DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1427 Bannock Street, Room 256 Denver, Colorado 80202 Phone: (303) 606-2300	DATE FILED: September 29, 2023 3:45 PM FILING ID: 2B30C416A0ED2 CASE NUMBER: 2023CV32577
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 RESPONSE TO PETITIONERS' MOTION TO DISMISS INTERVENOR'S FIRST CLAIM UNDER C.R.C.P. 12(b)(1)

The Colorado Republican Committee hereby responds to the Petitioners' motion to dismiss the First Amendment claim advanced by the Intervenor as Count I in its Verified Petition in

Intervention filed pursuant to C.R.C.P. 24(c). The Petitioners' motion to dismiss depends on the assumption that C.R.S. § 1-1-113 provides a jurisdictional basis for their novel Fourteenth Amendment case. As explained in more detail within both Intervenor and Respondent President Trump's motions to dismiss (incorporated herein by reference as if fully set forth herein in keeping with the Court's instructions to avoid duplication and the interests of judicial economy), C.R.S. § 1-1-113 is inapplicable in this matter and provides no statutory basis or vehicle for Petitioners' claims. As such, the Petitioners' motion to dismiss necessarily fails.

As a threshold matter, a correction is necessary. The Petitioners incorrectly frame Intervenor's claim as a direct First Amendment challenge to the constitutionality of the Colorado Election Code. To be clear, Intervenor does *not* contend that the Election Code is unconstitutional. Rather, the Intervenor argues that the relief sought by the Petitioners would violate the First Amendment, and for that reason, among others, is *unavailable* under the election code.[1] In other words, applying the principle that the courts should avoid constructions that would raise serious constitutional issues, *Dominguez v. Denver*, 363 P.2d 661, 664 (Colo. 1961), the Intervenor contends that construing the statute governing the Secretary's duties to include the authority to make discretionary decisions regarding the suitability of a party's nominee would violate the First Amendment, and such an interpretation should therefore be avoided. The Petitioners' motion to dismiss, which claims that "Intervenor's first claim directly challenges the Election Code's Constitutionality," (Pet. Mtn to Dis. 7), is simply inaccurate. Intervenor is not "directly" attacking

[1] The First Amendment bars unconstitutional actions both by a court, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1974); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010) ("Courts, too, are bound by the First Amendment."); *Pa. Democratic Party v. Republican Party of Pa.*, 2016 U.S. Dist. LEXIS 153944, **21-22 (PA. E.D. Nov. 7, 2016), and by a legislature or executive official. This underscores why Intervenor brought its two Counts: as an affirmative defense to the Petitioners' requested relief, and as a request for an affirmative court order preventing the Secretary from unilaterally undertaking the violative conduct herself.

the constitutionality of any statute, let alone the election code, but rather attacking the constitutionality and statutory basis of *the relief* the Petitioners seek and the vehicle by which they seek it.

I. PETITIONERS' MOTION TO DISMISS THE INTERVENOR'S CLAIM DEPENDS ENTIRELY ON C.R.S. § 1-1-113, A STATUTE INAPPLICABLE TO THIS LITIGATION.

In a shocking twist of irony, Petitioners, who are bringing a *constitutional* challenge to President Trump's eligibility to be on the ballot, rest their motion to dismiss on the proposition that the Court in this proceeding lacks jurisdiction to hear constitutional challenges. If that argument is correct, then Petitioners' own claims ipso facto fails. Specifically, Petitioners argue under C.R.C.P. 12(b)(1) that the provisions of C.R.S. § 1-1-113(1) and § 1-4-1204(4) do not allow for judicial examinations of constitutional issues in expedited election disputes. *See Carson v. Reiner*, 370 P.3d 1137, 1141 (Colo. 2016) (explaining that the statute "requires the district court, upon a finding of good cause, to issue an order requiring substantial compliance *with the provisions of the Colorado Election Code*." (emphasis added)). In a § 1-1-113 proceeding, Colorado courts have jurisdiction to consider only claims of "breach of neglect of duty or other wrongful act" under the Election Code and lack jurisdiction to examine any constitutional claims. The Petitioners do not advance any argument for the dismissal of Intervenor's constitutional claims apart from this argument based on § 1-1-113.

Intervenor fully agrees with the proposition that constitutional issues are not redressable in the context of proceedings under C.R.S. § 1-1-113(1) and § 1-4-1204(4). That, among other reasons, is exactly why Petitioners' constitutional challenge must be dismissed. *See* Intervenor's Mot. to Dismiss, at 14-15. As all parties concede, including the Petitioners as indicated by this motion to dismiss, the Secretary's role in the context of § 1-1-113 is solely to apply the

requirements of the Election Code. The Secretary has no authority to address constitutional issues, and accordingly a § 1-1-113 claim is not the context for resolving constitutional claims.

In defiance of their own contention, Petitioners bring a *constitutional* claim within their ostensible § 1-1-113 action: their central argument that the Fourteenth Amendment disqualifies President Trump from even running for office. That claim is the very crux of Petitioners' action. The fact that constitutional claims are off the table in § 1-1-113 cases would not just bar the Intervenor's claim; *it would bar the Petitioner's Fourteenth Amendment claim from the outset.* The Colorado Supreme Court has expressly held that petitioners may not litigate constitutional claims in a § 1-1-113 proceeding. As explained in more detail in the Intervenor and President Trump's motions to dismiss, therefore, the provisions of § 1-1-113 are, of necessity, inapplicable in this action, because if they were, the entirety of the Petitioners' claims would have to be dismissed. This is the legally correct result and the result the Intervenor requests from this Court. The Fourteenth Amendment is not properly before this Court in a purported § 1-1-113 proceeding. But so long as *Petitioners'* constitutional claim is entertained, the *Intervenor's* First Amendment arguments are rightly included as well, and Intervenor properly may seek relief on that basis in its Count I. Petitioners and Respondent Secretary Griswold have put the Intervenor in the position that it needs judicial declaratory relief to protect its First Amendment rights.

Again, the entirety of the arguments the Petitioners advance to dismiss Intervenor's Count I depends on its bare assertion that the provisions of § 1-1-113 control this matter. As was made thoroughly clear in both Intervenor and Respondent President Trump's motions to dismiss, Intervenor objects to the instant proceeding being characterized and advanced as a § 1-1-113 proceeding. The Secretary has no authority, let alone any duty under § 1-1-113, to prevent political parties from exercising their political choices. Instead of being a § 1-1-113 proceeding, this action

is constitutional declaratory and injunctive litigation regarding, primarily, provisions of the Fourteenth Amendment, dressed up as a § 1-1-113 proceeding. There is no jurisdictional bar that would prevent the First Amendment from being part of that inquiry. If Petitioners may bring a constitutional claim in a § 1-1-113 proceeding, a claim that threatens the Intervenor's First Amendment rights, the Intervenor may defend its First Amendment rights.[2]

II. PETITIONERS LACK STANDING TO BRING THEIR DECLARATORY JUDGMENT CLAIM, BUT THEIR DECLARATORY JUDGMENT CLAIM GIVES INTERVENOR STANDING FOR ITS DECLARATORY JUDGMENT CLAIM.

Intervenor's First Amendment claim proceeds not on the basis of § 1-1-113 or § 1-4-1204(4), which are not available in this action and are inapplicable, but on the other purported basis for this action, the declaratory judgment statute, C.R.S. § 13-51-101 *et. seq.* A declaratory judgment action can undoubtedly include relief based upon the First Amendment; the Petitioners do not advance any arguments to the contrary. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (affirming declaratory and injunctive First Amendment relief); *Brandon v. Springspree, Inc.*, 888 P.2d 357, 358 (Colo. App. 1994) (affirming declaratory judgment in First Amendment case). Moreover, although the Intervenor and President Trump's motions to dismiss provide additional reasons for dismissing the declaratory claim brought by the Petitioners, primarily relating to standing, those arguments do not apply to the Intervenor's counterclaims. In other words, Intervenor has a basis for its declaratory claim that the Petitioners lack to support their declaratory claim. In particular, Petitioners themselves conceded their alleged injury does not amount to a "particularized or concrete claim" but instead, is a "paradigmatic generalized grievance," Petitioners' Unopposed Motion to Remand [ECF No. 15, *Anderson et al. v. Griswold et al.*, U.S.

[2] Should the Petitioners file a reply brief to this response raising new arguments not raised in their motion to dismiss, Intervenor respectfully requests the opportunity to reply to any such arguments.

Dist. Colo. Case No. 1:23-cv-02291-PAB, at p. 7]; *see People v. Shell*, 148 P.3d 162, 175 (Colo. 2006); *Estate of Burford v. Burford*, 935 P.2d 943, 947 (Colo. 1997) (explaining judicial estoppel). Judicial estoppel is "an equitable doctrine by which courts require parties to maintain a consistency of positions," thereby "preventing the parties from deliberately shifting positions to suit the exigencies of the moment." *Id.* Petitioners are judicially estopped from changing course now. And, unlike the Petitioners' general grievance, the Intervenor's First Amendment claim is premised upon a specific and tangible injury.

Intervenor does not allege any speculative or uncertain injury; instead, it alleges that the Petitioners' tangible conduct and requests to the Court, if granted by the Court or otherwise relied upon by the Secretary of State to exclude political candidates from the ballot, constitutes an infringement on the First Amendment rights of the Colorado Republican Party. The Intervenor points to clear and undeniable conduct, already having occurred by virtue of this very action and the claims being considered by this Court, that Intervenor alleges infringed upon and, if granted, will further infringe upon, its First Amendment rights. Intervenor also alleges that there is a reasonable necessity in seeking that relief, in light, at least in part, of the fact that the Secretary has not yet taken a position on this litigation or indicated whether, should the Petitioners' claims be dismissed, she intends to place President Trump on the ballot. Thus, unlike the Petitioners, the Colorado Republican Party can and does point to an imminent potential injury in fact. Accordingly, even though the Petitioners lack standing to bring their speculative claims for declaratory relief, Intervenor retains standing to argue that its First Amendment rights were infringed upon, even after this Court dismisses the claims brought by the Petitioners.

WHEREFORE, Intervenor requests that this Court deny the Petitioners' partial Motion to Dismiss Intervenor's Count I. While Petitioners rightly recognize that all constitutional claims are

unavailable in § 1-1-113 proceedings (which includes the Fourteenth Amendment claims advanced by the Petitioners), they built this case on just such a claim. That recognition must lead to the conclusion, not that the Intervenor's counterclaims should be dismissed, but that this action is not a proper § 1-1-113 claim at all, and either should be dismissed in its entirety or treated as an. ordinary declaratory judgment action.

As briefed in President Trump's Motion to Dismiss, joined by Intervenor and incorporated herein, the Petitioners have confessed their own lack of standing. Intervenor has standing for its Count I because the Petitioners brought this action, seeking a Court order that the Colorado Secretary of State must take an action violating its First Amendment expressive and associational rights.

In sum, Intervenor requests this Court deny Petitioners' partial motion to dismiss, and that this Court apply the Petitioners' confession of its generalized grievance as grounds to grant Intervenor and President Trump's motions to dismiss Petitioners' action in its entirety. There is no grounds for an evidentiary hearing in this matter, which may only rightfully be decided as a question of law. The Intervenor respectfully objects to an evidentiary hearing and the manufactured uncertainty, time, resources and expense it imposes. Instead, Intervenor requests this Court decide its Counts I and II as a matter of law.

Respectfully submitted this 29th day of September, 2023,

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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 September 29, 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 Melito*