this

Court should affirm that courts can determine whether a candidate is eligible to appear on the ballot.

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction under section 1-1-113, C.R.S. (2023) to determine whether an election official has committed, or is about to commit, a breach or neglect of duty or other wrongful act, when that determination requires resolving an underlying constitutional issue.

2. Whether Colorado courts may order the exclusion of a candidate from the presidential primary ballot if a court determines such candidate is constitutionally disqualified from holding office.

STATEMENT OF THE CASE

The Secretary accepts the statement of the case in Petitioners' November 20 opening brief.

SUMMARY OF THE ARGUMENT

The Intervenors offer two myopic interpretations of the Election Code that, if accepted, would hamper the ability of election officials and

courts to exclude from the ballot candidates who are disqualified from holding office. Neither is supported by Colorado law.

First, Intervenors argue that state courts lack jurisdiction under section 1-1-113 because resolving Petitioners' claim requires determining a federal constitutional issue. If Petitioners were seeking relief under 42 U.S.C. § 1983 for an alleged violation of a right secured by federal law, Intervenors would have a point—such claims may not be brought in a section 1-1-113 proceeding. But that is not Petitioners' claim. Instead, Petitioners contend that it would be a wrongful act or breach of duty *under the Election Code* for the Secretary to certify a disqualified candidate to the primary ballot. Because this claim arises under the Election Code, it is properly resolved here under section 1-1-113. That it raises constitutional questions is jurisdictionally irrelevant—past section 1-1-113 proceedings have also required state courts to address constitutional issues.

Second, Intervenors argue that state courts lack authority under the Election Code to exclude disqualified candidates from the

presidential primary ballot if the party approves the candidate. But Colorado has not ceded its responsibility to ensure a fair and accurate ballot to political parties. The purpose of a ballot is to elect candidates who are eligible to hold office. Provisions throughout the Election Code—as well as caselaw from this Court—recognize that candidates who fail to meet qualification requirements should not be included on the ballot and that courts have the final say when determining candidate eligibility. Intervenors’ argument would render ballots nothing more than vehicles for political party expression with the State unable to exclude even candidates who do not meet the age, residency, or nationality requirements for office. This radical interpretation would undermine Colorado’s interests in ballot integrity and ensuring that all Colorado voters can cast ballots for eligible candidates.

ARGUMENT

I. Colorado’s courts have jurisdiction under section 1-1-113 to resolve disputes arising under the Election Code, even if those disputes raise constitutional questions.

A. Standard of review and preservation.

This Court reviews the district court’s legal determination de novo. *See Kuhn v. Williams*, 2018 CO 30M, ¶ 26. Trump raised this argument below. *See* CO GOP App’x at 183.

B. Section 1-1-113 is the “exclusive” way for courts to decide whether an election official is about to commit a breach of duty or other wrongful act.

Petitioners’ claim arises under both sections 1-4-1204(4) and 1-1-113. Section 1-4-1204 was added to the Election Code in 2016 as part of Proposition 107, which established a statewide presidential primary. The General Assembly amended section 1-4-1204(4) to expressly incorporate judicial review under section 1-1-113 for “[a]ny challenge to the listing of any candidate on the presidential primary election ballot.” 2017 Colo. Sess. Laws 841, 843.

Section 1-1-113 is the “exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful

act that occurs prior to the day of an election.” § 1-1-113(4). If the court finds good cause to believe that the election official “has committed or is about to commit a breach or neglect of duty or other wrongful act,” it “shall issue an order requiring substantial compliance with the provisions of [the Election Code].” § 1-1-113(1) (emphasis added).

The Colorado GOP suggests the Secretary is not charged with any relevant “duty or function under this Code” and so section 1-1-113 is inapplicable. *See* CO GOP Br. 14, 16. This argument is easily answered: the Code requires the “secretary of state [to] certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots.” § 1-4-1204(1). More generally, the Secretary is Colorado’s “chief state election official,” §§ 1-1-107(1)(e) and 1-1.5-101(1)(h), who “supervise[s] the conduct of primary . . . elections in this state.” § 1-1-107(1)(a). The Secretary is plainly an official “charged with [a] duty” under the Code and thus a proper respondent. § 1-1-113(1).

C. The Court may decide a section 1-1-113 matter that raises constitutional issues in determining whether an election official will breach a duty or commit another wrongful act under the Election Code.

A petitioner cannot inject a federal section 1983 claim to redress an alleged violation of his federal rights into a Colorado state-law section 1-1-113 proceeding. *See Frazier v. Williams*, 2017 CO 85, ¶ 17 (holding that “section 1983 claims cannot be adjudicated through section 1-1-113 proceedings”). Nor can a petitioner seek to invalidate a state law as unconstitutional in a section 1-1-113 proceeding. *See Kuhn*, 2018 CO 30M, ¶ 55. Such claims do not allege a “breach or neglect of duty or other wrongful act” under the Election Code, which is all that can be decided in a section 1-1-113 proceeding. *See id.*

But Petitioners are not bringing a constitutional claim.¹ They have not challenged the constitutionality of any portion of the Election Code, as in *Frazier* or *Kuhn*. Instead, Petitioners argue that it would be

¹ Petitioners originally brought a declaratory judgment claim, which the Secretary argued was barred by *Frazier*. *See Attach. 2 to Trump’s Opening-Ans. Br.* at 9-11. Petitioners voluntarily dismissed that claim. *See Ex. A to Petr’s Opening Br.* at 3.

“a breach or neglect of duty or other wrongful act” under the Code to allow Trump to appear on the Republican primary ballot. § 1-1-113(1). That states a justiciable claim under section 1-1-113.

While the Colorado GOP is correct that “constitutional *claims* are not justiciable in a section 1-1-113 proceeding,” CO GOP Br. at 16 (emphasis added), Petitioners did not bring such a claim. Instead, they seek an order that substantial compliance with the Election Code requires excluding Trump from the presidential primary ballot. See *Frazier*, 2017 CO 85, ¶ 17 (“[T]he remedy available at the end of a section 1-1-113 proceeding is limited to an order . . . that the provisions of the Colorado Election Code have been, or must be, substantially complied with.”). Their claim thus does not fall within the bar against constitutional claims recognized in *Frazier* and *Kuhn*.

Nor is there anything particularly unusual about a section 1-1-113 proceeding raising constitutional issues. For example, when a candidate brought a section 1-1-113 action challenging the Secretary of State’s refusal to print his purported nickname on the ballot, the district court

considered whether the Secretary interpreted the Election Code in a manner consistent with the candidate's First Amendment rights. *See* Ex. 1 at 17-24. This Court denied review. Ex. 2. In 2016, the district court ruled in another section 1-1-113 action that presidential electors must cast their Electoral College ballots as required by Colorado's Election Code. *See* Ex. 3. That case was infused with federal constitutional questions about whether the Election Code could compel presidential electors performing a federal function. *See, e.g.*, Ex. 4 at 9-14. This Court denied review. Ex. 5. In short, nothing in the Election Code or this Court's precedent suggests that courts cannot provide relief under section 1-1-113 for breaches of duty or wrongful acts under the Election Code when federal constitutional interests are implicated.

II. Colorado courts have the authority to exclude constitutionally ineligible candidates from the ballot.

A. Standard of review and preservation.

This Court reviews the district court's legal determination *de novo*. *See Kuhn*, 2018 CO 30M, ¶ 26. Trump raised this argument below. *See* CO GOP App'x at 200-03.

B. The Election Code permits courts to exclude disqualified candidates from the ballot.

Intervenors next argue that courts cannot keep disqualified candidates off the primary ballot. *See* CO GOP Ans. Br. 23. This is wrong and would lead to unreasonable results that disenfranchise Colorado voters.

The purpose of a ballot is to allow voters to select a candidate for office. “Ballots serve primarily to elect candidates, not as forums for political expression.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). But the Colorado GOP’s position—that the Secretary must list on the primary ballot any candidate proffered by the party—would transform the primary ballot into an unfiltered forum for a party’s political expression. Nor does allowing voters to select a candidate who is disqualified from holding office further the ballot’s purpose of allowing voters to select eligible candidates. The Election Code must “be liberally construed so that all eligible electors may be permitted to vote.” § 1-1-103(1). Permitting a disqualified candidate to

appear on the ballot does not protect voting rights and would transform the ballot into a vehicle for disenfranchisement.

Consistent with the ballot's purpose to elect candidates, the Election Code permits Colorado courts to exclude disqualified candidates. Language used in the Election Code "must be read in the context of the statute as a whole and the context of the entire statutory scheme." *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). The language used throughout the presidential primary statutes, in other sections of the Election Code, and in section 1-1-113, makes clear that state courts have this power.

State courts can hear "[a]ny challenge to the listing of any candidate on the presidential primary election ballot." § 1-4-1204(4) (emphasis added). This broad grant of jurisdiction is without qualification. *See Stamp v. Vail Corp.*, 172 P.3d 437, 447 (Colo. 2007) ("When used as an adjective in a statute, the word 'any' means 'all.'"). It thus includes challenges to whether a candidate is disqualified from appearing on the ballot.

Other language in the presidential primary statutes confirms this reading. Colorado’s presidential primary process should “conform to the requirements of federal law,” including the federal constitution. § 1-4-1201. While political parties play a vital role in the primary process, they may only provide to the Secretary “a *qualified candidate entitled to* participate in the presidential primary election.” § 1-4-1203(2)(a) (emphasis added).

In addition, election officers who administer the presidential primary “have the same powers and shall perform the same duties for presidential primary elections as they provide by law for other” elections. § 1-4-1203(3). Those preexisting administrative powers, as far as candidates for state offices are concerned, empower election officials to screen candidates for certain disqualifications concerning residency and other qualifications. *See* § 1-4-501(1).

Additionally, several provisions of the Election Code recognize that candidates who are disqualified before ballots are printed should be excluded from the ballot. *See* § 1-4-1001(2) (“If the designated

election official disqualifies a candidate before the ballots are printed, that candidate's name shall not appear on the ballots."); § 1-4-1001(1)(c) (withdrawing candidate's name should "be taken off the ballot" if there is time); § 1-4-1009(2)(a) ("When a vacancy is filled . . . before the ballots are printed, the coordinated election official shall cause the name of the replacement candidate to be printed on the ballot."); § 1-4-1002(4) (same, for primary elections); § 1-4-1003(4)(a) (same).

And section 1-1-113 itself supports this view. Section 1-1-113 applies to a "breach or neglect of duty or other wrongful act," and "other wrongful act" is more expansive than a 'breach' or 'neglect of duty.'" *Frazier*, 2017 CO 85, ¶ 16. Accordingly, "section 113 . . . clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code." *Carson v. Reiner*, 2016 CO 38, ¶ 17. Given the Election Code provisions cited above, it would be a

wrongful act that undermines the purposes of the Election Code for an election official to certify a disqualified candidate to the ballot.²

Finally, interpreting the Election Code to allow courts to resolve issues of candidate eligibility is consistent with this Court’s precedent. “[T]he power to resolve issues regarding candidate eligibility resides with the courts.” *Hanlen v. Gessler*, 2014 CO 24, ¶ 44; accord Ex. D to Petr’s Opening Br. 108:7-10 (testimony of Hilary Rudy, Deputy Director of Elections: “The Secretary’s Office is never the final arbiter of eligibility because the Secretary’s decision to either certify a candidate or not can be challenged in court.”).

Intervenors’ position would remove that power from courts and lodge it solely with political parties. They cite no cases supporting this

² For these same reasons, the Colorado GOP misses the mark when it argues the Secretary “concede[d]” the Election Code does not “explicitly” create any duty to screen candidates’ qualifications. CO GOP Ans. Br. 19. For one, when the statutory scheme is read as a whole, the Code contemplates election officials excluding disqualified candidates from the ballot. *See, e.g.*, § 1-4-1001(2). But even if it didn’t, Colorado courts could still exercise jurisdiction because courts can remedy “a broad range of wrongful acts” under the Code. *Carson*, 2016 CO 38, ¶ 17.

limitation on the jurisdiction of Colorado courts. The best they offer is a 19th-century case that held the Secretary of State could not select one Republican faction's candidate slate and reject a different faction's slate. *People ex rel. Hodges v. McGaffey*, 46 P. 930 (Colo. 1896). But that case not only arose under an entirely different law than the current Election Code—"the Australian ballot law"—it also did not allow disqualified candidates to appear on the ballot. *Id.* at 930. If relevant at all, the case reaffirmed that courts have the final say in determining whether candidates may be presented to the voters. Therefore, Intervenors' argument that courts are powerless to exclude disqualified candidates is unsupported by Colorado law.

C. Intervenors' position that courts cannot exclude ineligible candidates would produce unreasonable results and undermine the state's interest in ballot integrity.

Intervenors' view that political parties hold unfettered discretion to put anyone they want on a primary ballot would also lead to unreasonable results. See § 2-4-201(1)(c) ("In enacting a statute, it is presumed that a just and reasonable result is intended[.]"). If, for

example, the Colorado Democratic Party certified Barack Obama as a presidential primary candidate—despite plainly being disqualified by the Twenty-Second Amendment—Colorado election officials and courts could not exclude him from the ballot. Or if either party wanted to include the former governor of California Arnold Schwarzenegger, who emigrated to the United States as a young man, he would have to be listed on the ballot despite failing to meet the “natural born citizen” qualification imposed by Article II, Section 1 of the Constitution. Such absurd results are not warranted by the Election Code.

Contrary to Intervenor’s view, the Election Code does not render Colorado’s election officials and courts powerless to protect the electoral process. “States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.” *Timmons*, 520 U.S. at 364. Accordingly, “a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.” *Bullock v. Carter*, 405 U.S. 134, 145 (1972). This interest extends to primary

elections. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“[A] State may impose restrictions that promote the integrity of primary elections.”).

The Tenth Circuit has held Colorado’s interest in ballot integrity includes omitting disqualified candidates. In 2012, a naturalized citizen sought to appear on the ballot as a presidential candidate despite failing to satisfy the natural-born citizen requirement. *Hassan v. Colo.*, 495 F. App’x 947 (10th Cir. 2012). The candidate argued that “[e]ven if Article II properly [held] him ineligible to *assume the office of* president,” Colorado could not “deny him *a place on the ballot.*” *Id.* at 948. Rejecting this argument, then-Judge Gorsuch wrote, “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.” *Id.*

The same holds true here. The Secretary maintains simply that courts may exclude disqualified candidates from the ballot. Intervenors’ radical theory that the state is powerless to exclude such candidates

from the ballot is unsupported by Colorado law, would disenfranchise Colorado voters, and would undermine the state's strong interest in protecting the integrity of its ballot.

CONCLUSION

The Court should affirm that the Election Code allows courts to exclude constitutionally ineligible candidates from the ballot. Beyond that, the Secretary takes no position on the outcome of the case and welcomes the Court's direction as to whether former President Trump is disqualified from being certified to the 2024 Republican presidential primary ballot.

Dated this 1st day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, I served a true and complete copy of the foregoing **SECRETARY OF STATE'S ANSWER BRIEF**, upon all parties and their counsel of record by e-filing with the Colorado Courts E-Filing system maintained by the court.

/s/ Carmen Van Pelt