DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1427 Bannock Street, Room 256 Denver, Colorado 80202 Phone: (303) 606-2300	
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, an unincorporated association	▲ COURT USE ONLY▲
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COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S REPLY BRIEF TO THE PETITONERS' RESPONSE TO THE COMMITTEE'S MOTION TO DISMISS

Movant, the Colorado Republican Committee, respectfully replies to Petitioners' response to the Colorado Republican Committee's Motion to Dismiss. Unfortunately, Petitioners have

chosen to use the bulk of their response to advance new arguments attacking the Intervenor's First Amendment claim, arguments that should have been presented in their motion to dismiss that claim, rather than responding to the arguments for dismissal of the Petitioners' claims made by the Intervenor in the motion at issue. Most of the arguments for dismissal of the Petitioners' claims advanced by the Intervenor remain unanswered. Resort to pejoratives like "blunderbuss," Pet'rs' Resp. to Intervenor's Mot. to Dismiss 1, cannot substitute for actual legal arguments.

I. ARGUMENT

A. The Colorado Republican Committee's First Amendment Claim Does Not Fail On the Merits.

The vast majority of arguments contained in Petitioners' Response to the Intervenor's Motion to Dismiss do not respond directly to the basis of Intervenor's Motion to Dismiss, *i.e.*, the Intervenor's authority under C.R.S. § 1-4-1204(1)(b). Instead, Petitioners affirmatively attack the Intervenor's First Amendment claim. Intervenor accordingly incorporates by reference its Response to Petitioners' Motion to Dismiss, which was the appropriate place for adjudicating the merits of the Intervenor's claim. Intervenor notes that in their Response, just as in their Motion to Dismiss, Petitioners have framed Intervenor's argument as a "First Amendment challenge to the Election Code itself." Pet'rs' Resp. 2. That assertion is still as false as it was the first time they made it (which dooms Petitioners' arguments, as explained elsewhere). To be crystal clear, *Intervenor does not contend that the Election Code is unconstitutional*. Rather, the Intervenor argues that *the relief sought by Petitioners* is *unavailable* under the Election Code, in part because, were the Election Code interpreted to permit that relief, it would also violate the First Amendment. Intervenor's First Amendment claim was necessitated by *Petitioners' lawsuit,* improperly brought under the guise of a § 1-1-113 action effectively seeking to amend § 1-4-1204, a code section carefully drawn to *avoid infringing on the Party's First Amendment rights*. For reasons advanced

in multiple briefs, Intervenor categorically rejects Petitioners' claims that disqualification of one its candidates is available to them here as a remedy under the Election Code.

Again, Petitioners devote the bulk of their response brief to attacking the merits of the Intervenor's First Amendment arguments. They cite *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), a case in which the Supreme Court upheld a law prohibiting a candidate *already appearing on the ballot* from being on the ballot for multiple parties at once. That very different case plainly does not "foreclose" Intervenor's First Amendment arguments. First, *Timmons did not bar a candidate from the ballot*. Rather, it addressed how many different ways that candidate could be listed. Second, *Timmons* concerned qualifications for the *general* election ballot, and in that context upheld the state's interest in ballot management. This case, in contrast, concerns Petitioners' attempt to exclude from the party's *primary* ballot the ability to make its own decisions protected by both statute and the First Amendment. In such contexts, political parties are free to make their own choices, and courts are very reticent to deny parties the opportunity to set requirements in primary elections. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (statute providing that any voter could vote in a party's primary unconstitutional); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (statute's requirement that voters in a primary be members of that party unconstitutional).

Third, Petitioners' claim that "*Timmons* flatly rejected Intervenor's First Amendment argument," is simply false. Pet'rs' Resp. 6. *Timmons* concerned an entirely different statute from the Election Code provisions at issue in this case, and had nothing to do with asking the Court in a § 1-1-113 suit to add compliance with Section Three of Fourteenth Amendment to a finite enumerated list of ministerial duties. Nor did it reach a holding that election rules regarding ballot access are *per se* constitutional; instead, it articulated a standard under which States may not enact

"unreasonably exclusionary restrictions." *Timmons*, 520 U.S. at 367.[1] Laws regarding even general ballot access must still be "reasonable, politically neutral regulations." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). "[T]he State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the Party's rights." *Timmons*, 520 U.S. at 364 (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). *Timmons* does not "flatly" reject any claim of the Intervenor, rather, it acknowledges the scrutiny under which the purported restrictions advanced by Petitioners are examined. In fact, the Court made explicit that the burden imposed by the qualification requirement was "not trivial." *Id.* While the Petitioners do not discuss the *Timmons* standard or attempt to apply to this case the bar of reasonability and political neutrality to which it holds election regulations, it is abundantly clear that *Timmons* does not give carte blanche to any purported election regulation. They remain subject to First Amendment scrutiny.

Petitioners contend that the merits of President Trump's ineligibility are irrelevant to whether their purported relief would violate the rights of the Intervenor, citing *Timmons*, 520 U.S. at 358 and *Lindsay v. Bowen,* 750 F.3d 1061, 1063 (2014). But neither case contains any such assertion. On the contrary, both cases make very clear *the opposite* – that the basis for the purported disqualification is crucial to determining whether First Amendment rights are violated. *Bowen* explained this in detail:

> Age requirements, like residency requirements and term limits, are "neutral candidacy qualification[s] . . . which the State certainly has the right to impose." *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (en banc); see also *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002) (restrictions aren't severe when they are "generally applicable, even-handed, [and] politically neutral"). Distinctions based on *undisputed ineligibility* due to age do not "limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status." *Bates*, 131 F.3d at 847 (quoting *Anderson*, 460 U.S. at 793) (internal quotation marks and alterations

[1] That rule could be read to encompass the "unreasonably exclusionary restrictions" Petitioners ask this Court to create, where the Colorado Legislature has declined to do so.

> omitted). They simply recognize the lines that the Constitution already draws. Any burden on Lindsay's speech and association rights is therefore minimal.

Bowen, 750 F.3d at 1063 (emphasis added).

The Petitioners claim that "the merits of the underlying claim that would trigger the law at issue," (Pet'rs'. Resp. 8), is irrelevant to the examination of the First Amendment issue. *Bowen* clearly holds the exact opposite. The specific requirement for ballot access enforced in *Bowen*, age, was permissible due to the specific nature of the requirement, that it was "generally applicable," "politically neutral," and "undisputed." In other words, the nature of the underlying qualification item, *the nonpolitical, undisputed age requirement*, was the basis for the Court's determination that only a minimal and justifiable burden was imposed on the free speech rights of the attempted candidate. In contrast, in this case, as explained in more detail in the Intervenor's Motion to Dismiss and in the constitutional motion to dismiss filed by President Trump, the heavily political, extra-statutory, non-neutral, and not-generally-applicable requirement that Petitioners seek to impose is simply not available to them in this matter under the Fourteenth Amendment (and certainly not without serious dispute). And that is highly relevant to the First Amendment inquiry, as *Bowen* clearly indicates.

Likewise, the claim that *Timmons* did not address the underlying merits of the disqualification is false. The *Timmons* Court very clearly based its decision on the specific legitimacy and appropriateness of the requirement before the Court, looking at the legitimate reasons for this particular rule excluding double candidates, such as "Minnesota's interests in avoiding voter confusion and overcrowded ballots, preventing party-splintering and disruptions of the two-party system, and being able to clearly identify the election winner." *Timmons*, 520 U.S. at 364. In other words, the Court did exactly what Petitioners suggests is forbidden; it examined the nature and appropriateness of the underlying alleged disqualification.

To the extent Petitioners only attempt to suggest that whether President Trump actually committed insurrection is irrelevant to the First Amendment inquiry, Intervenor agrees fully that that conduct is irrelevant – which is why no evidentiary hearing should be needed in this case and it should be decided as a matter of law. But the nature of the disqualification here, and whether it applies at all, is undoubtedly relevant to whether the Intervenor's First Amendment rights should be infringed upon. If, as Intervenor has argued more extensively elsewhere, only Congress can create the mechanisms for the enforcement of Section Three of the Fourteenth Amendment, *see Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."), then it would violate the First Amendment rights of the Intervenor to nonetheless impose *sua sponte*, or by litigation, this political requirement without that congressional authorization.

B. The Petitioners Fail to Respond Effectively to the Colorado Republican Party's Statutory Arguments for Dismissal.

Petitioners present the Intervenor's argument in its Motion to Dismiss as a First Amendment challenge to the Election Code. Pet'rs' Resp. 3. Not only, as reemphasized above, is that assertion wholly inaccurate, it also completely ignores the *actual* arguments the Intervenor advanced in its Motion to Dismiss the Petitioners' claims. Intervenor did not attack the validity of any part of the election code in its Motion to Dismiss. Rather, its Motion to Dismiss explained that the Colorado Election Code, specifically C.R.S. § 1-4-1204(1)(b), does not vest in the Secretary of State the authority Petitioners claim she possesses. Intervenor's Mot. to Dismiss 3 ("It is the Colorado Republican Committee, not the Secretary, that sets those rules and determines the requirements for Republican nominees. The election code reflects the Colorado Republican Committee's constitutional right to freely associate and to exercise its political decisions. *See* U.S. Const. amend. I; Colo. Const. Art. I, § 10, § 5. And C.R.S. § 1-4-1204(1)(b)'s codification of the

inherent authority of the Colorado Republican Committee prohibits the Secretary of State from interfering with the Party's autonomy by denying it the chance to put forward to the voters the candidates of its choice."). Petitioners' contention that in its Motion to Dismiss, "Intervenor restates its Petition and again challenges the constitutionality of the Election Code itself." (Pet'rs' Resp. 3), is simply false. Intervenor did not challenge the constitutionality of any statute in its Motion to Dismiss; it argued that Colorado Law, specifically C.R.S. § 1-4-1204(1)(b), vests the decision at issue in this case in political parties, not the Secretary, rendering Petitioners' claims meritless as a matter of law. Intervenor is actually *defending* § 1-1-113 and § 1-4-1204 and insisting they be applied as written.

Petitioners have chosen primarily not to respond to the actual arguments advanced by the Intervenors regarding the scope of the Secretary's authority. Instead, they referred the Court to their response to President Trump's Motion to Dismiss. But that response likewise ignored Intervenor's arguments. Thus, Petitioners have still left Intervenor's actual arguments regarding the Election Code and the language of C.R.S. § 1-4-1204(1)(b) unanswered. But a lawyer should not "mischaracterize the other's argument and knock down straw men that they create based on those mischaracterizations." *Harleysville Ins. Co. v. King's Express, Inc.*, 2020 U.S. Dist. LEXIS 247748, No. CV 19-3817-DMG (SKx), *14 (C.D. Cal. July 6, 2020).

Petitioners purport to respond to *People ex rel. Hodges v. McGaffey*, 46 P. 930 (Colo. 1896), a case Intervenor cites for the proposition that the Secretary lacks authority to make discretionary decisions regarding candidates. Petitioners make much of the factual history of the case, involving two rival factions of the Republican Party. That distinction is historically interesting, but there is nothing about the Court's opinion that indicates that this distinction is by

any means legally significant; the holding (which Petitioners *do not cite*) was that "it is the plain duty of the secretary of state to certify to the various county clerks the ticket." *Id.* at 932.

The *McGaffey* Court made clear "that this is a plain duty enjoined by law, *about which the secretary of state has no discretion*." *Id.* at 931 (emphasis added). Nothing about the Court's holding was limited to the specific factual situation before it; nor do Petitioners identify anything in the Court's holding itself that would seem not to apply. Petitioners' argument would make about as much sense as limiting *McGaffey* only to cases involving the McKinley presidential ticket, the election that that case specifically discussed. Petitioners also contend that subsequent changes in the law have superseded *McGaffey* and lessened its persuasiveness as precedent. To support that assertion, they cite 1992 revisions to the Election Code, revisions that by neither indicated that earlier precedents were explicitly being overruled nor addressed *McGaffey in the least*. They do not identify any part of those revisions that contradicts or disagrees with *McGaffey* or cite to any specific language calling *McGaffey* into question. *McGaffey* remains good law and has not been overruled *sub silentio* by statute.

Petitioners also completely ignore all the other cases cited by the Intervenor to support its argument. For example, the Colorado Supreme Court has held that,

> [a]ny regulation that would have for its object the control of a political party concerning its own internal affairs or its own right of self-control and self-preservation, as an organization, would [be] . . . regulation of voluntary organizations in matters that in no wise tend to the purity and integrity of primary elections or nominations.

People ex rel. Vick Roy v. Republican State Cent. Comm., 226 P. 656, 660-61 (Colo. 1924). *People ex rel. Vick Roy v. Republican State Cent. Comm.*, 226 P. 656, 660-61 (Colo. 1924). Petitioners appeared to have waived, or at least forfeited, any response to these arguments of the Intervenor.[2]

[2] "Waiver is the intentional relinquishment of a known right or privilege." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); *People v. Carter*, 2021 COA 29, P26 (Mar. 11, 2021). Petitioners have intentionally chosen

Likewise, Petitioners ignored the *central* argument the Intervenor advanced, that *under the plain language of C.R.S. § 1-4-1204(1)(b), it is the Colorado Republican Committee that determines who the Republican nominee will be on a ballot*. The statute clearly indicates that the Intervenor alone determines whether a candidate is a "bona fide candidate" for president and does so "pursuant to political party rules." None of their briefs ever addressed this contention, or responded to the Intervenor's arguments regarding the effect of that language and the authority it vests in the Intervenor. Ignoring statutory language does not make it disappear. Instead, it continues to clearly indicate that the Intervenor retains the authority that the Petitioners would deny to it to make its own political decisions.

The Intervenor's Petition and its Motion to Dismiss are underpinned by much more than just *McGaffey*. The rest of the Intervenor's text-, jurisprudence-, and logic-based arguments for dismissal of the Petitioners' Verified Petition remain unanswered.

Respectfully submitted,

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not to respond to the Intervenor's arguments and have thereby waived any response to those arguments. *See also Dreibelbis v. Scholton*, 274 F. App'x 183, 185 (3d Cir. 2008) (finding that argument was waived where plaintiff "had ample opportunity to make this argument in response to defendants' motion to dismiss and failed to do so"); *see also Hollister v. U.S. Postal Serv.,* 142 F. App'x 576, 577 (3d Cir. 2005) (noting that a party's failure to oppose an argument raised in a motion to dismiss constitutes waiver).

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*Admitted pro hac vice
**Not admitted in this jurisdiction; application for pro hac vice admission forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 6, 2023, a true and correct copy of the foregoing was served electronically, via the Colorado Courts E-filing system upon all parties and their counsel of record.

By: *s/Christa K. Lundquist*