DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1427 Bannock Street, Room 256 Denver, Colorado 80202 Phone: (303) 606-2300	DATE FILED: October 20, 2023 4:04 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 **Intervenors:** DONALD TRUMP and COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, an unincorporated association	▲ COURT USE ONLY ▲
Attorneys for Intervenor: Michael Melito, CO Reg. #36059 MELITO LAW LLC 1875 Lawrence St., Suite 730 Denver, Colorado 80202 Phone: (303) 813-1200 Email: Melito@melitolaw.com Robert Kitsmiller, Esq., Atty. Reg. #16927 PODOLL & PODOLL, P.C. 5619 DTC Parkway, Suite 1100 Greenwood Village, CO 80111 Tel: (303) 861-4000 Fax: (303) 861-4004 bob@podoll.net	Case No: 23CV32577 Division: 209

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S RULE 702 MOTION TO EXLUDE THE TESTIMONY OF [redacted]

Movant, the Colorado Republican Committee, hereby submits this motion, pursuant to C.R.E. 702 and 704, to exclude the proposed testimony of Professor [redacted]. The

subject matter of this law professor's testimony concerns matters wholly inappropriate for expert testimony, namely, the nature and meaning of the law.

CERTIFICATE OF CONFERRAL

The undersigned has conferred with opposing counsel who indicated they oppose the relief requested herein. Intervenor President Donald Trump joins this motion.

I. ARGUMENT

Petitioners improperly propose to introduce an expert to testify about what he believes the law to be. Specifically, [redacted] proposed testimony consists of his beliefs about the meaning and scope of Section 3 of the Fourteenth Amendment. Those questions are legal questions, to be resolved on the basis of the Constitution's text, caselaw applying that text, and supplemental indications of original meaning to the extent the text is facially ambiguous. Purported expert testimony would usurp the role and responsibility of this Court to determine what the law is.

Trial courts possess a robust gatekeeper function concerning expert testimony. *People v. Shreck*, 22 P.3d 68, 77-79 (Colo. 2001) (adopting as part of analysis the standards indicated in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137 (1999)). This gatekeeper function requires the judge to assess "the reliability of the scientific principles upon which the expert testimony is based and the qualifications of the witness giving that testimony." *Ruibal v. People*, 432 P.3d 590, 593 (Colo. 2018). When the proposed testimony of an expert is challenged under *Shreck* and its progeny, C.R.E. 702 casts upon the proponent of the testimony the burden of establishing the admissibility of the testimony by a preponderance of the evidence. *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007).

This motion does not address some of the specific steps of *Shreck*: in particular, the qualifications and reliability of [redacted] testimony are irrelevant to this motion. Regardless of the basis for his opinions or even whether they are the correct opinions, [redacted] proposed testimony regarding the meaning of the Fourteenth Amendment is improper and should not occur.

C.R.E. 702 allows for expert testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a *fact* in issue." (emphasis added). One principle, nigh axiomatic, under Colorado law is that it is not the role of expert witnesses to express their opinions regarding the law. An expert witness must not express "an opinion as to the applicable law or legal standards, thereby usurping the function of the court." *Lawrence v. People*, 486 P.3d 269, 272 (2021); *see People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011). As the Colorado Court of Appeals has stated, "it is within the province of the trial court and not the expert witness to tell the jury what the law is." *Grogan v. Taylor*, 877 P.2d 1374, 1384 (Colo. App. 1993), *rev'd on other grounds*, 900 P.2d 60 (Colo. 1995) (citation omitted).

Opinion testimony offered on legal issues is simply not permitted for expert witnesses. *See Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000) (expert may not usurp the function of the court by expressing an opinion of the applicable law or legal standards); *People v. Lessliee*, 939 P.2d 443, 449-50 (Colo. App. 1996) (testimony was properly excluded where testimony in the form of a legal opinion would not have assisted the trier of fact in its role to understand the evidence or to determine facts in issue); *Town of Breckenridge v. Golforce, Inc.*, 851 P2d 214, 216 (Colo. App. 1992) (trial court properly excluded expert testimony on opinion of the parties' legal rights and responsibilities under a contract).

Federal courts, likewise, recognize that experts cannot testify regarding what the law is. "An expert cannot set forth legal conclusions. . . . Testimony that circumvents the jury's decision-making process is not admissible." *King v. McKillop,* 112 F. Supp. 2d 1214, 1222 (D. Colo. 2000). *Importantly, this rule applies in equal force in bench trials*. *CIT Group/Business Credit, Inc. v. Graco Fishing & Rental Tools., Inc.,* 815 F. Supp. 2d 673, 678 (S.D.N.Y.2011) (granting a motion in limine to exclude an expert's legal opinions during a bench trial)); *Edumoz v. Republic of Mozam*., 968 F. Supp. 2d 1041, 1050 n. 54 *(*noting "that the court's legal knowledge is presumed sufficient without the aid of an expert is equally applicable to non-jury matters"). It is a rule repeatedly embraced in a wide variety of contexts. *U.S. v. Arutunoff*, 1 F.3d 1112, 1118 (10th Cir. 1993); *see Aguilar v. International Longshoremen's Union,* 966 F.2d 443, 447 (9th Cir. 1992) (noting matters of law are for the court's determination, not that of an expert witness); *see also Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977) (expert testimony consisting of legal conclusions inadmissible); *Crow Tribe of Indians v. Racicot,* 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law.")

As the Tenth Circuit similarly explained:

> "[A]n expert's testimony is properly admissible under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of the testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case."

Specht v. Jensen, 853 F.2d 805, 809-10 (10th Cir. 1988). This rule applies also to constitutional issues and questions surrounding constitutional meaning. *See, e.g., Renfroe v. Parker*, 974 F.3d 594, 598 (5th Cir. 2020) (reasonableness under the Fourth Amendment a legal issue, not subject to expert testimony).

In fact, courts across the country have consistently recognized that expert witnesses may not give testimony on legal questions. *France v. Southern Equip. Co*., 689 S.E.2d 1, 14 (W. Va. 2009) ("An expert is not allowed by Rule 702 to usurp the role of the judge to determine the law of the case, or to instruct the trier of fact as to the applicable law."); *Franco v Jay Cee of N.Y. Corp.*, 36 A.D.3d 445, 448 (N.Y. App. Div., 1st Dept. 2007) ("Although New York courts permit expert testimony on the question of whether a certain condition or omission was in violation of a statute or regulation, this rule does not authorize expert testimony regarding the meaning and applicability of the law, which is the province of the court."); *Devin v. Hollywood*, 351 So. 2d 1022, 1026 (Fla. Dist. Ct. App. 4th Dist. 1976) ("[T]he trial court erred in relying upon expert testimony to determine the meaning of terms which were questions of law to be decided by the trial court.").

The subject matter of [redacted] testimony, as indicated by the expert disclosures and his expert report, consists entirely of legal conclusions. He will testify about the meaning of key terms in the Fourteenth Amendment, such as "insurrection," "officer of the United States," and "engaged in insurrection." He will also testify about what is one of the ultimate legal conclusions to be decided in this case, namely, whether the January 6, 2021, events at the U.S. Capitol fits within the historical meaning of the phrase "insurrection" against the Constitution of the United States as used at the time the Fourteenth Amendment was ratified. In other words, his testimony will be about the legal parameters of the Fourteenth Amendment, testifying about his belief about what it means and says and how it should be applied. His testimony would purport to advise this Court of the very legal issues that have been at the center of many of the motions to dismiss already filed in this case, such as, for example, the question of whether President Trump

was an "officer of the United States," a matter already extensively debated by the parties. His testimony is clearly testimony about the law. As such, it should not be permitted to occur.

The inappropriateness of [redacted] testimony is demonstrated by a consideration of what allowing that testimony would entail. [redacted] would, on the stand, make statements about what he believes the law to be, based on his reading of cases, statutes, and the like. Although titled a direct examination, this "testimony" would in actuality consist of [redacted] arguments to the Court about how to interpret the law. Intervenors' "cross-examination" would then of necessity consist of Intervenors attempting, through question form, to present their own arguments regarding constitutional meaning and to critique and respond to the arguments [redacted] advanced. Intervenors would need to draw the Court's attention to legally significant cases, not by raising them in brief and argument as would be typical and appropriate, but by questioning the witness about whether the witness had considered a particular case or not or about whether the witness had a response to a particular counterargument. In other words, allowing [redacted] to appear as a witness would render this case deeply confused; the fundamental legal questions about the meaning of text and cases, questions that are designed to be resolved through briefing and the argumentative process, would need to be resolved on the witness stand instead by means of interrogating this particular witness.

This Court has rightly highlighted at hearings the importance of careful examination of the original meaning of the Fourteenth Amendment. But this Court need look no further than itself to find the legal expert in this case. The Seventh Circuit rejected the use of expert testimony on foreign law, in a way that even more clearly applies to domestic law, and illustrated the reason why expert testimony on the law is improper: "[w]hen the testimony concerns a scientific or other technical issue, however, it may be unreasonable to expect a judge to resolve it without the aid of

such testimony. But judges are experts on law, and there are published materials on foreign law, in the form of treatises, law review articles, and cases." *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 496 (7th Cir. 2009). As the Sixth Circuit also explained, "Experts are supposed to interpret and analyze factual evidence. They do not testify about the law because the judge's special legal knowledge is presumed to be sufficient." *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). As the District Court for Colorado put it:

> an expert may not tell the Court what the law is. Counsel can present argument as to how the terms of the permit should be interpreted. But an expert will not be allowed to tell the Court how he thinks the Clean Air Act, the regulations, or the Colorado SIP should be interpreted. . . . [I]nterpretation of the law is a matter for the Court.

WildEarth Guardians v. Public Serv. Co., 853 F. Supp. 2d 1086, 1090 (D. Colo. 2012).

A typical expert, such as a medical expert in a personal injury case, would provide to the court evidence and expertise beyond the expertise the court already possesses. But the so-called expert testimony at issue here would be exactly within the scope of the expertise the Court already possesses, the knowledge of the law. The United State Constitution is, after all, the supreme *law* of the land. Interpreting its meaning is part of this Court's fundamental responsibility. The Court has highlighted in some hearings the novelty of some of the specific issues in this case. That is undoubtedly true. This Court may be the first court in the country to address whether a president can be disqualified under the Fourteenth Amendment. But experts do not solve that problem; the solution is found through the Court's review of the cases and other authorities provided by the parties, just as the Court would do to engage the most mundane of legal questions.

The way a legal issue is resolved does not change, simply because of the magnitude of the issue. The interpretation of the Fourteenth Amendment should be resolved through the same resources the Court would marshal to address any other legal question. The Court, not paid experts

for the parties, has the primary responsibility to weigh the various cases and come to a conclusion about their import. "In no instance can a witness be permitted to define the law of the case." *Specht*, 853 F.2d at 809-10.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That duty is a nondelegable one. The court has the ability and, in fact, the responsibility, to review the constitutional text and the cases and materials provided by the parties and determine what the law is. For a law professor to serve as an "expert" would interfere with that duty, because it would allow opinions about the law to come into the case as if they were the law. It is not the role of any expert to supersede the role of the court and pontificate concerning the nature of the law.

An expert report that examines constitutional meaning is not truly an expert report. It is an amicus brief, trying to convince the Court of a particular outsider's view of the law. While there is of course nothing wrong with amicus briefs, this Court has excluded them from this particular proceeding in light of its expedited nature. Testimony of the kind [redacted] would provide would be a work-around of the Court's order and be another means for the Petitioners to present their arguments regarding legal meaning. This case involves questions of *law*, not fact. Through legal briefs submitted by the parties' attorneys, the parties have had the opportunity to argue the law. Briefs, and oral arguments thereon, are the context where these questions about the meaning of the Fourteenth Amendment should be resolved. The Court should grant this Motion pursuant to C.R.E. 702 and [redacted] testimony should be excluded as improper.

This same rationale applies to bar the remainder of Petitioners' proposed expert witnesses, as well. Further, Intervenor the Colorado State Republican Committee adopts and joins Intervenor President Donald Trump's Rule 702 objections to Petitioners' proposed expert witnesses.

Respectfully submitted,

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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 16, 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/Michael W. Melito*