

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock St.
Denver, CO 80203

Petitioners:

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
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.

▲ COURT USE ONLY ▲

Attorneys for Petitioners:

Mario Nicolais, Atty. Reg. # 38589
KBN Law, LLC

[REDACTED]

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC

[REDACTED]

Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC

[REDACTED]

Case Number: 2023CV032577

Division/Courtroom: 209

[REDACTED]

Donald Sherman*
Nikhel Sus*
Jonathan Maier*
Citizens for Responsibility and Ethics in Washington

[REDACTED]

**Pro hac vice* admission pending

MOTION TO DISMISS INTERVENOR’S FIRST CLAIM UNDER C.R.C.P. 12(b)(1)

Petitioners move to dismiss Intervenor Colorado Republican State Central Committee’s first claim under Colorado Rule of Civil Procedure 12(b)(1). That claim alleges that granting Petitioners’ requested relief in this case—compelling the Secretary of State’s compliance with the Colorado Election Code and enjoining her from allowing Respondent Donald Trump access to the ballot—would violate Intervenor’s First Amendment rights. There are numerous substantive problems with such a claim, but this motion focuses only on the procedural problems under state law. In expedited proceedings under the Election Code, the Court has jurisdiction only over claims alleging breaches of duty under the code, such as placing an unqualified candidate on the ballot. In *Frazier v. Williams*, 2017 CO 85, the Colorado Supreme Court held that a party may not inject into an expedited election proceeding a First Amendment challenge to the Election Code itself. Yet Intervenor’s first claim seeks to do exactly that. For that reason, the Court should dismiss this claim for lack of jurisdiction.

Certification Under C.R.C.P. 121, Section 1-15(8)

Undersigned counsel conferred with all counsel for the parties by phone on September 21, 2023. Intervenor the Colorado Republican State Central Committee opposes this motion.

Factual Background

Petitioners challenge the listing of Trump as a candidate on the 2024 Republican presidential primary election ballot under C.R.S. §§ 1-4-1204(4) and 1-1-113(1) because he is not qualified to hold public office under Section 3 of the Fourteenth Amendment. Their claims arise under the Election Code—Secretary Griswold will violate the code if she places an unqualified candidate on any Colorado ballot. Petition, ¶¶ 433-52. Petitioners ask the Court to enjoin Secretary Griswold from taking any action that would allow Trump to access the ballot and seek declaratory relief to that effect. *Id.*

By contrast, Intervenor’s first claim does not arise under the Election Code. It challenges the constitutionality of the Election Code itself. Intervenor argues that a court order requiring the Secretary to adhere to the Election Code by enforcing candidate qualification requirements would violate Intervenor’s First Amendment rights to free speech and association, Intervenor’s Petition, ¶¶ 32-39, implying that *any* exclusion of an ineligible candidate from the ballot would violate Intervenor’s constitutional rights.

Petitioners now move to dismiss Intervenor’s first claim for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

Legal Framework

The Colorado Election Code, §§ 1-1-101 through 1-13-804, applies to all primary and general elections. § 1-1-102(1).

Article 1 applies to elections generally. It charges the Secretary of State with the supervision of primary and general elections and enforcement of the code. § 1-1-107(1). Section

1-1-113 establishes a process by which an “eligible elector” can file suit to enjoin “a person with a duty” under the Election Code—like the Secretary of State—from “commit[ing] a breach or neglect of duty of other wrongful act.” § 1-1-113(1). “Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought ... against state election officials prior to election day.” *Frazier*, ¶ 11. Section 1-1-113 proceedings “generally move at a breakneck pace.” *Id.*

Article 4 of the Election Code establishes processes for political parties’ nominations and for specific types of elections. Part 12 concerns presidential primary elections, at issue in this case. It charges the Secretary of State with certifying the names and party affiliations to appear on a presidential primary election ballot, § 1-4-1204(1), and makes clear that its provisions were intended to “conform to the requirements of federal law” and national political party rules on presidential primary elections, § 1-4-1201.

Part 12 also establishes a specific process for challenging the Secretary of State’s listing of a candidate on the presidential primary election ballot:

Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court *in accordance with section 1-1-113(1)* no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. *No later than five days after the challenge is filed*, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law *no later than forty-eight hours after the hearing*. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113(3).

§ 1-4-1204(4) (emphases added). By incorporating section 1-1-113(1)’s process, challenges under section 1-4-1204(4) necessarily move along at a “breakneck” pace. *See Frazier*, ¶ 11.

Standard of Review

A court may not decide cases over which it does not have subject matter jurisdiction. *Zook v. El Paso Cnty.*, 2021 COA 72, ¶ 7 (citing *Long v. Cordain*, 2014 COA 177, ¶ 10). Subject matter jurisdiction cannot be conferred by waiver or consent of the parties. *Long*, ¶ 10. A plaintiff bears the burden of establishing the court’s subject matter jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

In reviewing a motion to dismiss under C.R.C.P. 12(b)(1), a court examines “the substance of the claim based on the facts alleged and the relief requested.” *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006) (citing *State ex rel. Colo. Dep’t of Health v. I.D.I., Inc.*, 642 P.2d 14 (Colo. App. 1981)). When, as here, “all relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law.” *Medina*, 35 P.3d at 452.

Argument

“[C]laims brought in a section 1-1-113 proceeding are limited to those alleging a breach or neglect of duty or other wrongful act *under the Colorado Election Code*.” *Frazier*, ¶ 10 (emphasis added); *Williams v. Libertarian Party of Colo.*, 2017 CO 86, ¶ 4. This Court “lacks jurisdiction” to hear constitutional challenges to the Election Code in such proceedings. *Kuhn v. Williams*, 2018 CO 30M, ¶ 55. Because Intervenor’s claim challenges the constitutionality of the Election Code itself, rather than a violation of the code, the Court lacks subject matter jurisdiction to hear that claim in this expedited election proceeding. It must be dismissed.

The Colorado Supreme Court in *Frazier* expressly held that a First Amendment claim challenging applicability of the Election Code may not be asserted in an action under section 1-1-113. Ryan Frazier brought a section 1-1-113 action to challenge then-Secretary of State Wayne Williams’ determination that he had not collected enough signatures to appear on the Republican

primary ballot for the United States Senate. *Frazier*, ¶ 1. That claim was appropriate for adjudication. Frazier also asserted a separate claim under 42 U.S.C. § 1983, arguing that state laws prohibiting non-resident circulators were unconstitutional under the First Amendment. *Id.* The Supreme Court held that Frazier could not bring his section 1983 claim, which challenged the constitutionality of the Election Code, in his section 1-1-113 action because “section 1-1-113 limits the claims that can be brought to those alleging a breach or neglect of duty or other wrongful act under the Colorado Election Code.” *Id.* at ¶ 12.

The Court in *Frazier* also noted conflicts between Frazier’s constitutional challenge and a section 1-1-113 proceeding. For example, section 1-1-113’s remedy of ordering “substantial compliance with the provisions of [the Election Code]” upon a finding of “good cause” is not the proper standard under section 1983, and section 1-1-113 limits appellate review, while section 1983 does not. *Id.* at ¶¶ 17-18. Given those “substantial inconsistencies,” the Supreme Court concluded that “section 1-1-113 does not provide an appropriate procedure for adjudicating section 1983 claims.” *Id.* at ¶ 18.

Thus, the Court held that a section 1983 claim brought in a section 1-1-113 proceeding should be dismissed without prejudice and refiled in a separate action. *Id.* at ¶ 19. The Court reaffirmed that holding in a companion case, *Kuhn*, ¶ 55, which likewise held that the Court lacked jurisdiction to address a constitutional challenge to the Election Code in a section 1-1-113 proceeding.

As in *Frazier*, this case is a section 1-1-113 proceeding, “limited to allegations of a ‘breach or neglect of duty or other wrongful act’ under the election code itself.” *Williams*, ¶ 4 (quoting § 1-1-113(1)). Petitioners filed suit under the Election Code, sections 1-4-1204 and 1-1-113. Petition, ¶¶ 443-48. They ask that the Court enjoin Secretary Griswold from violating the Election Code by taking any action that would place an unqualified candidate on the ballot. *Id.* at

103-04, ¶¶ 1-5. Petitioners do *not* challenge the constitutionality of the Election Code. They seek to enforce it. To be sure, the Petition implicates federal constitutional questions concerning Trump’s eligibility for office. But that is because the Election Code itself charges the Secretary with assessing whether a candidate is qualified for the office they are seeking—including whether candidates for the presidency meet federal qualifications. *See Hassan v. Colorado*, 495 F. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding Secretary Gessler’s exclusion of a constitutionally ineligible presidential primary candidate from the ballot). Petitioners’ claim here is no different from a challenge to placing someone on the presidential election ballot who is under the age of 35, a non-citizen, or who has already served two terms as president. These qualifications also come from the U.S. Constitution. And the Secretary must enforce them under the Election Code.

In contrast, Intervenor’s first claim directly challenges the Election Code’s constitutionality. Intervenor’s Petition, ¶¶ 32-39. Intervenor asserts that if the Court compels Secretary Griswold to block Trump’s access to the ballot—which the Election Code requires her to do when a candidate is not qualified to assume office, *see Hassan*, 495 Fed. App’x at 948—then Secretary Griswold would infringe Intervenor’s First Amendment rights. Intervenor’s Petition, ¶ 35. In short, it asks the Court to declare the Election Code unconstitutional.

Under *Frazier*’s controlling precedent, the Court lacks subject matter jurisdiction to hear Intervenor’s First Amendment claim. The key language of section 1-1-113(1) hasn’t changed since *Frazier*. And there are inconsistencies between a First Amendment claim and a section 1-1-113 proceeding, just like the inconsistencies Colorado Supreme Court found between a section 1983 claim and a section 1-1-113 claim. *See Frazier*, ¶¶ 17-18. Ordering “substantial compliance” with the Election Code upon a finding of “good cause” is not the proper standard for a First Amendment claim and granting such relief would do nothing to redress Intervenor’s

alleged constitutional injury. *See* § 1-1-113(1). Nor should a state law operate to limit appellate review of a First Amendment claim. *See* § 1-1-113(3). Section 1-1-113 “does not provide an appropriate procedure” for adjudicating Intervenor’s constitutional claim. *Frazier*, ¶ 18. The claim should be dismissed. *See id.* at ¶ 19.

Conclusion

Because this is a section 1-1-113 proceeding, the Court has jurisdiction to consider only claims of “breach of neglect of duty or other wrongful act” under the Election Code. Intervenor’s First Amendment claim should be dismissed.

Date: September 22, 2023

Respectfully submitted,

/s/ Jason Murray

Eric Olson, Atty. Reg. # 36414

Sean Grimsley, Atty. Reg. # 36422

Jason Murray, Atty. Reg. # 43652

Olson Grimsley Kawanabe Hinchcliff & Murray LLC

[REDACTED]

Mario Nicolais, Atty. Reg. # 38589

KBN Law, LLC

[REDACTED]

Martha M. Tierney, Atty. Reg. # 27521

Tierney Lawrence Stiles LLC

[REDACTED]

Donald Sherman*

Nikhel Sus*

Jonathan Maier*

Citizens for Responsibility and Ethics in Washington

[REDACTED]

**Pro hac vice admission pending*

Counsel for Petitioners

CERTIFICATE OF SERVICE

I served this document on September 22, 2023, by Colorado Courts E-filing and/or via electronic mail as follows:

Michael T. Kotlarczyk
Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office



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

Scott E. Gessler
Geoffrey N. Blue
Justin T North
Gessler Blue LLC



Attorneys for Donald J. Trump

Michael William Melito
Melito Law LLC
melito@melitolaw.com

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
bob@podoll.net

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow
American Center for Law and Justice
bsisney@aclj.org
nmoelker@aclj.org
jordansekulow@aclj.org
sekulow@aclj.org

Attorneys for Intervenor Colorado Republican State Central Committee

/s/ Jason Murray