DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** 1437 Bannock Street, Room 256 Denver, CO 80202 Phone: (303) 606-2300	
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and **CHRISTOPHER CASTILIAN**, **Petitioners**, v. **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, and **DONALD J. TRUMP** **Respondents**. and **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, and **DONALD J. TRUMP,** **Intervenors.**	▲ COURT USE ONLY ▲
Attorneys for Respondent Donald J. Trump: Scott E. Gessler (28944), sgessler@gesslerblue.com Geoffrey N. Blue (32684), gblue@gesslerblue.com Justin T. North (56437), jnorth@gesslerblue.com Gessler Blue LLC 7350 E. Progress Pl., Suite 100 Greenwood Village, CO 80111 Tel: (720) 839-6637 or (303) 906-1050	Case Number: 2023CV32577 Division:
RESPONDENT DONALD J. TRUMP'S REPLY IN SUPPORT OF MOTION TO DISMISS	

Former President of the United States, Donald J. Trump submits this *Reply in Support of Motion to Dismiss* filed on September 22, 2023, which focused on C.R.S. § 1-1-113 and § 1-

4-1204 and Petitioners' standing to bring a declaratory action.

Introduction

Petitioners' claims fail for two primary reasons. First, a constitutional challenge is directly prohibited under *Frazier* and *Kuhn*. The Petitioners' and the Secretary's efforts to confine *Frazier* and *Kuhn's* holdings to a narrow class of constitutional claims misreads the Court's rulings and is contrary to its reasoning in those cases. The Supreme Court clearly established that the plain language of Section 113 prohibits constitutional claims because those claims present weighty practical, procedural, and appellate issues that are incompatible with Section 113's procedures. These issues apply here: the entire substance of Petitioners' claim arises from the Fourteenth Amendment and litigating this issue in a Section 113 proceeding severely prejudices President Trump.

Second, Petitioner's *Response* still fails to identify a single violation of Section 1204. The Secretary's only duty under Section 1204 is to list presidential candidates that fulfill that Section's requirements, and she admits that Section 1204 does not give her authority to bar candidates on Fourteenth Amendment grounds. The Petitioners cite a number of statutes that supposedly support their claim, but these (1) are *not* Section 1204, (2) do *not* form the basis of their claim for relief, and (3) *cannot* bar a presidential candidate from the ballot on Fourteenth Amendment grounds.

Petitioners must directly litigate their Fourteenth Amendment claim, which they initially did in Count II of their Petition. But they now seek to voluntarily dismiss Count II and rely entirely on a purported violation of Colorado's Election Code to litigate the Fourteenth Amendment. Petitioners' proper course of action is to dismiss their Election

Code claim under Count I and pursue their action for declaratory relief under Count II.

Because Petitioners did not address the standing arguments and have withdrawn Count II, this *Reply* does not address standing arguments.

I. Petitioners' Count I is an artful pleading designed to inappropriately litigate a constitutional claim in the guise of an Election Code proceeding.

A. The substance of Count I is a Fourteenth Amendment claim.

The Petition spends 104 pages alleging and arguing that the events at the Capitol on January 6, 2021, constituted an insurrection, and that somehow President Trump "engaged" in that insurrection. Their claim is inextricably and solely based on the Fourteenth Amendment. Indeed, Petitioners' case – every argument, every alleged fact, every witness, and every piece of evidence – comes back to the Fourteenth Amendment at every step. The witness testimony they intend to provide is related the Fourteenth Amendment. Tellingly, not a single witness or exhibit addresses the statutory language of Section 1204. Petitioners' clear goal is to strip President Trump of his right to hold elective office by accusing him of violating Section Three of the Fourteenth Amendment. Section 1204 factors into this goal not at all, other than as statutory vehicle to bring Fourteenth Amendment claim through the Court's doors.

The language used in Petitioners' *Response* betrays that the purpose is solely to bring a Fourteenth Amendment constitutional claim by any means possible. They insist that the Court "*must* consider" whether President Trump is qualified under the Fourteenth Amendment[1] and they argue that they may litigate "a broad scope of improprieties, wrongful

[1] *Corrected Response to Respondent's Motion to Dismiss* ("Response" or "Resp.") at 16 (emphasis in original), October 3, 2023.

acts, and qualifications established by the U.S. Constitution,"[2] while failing to identify a single section of the Election Code that uses the words "Fourteenth Amendment," "insurrection," or "engage," or that otherwise imposes a duty on the Secretary to evaluate whether a person may hold office because he or she "engaged" in an "insurrection."

B. § 1-1-113 is a procedural vehicle that does not create a cause of action.

Petitioners argue that they have brought a valid Section 113 claim. But Section 113 does not create a cause of action that allows for a "broad scope of challenges [to] be brought under its umbrella."[3] It is merely a procedural vehicle establishing the terms by which challenges to official conduct based on the duties established *elsewhere* in the Election Code may be litigated. The text of Section 113(1) is clear that it serves as a vehicle for bringing claims solely based on an official's alleged violations of his enumerated duties under the *Election Code*; it is limited to controversies that arise from an official's discharge "any duty or function under this *code*."[4]

Petitioners cite *Carson v. Reiner*[5] to suggest that Section 113 establishes a cause of action for challenging "a broad range of wrongful acts" and "permit[s] the adjudication of controversies arising from any wrongful act that occurs prior to the day of an election, without further limitation." This mischaracterizes *Carson* and flatly contradicts *Frazier*. In *Carson*, the Supreme Court resolved a conflict between the procedures laid out in Section 113

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[2] Resp. at 14.

[3] Resp. at 15.

[4] C.R.S. § 1-1-113(1) (emphasis added).

[5] *Carson v. Reiner*, 2016 CO 38, ¶ 17.

and those in Section 1-4-501(3), which established a cause of action for challenging a candidate's qualifications in a Section 113 proceeding. The procedures in Section 501(3) specified stricter timelines than those in Section 113(1). The Court resolved this *procedural* conflict, reasoning "section 113 stands in relation to section 1-4-501(3) as a general to a special, or specific, provision" and therefore the timelines in Section 501(3) controlled.[6] The Court in *Carson* did not, as Petitioners claim, interpret Section 113 to create an independent cause of action.

II. *Frazier* and *Kuhn* bar Fourteenth Amendment litigation in a Section 113 proceeding.

A. Petitioners seek to litigate duties that appear outside the Election Code.

Frazier explicitly limited Section 113 proceedings to enforcement of duties and obligations under the Colorado Election Code, holding "that where the language of section 1-1-113 allows a claim to be brought against an election official who has allegedly committed a 'breach or neglect of duty or other wrongful act' under 'this code,' it is referring to a breach of duty or other wrongful action under the Colorado Election Code, not a section 1983 claim."[7] Although Petitioners focus on "section 1983," they ignore the inconvenient truth that the Fourteenth Amendment also falls outside of the Colorado Election Code. And the "wrongful act" they seek to remedy is found in the U.S. Constitution – just like a claim under 42 U.S.C. § 1983. To allow them to litigate the Fourteenth Amendment would directly violate *Frazier's* ruling and reasoning. *Frazier* did not limit certain Section 1983 claims that

[6] *Id.*

[7] *Frazier v. Williams*, 2017 CO 85, ¶ 3.

arise outside of the Election Code, but rather *all* claims that arise outside of the Election Code. And *Kuhn* made clear that Frazier was not limited to Section 1983 claims, holding "to the extent the Lamborn Campaign challenges the constitutionality of the circulator residency requirement . . . this court lacks jurisdiction to address such arguments in a section 1-1-113 proceeding."[8] Notably, *Kuhn* did not even refer to Section 1983.

B. A Section 113 proceeding is practically, procedurally, and constitutionally inappropriate for constitutional claims.

Contrary to Petitioners' characterization, *Frazier*'s holding is not merely limited to a textual analysis of Section 113. Nor did the Court limit its reasoning to constitutional challenges *to* the Election Code, as Petitioners suggest. The Court explained at length that Section 113 is also wholly inappropriate as a vehicle for constitutional claims.

Frazier recognized that distinct and unavoidable problems arise when litigating a constitutional claim in a Section 113 proceeding. First, Section 113 is incompatible with the opportunity for appellate review of constitutional claims,[9] because the Supreme Court has discretion to decline review.[10] If the Court declines, the district court's decision is final and not subject to further review.[11] By comparison, constitutional claims enjoy the opportunity for appellate review.[12] The Court also recognized that, because of its procedural limitations,

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[8] *Kuhn,* ¶ 55

[9] *Id.*, ¶ 18.

[10] C.R.S. § 1-1-113(3).

[11] *Id.*

[12] *Id.*

"section 1-1-113 does not provide an appropriate procedure for adjudicating section 1983 claims."[13] Section 113's limited procedures were inappropriate because Section 1983 claims arise under the *United States Constitution* – just like Petitioners' current claims.

Second, the Court explained that using Section 113 for constitutional claims "would run afoul of the Supremacy Clause" because constitutional claims "cannot be subject to the kind of state-law limitations that section 1-1-113 would impose, such as truncated appellate review, limitation on proper plaintiffs, and a standard of 'substantial compliance' upon a showing of 'good cause.'"[14] The Court further explained that it knew "of no authority suggesting [it] should allow section 1983 claims to be litigated in a special statutory proceeding . . . simply because the plaintiff is willing to subject himself to the limitations of the proceeding … if he can simultaneously take advantage of what he views as its benefits."[15]

The Court's thorough explanation thoroughly refutes Petitioners' argument that *Frazier* is too limited to preclude bringing their Fourteenth Amendment claim under Section 113.

C. *Hassan* does not provide authority for the Secretary of State to evaluate potential disqualification under Section Three.

Petitioners repeatedly cite to *Hassan v. Colorado.*[16] In that case, Hassan refused to

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[13] *Frazier*, ¶ 18.

[14] *Id.*, ¶ 24

[15] *Id.*

[16] And they repeatedly point out that undersigned counsel served as Secretary of State in opposing Hassan, no doubt intending it as a clever rhetorical device.

submit a notarized candidate's statement of intent because it required him to affirm that he met the Article II qualifications for President – that he was at least 35 years old, at least a 14-year resident, and a natural-born citizen. In short, Hassan failed to fulfill the explicit requirements of the Election Code.[17]

Petitioners mischaracterize these proceedings, suggesting that the Secretary's refusal to list Hassan as an independent candidate demonstrated that the Secretary exercised an independent obligation to evaluate a candidate's constitutional qualification for the presidency. But Petitioners selectively omit the relevant portion of a letter from the Secretary to Hassan, which states:

> Any individual who submits a candidate statement of intent for President and fails to check the boxes affirming his or her eligibility, or who affirmatively discloses that he or she does not meet the constitutional qualifications for the office, will not be placed on the ballot in Colorado.[18]

The letter did *not* admit to a general duty by the Secretary to enforce constitutional qualifications against candidates. It simply affirmed that the Secretary is responsible for ensuring that candidates submit a properly executed statement of intent as required by now-repealed C.R.S. § 1-4-303, and that the Secretary must reject candidates who either do not submit paperwork or who self-affirm that they cannot meet Article II qualifications. Nothing in the letter or the related litigation on this matter supports Petitioners' position that the Secretary has a free-ranging, independent duty of investigation that falls outside of specific statutory provisions. In *Hassan* – as here – the Secretary's only role is to verify that the

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[17] *Hassan v. Colorado*, 495 Fed. Appx. 947 (10th Cir. 2012).

[18] Resp., Ex. 1.

candidate made the appropriate affirmation.

D. This Fourteenth Amendment litigation raises the same practical concerns recognized in *Frazier*.

The Petitioners do not address the practical difficulties of pursuing constitutional litigation in an expedited Section 113 proceeding. That is because here, "the plaintiff is willing to subject himself to the limitations of the proceeding . . . if he can simultaneously take advantage of what he views as its benefits."[19] Constitutional claims are complex, and it is impossible to fully litigate them within the time range of days or weeks provided by Section 113. As well, Section 113 includes limited tools for developing evidence;[20] indeed Petitioners and the Secretary have argued that President Trump is entitled to *no* discovery tools, a position that this Court presumptively agrees with.

Furthermore, Petitioners' claim requires the Court to resolve several factual and legal issues that realistically require months, if not years, of litigation to resolve: 1) what does the Constitution mean by "insurrection" or "rebellion"; 2) how does the First Amendment interact with Section Three of the Fourteenth Amendment; 3) is the Presidential Oath of Office covered by Section Three; 4) is the President an officer of the United States; 5) were the events on January 6, 2021, an insurrection; and 6) did President Trump "engage" in an insurrection. This is not an exhaustive list, and none of these issues resembles the far simpler legal and factual issues appropriate for under Section 113.[21]

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[19] *Frazier*, ¶ 24.

[20] *Id.*, ¶ 18 n.3.

[21] *Id.*, ¶ 11.

To be sure, Petitioners are willing to accept these limitations, no doubt because they have spent many months preparing their case. As *Frazier* recognized, a Section 113 proceeding stacks the deck against defendants and rewards "ambush" litigation. The breakneck pace of litigation applies *after* the plaintiff pulls the trigger on filing a petition. Leading up to that point, a Petitioner has months or even years to prepare arguments, evidence, and witnesses. Petitioners have had nearly two years to prepare their claim – while President Trump has a handful of weeks to prepare his entire defense. Bluntly put, the obvious lopsidedness of this arrangement does not serve the ends of justice and it encourages exploitative gamesmanship that confers an overwhelming tactical advantage to a well-prepared plaintiff. The *Frazier* Court recognized this possibility and rejected it.[22]

Allowing Petitioners to bring their Section 113 and 1204 claims has the added consequence of opening the courts to a flood of qualifications challenges. As Petitioners admitted themselves, they do not have Article III standing as voters to bring a direct constitutional challenge to President Trump's qualification under the Fourteenth Amendment. This standing concern is why Petitioners cloak their claim in the guise of an Election Code controversy and is also why they have withdrawn their request for declaratory relief. If Petitioners succeed, the Court would open its doors to parties who otherwise lack standing to litigate citizenship claims, such as claims surrounding President Obama, Senators McCain, and Senator Cruz. And it would open the door to other Fourteenth Amendment claims, such as whether Vice President Kamala Harris gave "aid" and "comfort" to violent

[22] *Id.*, ¶ 24.

protestors who attacked federal facilities. Petitioners seek to dodge the legal standing doctrines that have previously weeded-out such challenges. And if Petitioners succeed in litigating constitutional claims in the guise of election code violations, these challenges will be unmoored from well-recognized standing restraints.

The Secretary herself uses these exact same arguments in her *Response to President Trump's Special Motion to Dismiss*. First, she argues that Section 113 proceedings are designed to move far more quickly than anti-SLAPP proceedings, and therefore an anti-SLAPP motion should not be made in a Section 113 proceeding. Second, she argues that appellate procedures for an anti-SLAPP motion are "completely incompatible with a section 1-1-113 action." Here, the same reasoning explains why Section 113 proceedings are inappropriate for adjudicating constitutional claims: Section 113 proceedings under the Election Code are designed to move far more quickly than constitutional litigation, and the appellate procedures are incompatible with the right to appeal a constitutional claim. Of course, President Trump would have no need to bring his anti-SLAPP motion if the Petitioners did not seek to litigate Fourteenth Amendment constitutional issues under Section 113. But the Secretary's reasoning against mingling constitutional litigation with Section 113 procedures applies precisely to Petitioners' Fourteenth Amendment claims, even if she is personally unwilling to employ that same reasoning as a *Respondent* in this case.

III. Neither the Petitioners nor the Secretary identifies a dispute or controversy under § 1-4-1204.

A. Secretary Griswold admits that § 1204 does not give her authority to bar a presidential candidate under the Fourteenth Amendment.

In her *Omnibus Response to Motions to Dismiss*, the Secretary directly admits that "the

Election Code does not explicitly give the Secretary independent authority to determine whether a candidate is disqualified from holding office under Section Three of the Fourteenth Amendment."[23] The Secretary is correct – she has no such authority.

Her position aligns with the New Hampshire Attorney General. In an advisory opinion on September 13, 2023, Attorney General Formella concluded that New Hampshire's statutory equivalent of Section 1204 requires candidates to affirm their Article II qualifications (in a procedure nearly identical to Colorado's), but that New Hampshire law creates no duty for the Secretary of State to evaluate a candidate's constitutional qualifications beyond that affirmation.[24] Importantly, in 2012 the same candidate who sued the Secretary (Mr. Hassan) also sued the New Hampshire Secretary of State on the exact same grounds he sued the Colorado Secretary of State. And like the Tenth Circuit in *Hassan v. Colorado,* the New Hampshire federal district court affirmed the New Hampshire Secretary's authority to bar Hassan from the ballot.[25] In short, in 2012 federal courts upheld the authority of both the Colorado and New Hampshire Secretaries of State to bar Hassan from the ballot for failure to submit paperwork. And in 2023, both the Colorado and New Hampshire Secretaries properly agree that they have no authority to bar a candidate under the Fourteenth Amendment.

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[23] Omnibus Resp. at 2.

[24] Ex. C, Letter from John M. Formella to David M. Scanlan and Sheehan Phinney (Sept. 13, 2023).

[25] Ex. D, *Hassan v. New Hampshire*, 11-CV-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), *aff'd* (Aug. 30, 2012).

This refutes Petitioners' argument their "claim here is no different from a challenge to placing someone on the presidential election ballot who is under 35, a non-citizen, or who has already served two terms as president." Although a Secretary can require a candidate to submit paperwork of intent, neither the Colorado nor the New Hampshire Secretary of State has authority to bar a candidate under the Fourteenth Amendment. As well, Article II qualifications differ from disqualifications under the Fourteenth Amendment. The disqualification clause is subject to substantial factual and legal dispute, not the least of which involves federal preemption doctrine and political questions. Even assuming the Election Code gives the Secretary authority to enforce Article II qualifications outside of his duty merely to verify a candidate has affirmed he meets them; those qualifications are of a fundamentally different nature than disqualification under the Fourteenth Amendment.

B. Petitioners cannot identify a single factual dispute or breach of duty under Section 1204.

Consistent with the Secretary's position, Petitioners do not identify single breach of a duty in Section 1204. Petitioners claim that President Trump "myopically focuses"[26] on Section 1204. But that focus on Section 1204's plain language is for good reason. Section 1204 (and Section 113) is the *sole* basis for Petitioners' Count I.

1. Section 1204(4) is not an open-ended cause of action for all manner of claims.

Section 1-4-1204(4) does not work the way Petitioners say it does. They claim it "establishes [] a broad scope of challenges [that] may be brought under its umbrella,"[27]

[26] Resp. at 7.

[27] *Id.* at 15.

asserting that it "permits '*any* challenge to the listing of any candidate' based on any 'alleged impropriety' and directs that 'the district court shall assess the validity of *all alleged improprieties*.'"[28] This suggested interpretation of subsection (4) makes no sense in the context of Section 1204 and directly contradicts *Frazier* and *Kuhn*.

Subsection (4) is an enforcement clause. Subsections 1(b)-(c) establish the qualifications a candidate must satisfy to have his or her name listed on the presidential primary ballot, and subsection (4) provides the mechanism to enforce the Secretary's duty to list a candidate on the ballot if those qualifications are met. Its placement at the end of Section 1204, indicates that the "improprieties" contemplated by subsection (4) consist of the Secretary improperly listing a candidate on the ballot, as required Subsections 1(b)-(c). Section 1204 identifies no other qualifications.

Ignoring this context, Petitioners interpret § 1-4-1204(4) as an unlimited cause of action that would allow a Section 113 proceeding based "any alleged impropriety" with a candidate's listing on the presidential primary ballot, for any reason, regardless of whether it is enumerated in Section 1204.[29] They identify no limiting principle to their argument, suggesting that Subsection 1204(4) allows their Fourteenth Amendment constitutional claim to be brought simply because it constitutes an example of "an 'alleged impropriety'" with listing President Trump on the ballot.[30]

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[28] *Id.* (quoting § 1-4-1204(4)) (emphasis in original).

[29] Resp. at 15.

[30] *Id.*

This breathtaking expansion would expand Section 1204's requirements to include every state and federal law – a person could essentially challenge a presidential candidate for violating (or seeming to violate) *any* law. And the interpretation flatly contradicts *Frazier* and *Kuhn*, which forbade using Section 113 to bring constitutional claims. Under Petitioners' logic, the plaintiffs challenging a candidate's access to a ballot on constitutional grounds simply need to artfully plead their claims as challenges under the Election Code by finding a generalized requirement to follow the law. And with that requirement, they can bring any constitutional claim as a Section 113 challenge under the Election Code.

Petitioners' interpretation would directly lead to a flood of constitutional and other legal challenges that are otherwise barred by standing requirements. By their nature, election statutes implicate a wide array of constitutional rights, such as the First Amendment rights to speech, assembly, association, voting, and ballot access, and the Fourteenth Amendment. Under Petitioners' interpretation, naked constitutional challenges to presidential candidates' qualifications can freely be brought under Section 113's expedited procedures, so long as a petitioner can cast them as an "impropriety" with listing a candidate under Subsection 1204(4).

2. Petitioners have not alleged that the Secretary engaged in any impropriety under her duties established by Section 1204.

The *Response* never argues that the Secretary has breached a duty under Section 1204. Petitioners do not allege that she has listed President Trump on the presidential primary ballot without verifying that he: 1) is a bona fide candidate for a major political party; 2) has submitted a notarized candidate's statement of intent; and 3) and has paid the filing fee.

First, Petitioners do not allege that the Secretary listed President Trump on the ballot

in violation of § 1-4-1204(1)(b)-(c). Section 1204(4) states that "[a]ny challenge to *the listing* of any candidate on the presidential primary election ballot must be made … in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates."[31] It requires that the listing already be completed. There is no language allowing for an "anticipatory" challenge, unlike Section 113(1), which allows a claim to be brought when an official is "about to" commit a wrongful act.

Petitioners rely on Section 113(1)'s language that it applies when an official is "about to" commit a wrongful act, but this argument fails under *Carson*. In *Carson*, as previously discussed, the Supreme Court resolved a similar conflict between the provisions of Section 113 and Section 501(1).[32] The Court found that Section 113 is a general provision intended to resolve Election Code challenges broadly and that it lays out standard terms for proceedings.[33] But, as a general provision, it can be overridden by conflicting terms in specific Election Code provisions: "the legislative prescription for this conflict is to give effect to … the special, or more specific, provision.[34] Section 1204(4) stands in relation to Section 113 in the same manner; it is a more specific provision and thus overrides Section 113(1) where they conflict. Accordingly, the "about to" language in Section 113 does not apply, and Petitioners may only challenge the "the listing of any candidate" on the primary ballot.

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[31] C.R.S. § 1-4-1204 (emphasis supplied).

[32] *Carson v Reiner*. 2016 CO 38.

[33] *Carson*, ¶ 18.

[34] *Id.*

Likewise, the Secretary has not committed an impropriety within the meaning of Section 1204. Petitioners Response does not claim that President Trump is not qualified under Section 1204(1)(b)-(c): it identifies no issue with his status as a bona fide candidate of a major political party, his submission of a statement of interest, or his payment of the filing fee. In short, they identify no statutory "impropriety."

Furthermore, President Trump is not a candidate covered by Section 1204. In their *Response*, Petitioners go to great lengths to argue that President Trump is a candidate under the Election Code. First, they argue the Election Code applies to him because he is a "candidate" under the general usage of the word. This is absurd. Under their rationale, Colorado's Election Code – and Sections 113 and 1204 – would immediately apply to anyone who declares themselves a presidential "candidate."

Their next argument is equally specious – they point to the definition of "candidate" in C.R.S. § 1-4-905.5, but that definition is limited to Section 1-4-905.5, which itself is limited to *petition entities* for *state* candidates. Lastly, they look at how the term "candidate" is used in Section 1204, but their argument ignores that the legal requirements of Section 1204, by its terms, only regulate candidates who meet the requirements of Subsections 1204(1)(b) and (c). What matters is that Section 1204 governs certain conduct, none of which includes the Fourteenth Amendment.

Overall, Petitioners' focus on how President Trump could be considered a candidate for misses the point. Section 1204 cannot bar President Trump from the ballot, because there is no allegation that he violates the substantive provisions in subsections (1)(b) and (c), and because the Secretary has not listed him on the ballot.

IV. Petitioners did not include other Election Code sections in Count I for good reason: they provide no authority to bar a candidate under the Fourteenth Amendment.

Despite bringing Count I solely on the basis of Section 1204, Petitioners look beyond Section 1204 to hunt for a provision that incorporates federal law into the Election Code, citing to several provisions that they claim import the entire content of federal law into the Election Code and thereby impose a duty on the Secretary to enforce the Fourteenth Amendment against President Trump. As noted above, this approach simply ignores *Frazier* and would effectively nullify *Frazier's* holding.

But Petitioners' arguments also fail because they rely on flimsy inferences, improper interpretations, and blatant mischaracterizations. And as a practical matter, striking a presidential candidate from the ballot under the Fourteenth Amendment of the U.S. Constitution is a big deal. A *really* big deal. If the legislature wished to anoint the Secretary with the duty to take such monumental action, it would have done so by direct statutory command – not by a system of half-sunken references and interpretive glosses from provisions scattered across the Election Code that supposedly divine the legislature's alleged intent.

A. Section 1-4-1201 is merely a statement of intent by the legislature with no operative language.

First, Petitioners cite § 1-4-1201, claiming that it incorporates all federal law, including the Fourteenth Amendment, into Part 12.[35] Section 1201 does no such thing, as is clear from its text:

[35] Resp. at 14.

> In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections, and that the Colorado General Assembly will, during the 2017 legislative session, adopt all necessary conforming amendments to ensure the proper operation of a presidential primary election in Colorado.

This provision is merely a statement of intent by the legislature indicating that Part 12 should not be interpreted in a way that conflicts with either federal law or the major political parties' presidential primary rules. Its very title attests that it is only a declaration of intent: "§ 1-4-1201. Declaration." Contrary to Petitioners' assertion that the legislature imported all federal law into the Election Code by this provision, the provision contains *no operative language*. It makes no commands, compels no actions, and establishes no duties. All that it does in addition to announcing the legislature's general intent for how Part 12 should be interpreted is state the legislature's intent to take future action to adopt additional amendments to Part 12. Petitioners' interpretation directly conflicts with Section 1204's text and purpose.

B. The qualifications under Section 1203(2)(a) refer only to Section 1204(1)(b)-(c).

Second, Petitioners cite Section 1203(2)(a) as authority requiring the Secretary to verify whether a political party has "qualified candidate[s]" participating in the presidential primary.[36] Petitioner's suggest that "qualified" in this context means "qualified under the Constitution" and thus imposes a duty on the Secretary to evaluate whether a candidate is disqualified under the Fourteenth Amendment. To make this argument, Petitioners omit material language from the statute. The provision's full text directly contradicts Petitioners' claim:

[36] *Id.*

> Except as provided for in subsection (5) of this section, each political party that has a qualified candidate entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.[37]

The provision's full text brooks no argument: the qualifications the Secretary of State must evaluate are solely those established in Part 12. And the only provision in Part 12 establishing any qualifications for a candidate is Section 1204(1)(b)-(c). No other qualifications are required under Part 12. Here again, Petitioners' citation to Section 1203(2)(a) directly conflicts with the statutory text and mischaracterizes its content.

C. Section 1203(3) does not require the Secretary of State to evaluate any candidate qualifications beyond those established in Section 1204.

Third, Petitioners cite Section 1203(3), claiming it charges the Secretary of State with evaluating whether a candidate is disqualified under the Fourteenth Amendment. Petitioners base this claim on Section 1203(3)'s requirement that a "presidential primary must be conducted in the same manner as any other primary election to the extent statutory provisions governing other primary elections are applicable to this part 12." Petitioners then cite Sections 1-4-501(1) and (3) as generally supporting their claim that the Secretary of State must verify a candidate's qualification under the Fourteenth Amendment, even though neither provision mentions the Fourteenth Amendment nor applies to presidential primaries.

Section 501 has nothing to do with the Fourteenth Amendment or the federal Constitution. It limits candidacy for *state office* to individuals who meet the qualifications

[37] C.R.S. § 1-4-1203(2)(a) (emphasis added).

established under Colorado's constitution and statutes. Among those qualifications are registration and residency or property ownership in Colorado.[38] Section 501(3) merely states that a candidates' qualifications under Section 501(1) may be challenged by a particular process. The Fourteenth Amendment makes no appearance, nor does any reference to the federal Constitution.

And Section 501 only incorporates the procedures for other primary elections into the procedures for the presidential primary, to the extent they are applicable. It allows the legislature to avoid repeating the entire statutory scheme for running a primary in Part 12. Bluntly stated, provisions are irrelevant to a presidential primary do not apply. Finally, applying the Colorado residency or property ownership requirements established by Section 501(1) to presidential primary candidates would be absurd.

As closer inspection reveals, none of the provisions in the Election Code relied on by Petitioners supports their claim that the Code imposes a duty on the Secretary of State to evaluate a candidate's qualifications under the Fourteenth Amendment. Bluntly put, the Petitioners' blatant omissions and statutory mischaracterizations are unworthy of sophisticated counsel.

V. *Frazier* requires the Petitioners to directly litigate their Fourteenth Amendment claims outside of the Election Code challenge.

Petitioners are not without recourse. Even though their constitutional claim cannot be brought in § 1-1-113 proceeding, *Frazier* is clear that the courthouse "door remains wide open" for their claim to be brought in an appropriate proceeding, and indeed Petitioners

[38] C.R.S. § 1-4-501(1).

already have brought an action for declaratory relief as Count II.

To be sure, Petitioners persist in their statutory claims in Count I claim and have abandoned their declaratory claim in Count II.[39] But they have it backwards. A Fourteenth Amendment claim is wholly inappropriate for a Section 113 proceeding, whereas Colorado courts are open to litigating constitutional claims through their normal, robust procedures. Of course, President Trump has asserted the Petitioners have no concrete or particularized harm that would give them standing for declaratory relief. But Petitioners contend Count II is appropriate and meritorious. If the Petitioners are indeed so confident in Claim II, they should Dismiss Count I and reasserting Count II. They should forthrightly and directly litigate their Fourteenth Amendment claim, rather than dressing it up in the ill-fitting garb of Sections 113 and 1204. Their current approach is substantively unjust, interferes with the Court's ability to adjudicate their claim on the merits, and is prohibited under *Frazier* and *Kuhn*.

Conclusion

Undersigned counsel recognizes the urgency to resolve this matter and provide a fulsome record for appellate review. But the fundamental protections afforded defendants in all civil cases should nonetheless remain in place, no matter the political passions generated by this current matter. The Petitioners must present valid legal claims *before* they can compel a factual hearing. Here, the Petitioners' claims are exceedingly weak. They should litigate their Fourteenth Amendment claims by seeking declaratory or injunctive relief under the Fourteenth Amendment itself – not an Election Code proceeding that presents no basis for

[39] Resp. at 16-17.

their constitutional claim. Undersigned respectfully submits that Petitioners have spent so much time and effort trying to squeeze their Fourteenth Amendment claim into an Election Code proceeding for two reasons: An expedited Election Code proceeding gives them an unfair tactical advantage, and they are barred from seeking declaratory or injunctive relief because they self-admittedly have no standing to bring a Fourteenth Amendment claim. This Court should properly and promptly dismiss this matter.

FOR THESE REASONS, the Court should dismiss this action, award attorney fees, and grant President Trump all such further relief as is just, proper, or appropriate.

Respectfully submitted this 6th day of October 2023,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

Certificate of Service

I certify that on this 6th day of October 2023, the foregoing was electronically served via email or CCES on all parties and their counsel of record.

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