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DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	
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** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	**Δ COURT USE ONLY Δ** Case No.: 2023CV32577 Division: 209

OMNIBUS RULING ON PENDING DISPOSITIVE MOTIONS

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 22, 2023; Colorado Republican State Central Committee's Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5), filed September 22, 2023; Petitioners' Motion to Dismiss Intervenor's First Claim for Relief under C.R.C.P. 12(b)(1), filed September 22, 2023; and Colorado Republican State Central Committee's Motion for Judgment on the Pleadings Under Rule 12/Judgment as a Matter of Law

Under Rule 56, filed September 29, 2023. Having considered the parties' briefing, the relevant legal authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

I. PROCEDURAL BACKGROUND

1. On September 6, 2023, Petitioners filed their Verified Petition under C.R.S. §§ 1-4-1204, 1-1-113, 13-51-105 and C.R.C.P. 57(a). Petitioners alleged two claims for relief. First, they asserted a claim against Respondent Jena Griswold pursuant to C.R.S. § 1-4-1204 and § 1-1-113. Second, they requested declaratory relief against both Respondent Griswold and then-Respondent Donald J. Trump. The declaratory relief requested included a declaration that then-Respondent Trump was not constitutionally eligible for the office of the presidency.

2. On September 22, 2023, then-Respondent Trump filed a Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a) ("Trump Anti-SLAPP Motion"). In that motion, then-Respondent Trump argued that "this lawsuit" is subject to Colorado's anti-SLAPP statute because Petitioners' claims all stem from protected speech or the refusal to speak, and that because the speech concerned election fraud and a hard-fought election, they are the epitome of public issues. Then-Respondent Trump further argued that Petitioners were unable to establish a reasonable likelihood of success on their claims. As a result, argued then-Respondent Trump, the Court must dismiss the claims.

3. Also on September 22, 2023, then-Respondent Trump separately moved to dismiss Petitioners' claims ("Trump Procedural Motion to Dismiss"). Specifically, Trump argued: (1) Petitioners may not litigate constitutional claims in a C.R.S. § 1-1-113

proceeding; (2) the C.R.S. § 1-4-1204 claim was not ripe; (3) C.R.S. § 1-4-1204 does not provide grounds to use the Fourteenth Amendment to bar candidates; and (4) there is no standing on the declaratory judgment claim because there is no particularized or concrete injury.

4. Also, on September 22, 2023, Intervenor Colorado Republican State Central Committee ("CRSCC") filed a Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5) ("CRSCC Motion to Dismiss"). In that motion, CRSCC argued: (1) the Petition infringes on CRSCC's first amendment rights; (2) Secretary Griswold's role in enforcing C.R.S. § 1-4-1204 is ministerial; and (3) the C.R.S. § 1-4-1204 claim is not ripe. The motion also previewed additional arguments that Intervenor Trump made in a subsequent motion to dismiss on whether the 14th Amendment can be used to keep Intervenor Trump off the ballot.

5. Finally, also on September 22, 2023, Petitioners moved to dismiss Intervenor's First Claim for relief ("Petitioners' Motion to Dismiss"). The Petitioners argued that the CRSCC's First Claim for Relief was inappropriate in a C.R.S. § 1-1-113 proceeding because it is a constitutional challenge to the election code.

6. On September 29, 2023, the Petitioners responded to then-Respondent Trump's Motion to Dismiss. In that Response, the Petitioners agreed to dismiss their declaratory judgment claim. The Court has since dismissed that claim.

7. On September 29, 2023, Intervenor Trump filed an additional motion to dismiss. This motion to dismiss addresses various constitutional arguments regarding why the Petitioners' Fourteenth Amendment arguments fail ("14th Amendment Motion

to Dismiss"). In that motion, Intervenor Trump argues: (1) this case presents a nonjusticiable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section 3 does not apply to Intervenor Trump; (5) Petitioners fail to allege that Intervenor Trump "engaged" in an "insurrection"; and (6) this is an inconvenient forum under C.R.S. § 13-20-1004.

8. Finally, on September 29, 2023, CRSCC filed a motion for Judgment on the Pleadings under Rule 12/Judgment as a Matter of Law Under Rule 56 ("CRSCC Motion for Judgment"). This motion essentially argues that this Court should grant all the relief CRSCC requested in its Petition based on the Petition alone. This includes its requests that this Court declare: (1) the relief Petitioners' request is a violation of their First Amendment rights; (2) Respondent Griswold does not have authority to preclude the placement of Intervenor Trump on Colorado's ballot pursuant to the Fourteenth Amendment; and (3) only the CRSCC has the authority to determine who is on Colorado's ballot.

9. On October 11, 2023, the Court denied Intervenor Trump's anti-SLAPP Motion.

II. LEGAL STANDARD

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the

plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as "documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Denver Post*, 255 P.3d at 1088.

A motion to dismiss under C.R.C.P. 12(b)(1) challenges a court's subject matter jurisdiction and may be raised at any time in the proceeding. "Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment." *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). In determining whether a court has subject matter jurisdiction, reference must be made to the nature of the claim (the facts alleged) and the relief sought. *In re Water Rights of Columbine Ass'n*, 993 P.2d 483, 488 (Colo. 2000); *Currier v. Sutherland*, 215 P.3d 1155, 1160 (Colo. App. 2008).

Standing is a prerequisite to establishing subject matter jurisdiction that can be raised at any time during the proceedings and must be determined prior to a determination on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). A plaintiff bears the burden of proving a court has subject matter jurisdiction when such jurisdiction is challenged, but a "court may consider evidence outside of the complaint when necessary to resolve the issue." *City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). If a plaintiff cannot establish the trial court has subject matter jurisdiction or the court has no power to hear the case, the court must dismiss the action. *See* C.R.C.P. 12(h)(3).

III. LEGAL FRAMEWORK

The Colorado Secretary of State is charged with the duty to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" and to "enforce the provisions of [the election] code." C.R.S. § 1-1-107(1). When a dispute regarding the application and enforcement of the Election Code arises, C.R.S. § 1-1-113 is implicated. This statute provides in part:

> (1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

CR.S. § 1-1-113 is the "exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." C.R.S. § 1-1-113(4). After the filing of a "verified petition" by a registered elector and "notice to the official which includes an opportunity to be heard," if a court finds good cause to believe that the election official "has committed or is about to commit a breach or neglect of duty or other wrongful act," it "shall issue an order requiring substantial compliance with the provisions of [the Election Code]." C.R.S. § 1-1-113(1).

C.R.S. § 1-4-1204 was added to the Election Code in 2016. Section 1-4-1204(1) provides that "[n]ot later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." Each candidate must be:

> seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and [must be] affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election.

C.R.S. § 1-4-1204(1)(b). Section 1-4-1204(4) expressly incorporates section 1-1-113 for "any challenge to the listing of any candidate on the presidential primary election ballot." Such challenges "must be . . . filed with the district court in accordance with section 1-1-113(1)." C.R.S. § 1-4-1204(4). "Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." C.R.S. § 1-4-1204(4).

IV. LEGAL ANALYSIS

A. Trump Procedural Motion to Dismiss

Intervenor Trump makes the following arguments in the Trump Procedural Motion to Dismiss: (1) Petitioners cannot litigate a constitutional claim in a C.R.S. § 1-1-113 proceeding; (2) under the plain language of C.R.S. § 1-4-1204, Petitioners cannot properly state a claim; (3) Petitioners don't have standing to seek relief under the Fourteenth Amendment in their claim for declaratory relief.

The Petitioners dismissed their claim for declaratory relief, so Intervenor Trump's third argument is moot.

1. Litigating a Constitutional Claim in a C.R.S. § 1-1-113 Proceeding

Intervenor Trump argues this Court must dismiss this proceeding because C.R.S. § 1-1-113 proceedings are limited to addressing wrongful acts under the Colorado Election Code and this case is about whether Intervenor Trump is disqualified under the Fourteenth Amendment's disqualification clause. In support of that argument, Intervenor Trump cites *Frazier v. Williams*, 401 P.3d 541, 547 (Colo. 2017). There, a candidate for the Republican primary ballot for the U.S. Senate initiated a C.R.S. § 1-1-113 proceeding after then-Secretary Williams determined he had not gathered sufficient signatures to appear on the ballot. *Id.* at 542-43. He simultaneously brought a 42 U.S.C. § 1983 claim arguing that Colorado statutes that prevented non-residents from collecting signatures violated the First Amendment. *Id.* at 543. The Colorado Supreme Court dismissed the 42 U.S.C. § 1983 claim, holding that the language of C.R.S. § 1-1-113 limits the claims that can be brought thereunder to "those alleging a breach or neglect of

duty or other wrongful act under the Colorado Election Code." *Id.* In rejecting Frazier's argument that the statute's reference to "other wrongful act[s]" expanded the scope of the provision to include claims such as those brought pursuant to section 1983, the Supreme Court noted: (1) such a myopic reading is disconnected from the context of the statute (*i.e.* when the statute references "other wrongful act[s]," it is referring to other wrongful acts under the Election Code); (2) C.R.S. § 1-1-113 provides for only one remedy: an order compelling substantial compliance with the Election Code, which is incompatible with the relief requested under the section 1983 claim; and (3) further inconsistencies between C.R.S. § 1-1-113, such as the limitation on appellate review and the limitation on proper plaintiffs under C.R.S. § 1-1-113, directly conflict with the provisions of section 1983, and such a reading would cause C.R.S. § 1-1-113 to conflict with the Supremacy Clause by allowing a state law to circumscribe the scope of a section 1983 claim. *Id.* at 544-47. Intervenor Trump also cites to *Kuhn v. Williams*, 418 P.3d 478, 489 (Colo. 2018), which relied on *Frazier* in holding, in cursory fashion, that it lacked jurisdiction to consider any constitutional challenge to the residency requirement for petition circulators under C.R.S. § 1-4-905(1) in a C.R.S. § 1-1-113 challenge.

The Petitioners respond that *Frazier* stands for the proposition that a party may not inject into an expedited proceeding a First Amendment challenge to the Election Code and that here, Petitioners are properly using the C.R.S. § 1-1-113 procedure to ask the Court to enjoin Secretary Griswold from violating the Election Code by putting an unqualified candidate on the ballot. In support of the argument that Secretary Griswold may only put constitutionally eligible candidates on the ballot, Petitioners cite *Hassan v.*

Colorado, 495 F.App'x. 947, 948 (10th Cir. 2012) which held that then-Secretary Gessler was correct in excluding a constitutionally ineligible candidate and that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."

First, the Court holds that *Frazier* and *Kuhn* are not controlling in the circumstance where the constitutional issue is not a separate claim. Both of those cases addressed whether the petitioner could bring a separate claim challenging the constitutionality of the Election Code in a C.R.S. § 1-1-113 proceeding. *See Frazier*, 401 P.3d at 543; *Kuhn*, 418 P.3d at 489. Petitioners have asserted no such claim in this case. While the Court agrees with Intervenor Trump that Petitioners' claim relies heavily on the Fourteenth Amendment of United States Constitution, Intervenor Trump does not cite any case law that suggests that a C.R.S. § 1-1-113 claim cannot have constitutional implications. Finally, as the Petitioners point out, the Tenth Circuit in *Hassan*, in an opinion written by now United States Supreme Court Justice Gorsuch, held "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F.App'x. at 948, citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-95 (1986) (affirming exclusion of candidate from ballot under state law based on compelling state interest in protecting integrity and stability of political process) and *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("Moreover,

a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.").

Further, to the extent that the Election Code requires the Secretary of State to exclude constitutionally unqualified candidates (which the Court is not holding), the Court holds that a C.R.S. § 1-1-113 proceeding would be the correct (and, indeed, only) procedure to do so. *See* C.R.S. § 1-1-113(4) (describing such proceedings as "the exclusive method for the adjudication of controversies" arising from an election official's neglect of duty). Any attempt to keep a candidate off the ballot is necessarily going to be expedited, and C.R.S. § 1-1-113 is the mechanism available to get a timely ruling with a direct appeal to the Colorado Supreme Court should that Court feel the issue needs its intervention.

Intervenor Trump next argues that "Petitioners seek to use Section 113 against a private citizen, to terminate his run as a candidate, without basic, well-established protections required by due process."[1] Motion, p. 7. To the extent that Intervenor Trump is arguing that the claim, though brought against the Secretary of State, is nonetheless directed at him and therefore improper, this argument would apply to any C.R.S. § 1-1-113 claim that charges a candidate should be excluded from the ballot. To hold that such a claim is improper would be to undermine the explicit legislative intent

[1] Intervenor Trump seems to take the position that Petitioners' C.R.S. § 1-1-113 claim is directed against him, personally. *See* Motion, p. 7 ("Petitioners cannot use Section 113 procedures against a private individual, like President Trump. Section 113 is expressly limited to bringing claims against *Colorado election officials*, not private individuals or potential candidates.") (emphasis in original). As a matter of procedural record, this is simply incorrect: Petitioners' C.R.S. § 1-1-113 claim is directed at the Secretary of State, not Intervenor Trump.

that C.R.S. § 1-1-113 serve as the exclusive vehicle to resolve such questions prior to an election, as it would create an exception which swallows the rule.

To the extent that Intervenor Trump is challenging the constitutionality of C.R.S. § 1-1-113 under the Due Process clause as a defense to Petitioners' claims, the Court lacks the jurisdiction to consider such a challenge. *See Kuhn*, 418 P.3d at 489 (rejecting challenge to the constitutionality of the circulator residency requirement asserted as a defense in an intervenor's response to the initial petition based on lack of jurisdiction). To be clear, the Colorado Supreme Court has held that challenges to the constitutionality of the Election Code are beyond the contemplated scope of C.R.S. § 1-1-113 challenges, which entertain only one type of claim (those for violations of the Election Code by election officials) and one type of relief (an order compelling obedience to the Election Code).

In short, Petitioners' C.R.S. § 1-1-113 claim is brought against the Secretary of State based on her alleged dereliction of her duty under the Election Code to only certify qualified candidates to the ballot. C.R.S. § 1-1-113 is the exclusive vehicle for such challenges. And while the question of whether the Secretary of State has neglected her duties in this case requires resolution of constitutional questions, it remains a challenge against an election official based on her alleged duties under the Election Code. *Frazier* has made clear that a Court cannot consider independent claims in a C.R.S. § 1-1-113 proceeding based on a violation of constitutional rights, but such cases do not stand for the proposition that a petitioner cannot seek to compel compliance with the Election Code to the extent that the Code itself requires that an election official verify

constitutional qualifications for office. The Court holds that such a claim is proper under C.R.S. § 1-1-113 as a matter of procedure.

2. Whether Petitioner's Claim Is Within the Scope of C.R.S. § 1-4-1204

As to C.R.S. § 1-4-1204, Intervenor Trump first argues that Petitioners cannot bring this claim because Secretary Griswold has not yet certified any candidates to the ballot and as a result there is no claim or controversy under C.R.S. § 1-4-1204. Intervenor Trump points to the language in C.R.S. **§** 1-4-1204(4) that provides for challenges to the "listing" of any candidate on the presidential primary ballot, arguing that he has not yet been "listed" by the Secretary of State. *See* Motion, pp. 11-12.[2]

The Petitioners respond that Intervenor Trump's argument fails because C.R.S. § 1-4-1204(4) incorporates C.R.S. § 1-1-113 as an enforcement mechanism, and that Secretary Griswold is "about to commit" an "impropriety" or "wrongful act." Further, C.R.S. § 1-4-1204(4) requires that a "challenge to the listing of any candidate" be made "no later than five days *after the filing deadline for candidates*" (emphasis added). The Secretary of State is not required to certify the primary ballot until sixty days prior to the primary, whereas candidates must file their statements of intent no later than eighty-five days prior to the primary election. C.R.S. § 1-4-1204(1), (1)(c). Conceivably, then, the Secretary of State could certify the primary ballot more than five days after the candidates' filing deadline. Under Intervenor Trump's proffered interpretation of the

[2] Intervenor Trump also argued in his Motion that before there can be a claim or controversy, he would have to be a candidate and that won't happen until he files his Major Party Candidate Statement of Intent. Because Intervenor Trump filed his Major Party Candidate Statement of Intent on October 11, 2023, this issue is now moot.

statute, a candidate's listing could not be challenged where the Secretary of State fails to certify the ballot list weeks in advance of the statutory mandate. Such an interpretation is untenable as it would lead to an absurd result, and the Court therefore affords C.R.S. § 1-4-1204(4) a more reasonable construction which allows challenges to primary ballots in advance of the Secretary's official certification under the appropriate circumstances.

As described above, C.R.S. § 1-4-1204 expressly incorporates C.R.S. § 1-1-113, and C.R.S. § 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is "about to" take an improper or wrongful act. The Petitioners have alleged that the Secretary is "about to" take an unlawful act because she has publicly stated that she will not exclude Intervenor Trump. This is consistent with public statements that the Secretary welcomes the Court's direction as well as her Omnibus Response to Motions to Dismiss.

Based on the clear language of the statute, the fact that Intervenor Trump has submitted his Major Party Candidate Statement of Intent, and Secretary Griswold's statements both in public and in this litigation, the Court holds that this matter is ripe for decision under C.R.S. § 1-4-1204.

3. Whether an Elector Can Make a Fourteenth Amendment Challenge Under C.R.S. § 1-4-1204

Intervenor Trump argues C.R.S. § 1-4-1204 sets forth three criteria for inclusion on the presidential primary ballot and that this Court cannot consider a challenge based on anything but those three criteria. The criteria are: (1) the candidate is seeking nomination as a *bona fide* candidate pursuant to the political party's rules; (2) the candidate's political party received at least 20% of the votes in the last presidential

election; and (3) the candidate has submitted a notarized Major Candidate's Statement of Intent along with a filling fee or petition. Intervenor Trump argues that the first criterion is something the Party decides, not the Secretary of State; the second criterion is an objective fact based on the prior election; and the third criterion is whether the candidate has filled out a form. Intervenor Trump points out the Major Candidate's Statement of Intent form requires a candidate to affirm he or she meets the qualifications set forth in Article II of the U.S. Constitution—it says nothing about the Fourteenth Amendment.

Petitioners argue C.R.S. § 1-4-1204 must be read in conjunction with the other provisions in the Election Code. For instance, C.R.S. § 1-4-1201 provides that all of part 12 must "conform to the requirements of federal law" which includes the United States Constitution. C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a "qualified candidate." C.R.S. § 1-4-1203(3) provides the Secretary has "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." Petitioners argue that in all "other primary and general elections" only candidates who meet all the qualifications to hold office may access the ballot. Further, they point out that the text of C.R.S. § 1-4-1204(4) is broad in that it provides for "[*a*]*ny challenge to the listing* of any candidate" (emphasis added) and directs that the district court shall assess the validity of **"***all alleged improprieties*" (emphasis added). Finally, Petitioners point to the Supremacy Clause in Article VI of the U.S. Constitution that "'charges state courts with a coordinate responsibility to enforce

[federal] law according to their regular modes of procedure,' unless Congress dictates otherwise." *Consumer Crusade, Inc. v. Affordable Health Care Sol., Inc.*, 121 P.3d 350, 353 (Colo. App. 2005) (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990)) (internal citation omitted). This, Petitioners argue, means that Part 12 of the Election Code must necessarily encompass challenges under the Fourteenth Amendment. Consequently, argue Petitioners, a challenge under C.R.S. § 1-4-1204(4) may be predicated on grounds beyond simply those enumerated in subsections (1)(b)-(c).

The Court agrees with Petitioners' interpretation of C.R.S. § 1-4-1204(4). Nothing in the language of that subsection suggests a legislative intent to limit the scope of challenges thereunder to those arising from C.R.S. § 1-4-1204. Had the legislature intended such a result, it could have limited challenges brought pursuant to subsection (4) to "any challenge under this section." The Court will not read additional language into the statute to limit its scope.

Intervenor Trump in his Motion argues the "General Assembly did not charge either the Secretary or the Petitioners with the authority to investigate or presumably enforce Section 3 of the Fourteenth Amendment." Motion, p. 14. In the Court's view, this is a pivotal issue and one best reserved for trial. In addressing Petitioners' contention that their C.R.S. § 1-1-113 proceeding here is no different than enforcing the disqualification of an underage or alien presidential candidate, Intervenor Trump argues that the Secretary of State's only role in assessing candidate qualifications is "to verify that the candidate made the appropriate affirmation" in their statement of intent.

Reply, pp. 8-9. In other words, the Secretary's role is to make sure the boxes are checked.

Intervenor Trump argues that, in *Hassan*, the reason Mr. Hassan was not allowed on the ballot is not because Secretary Gessler had authority to investigate Mr. Hassan's constitutional qualifications but because Mr. Hassan did not self-affirm he was a natural born citizen in his Statement of Intent. But that does not answer the question of whether an elector could have challenged his inclusion on the ballot had he claimed he was a natural born citizen when he wasn't, and the argument makes the mistake of assuming that because the *Hassan* court found that the Secretary of State had the authority to do one thing, it meant he had the authority to do *only* that thing. Further, the Court knows that the Secretary does, at least in some instances, exclude candidates based on constitutional deficiencies. The Court does not know how often or under what bases. These are issues that should be addressed at trial.

To be clear, the Court is not affirmatively holding the Fourteenth Amendment can be used to exclude a presidential candidate from the primary ballot, or that the Secretary of State is empowered to evaluate such a question. The Court is merely holding that it is unable to conclude as a matter of law that to the extent the Fourteenth Amendment applies to prevent ballot access for a Presidential primary candidate, the Secretary of State has no authority to investigate and exclude a candidate on that basis.

B. CRSCC Motion to Dismiss

CRSCC, in its motion to dismiss, argues this lawsuit is an infringement of CRSCC's first amendment and statutory rights because the Republican Party, not the

Secretary, under C.R.S. § 1-4-1204(1)(b) determines whether a candidate is "a bona fide candidate for president . . . pursuant to political party rules." The gist of the argument is that the Secretary has no discretion under the Election Code and that all her duties are purely ministerial. Further, because it is CRSCC who chooses its candidate, if the Secretary were to screen for qualifications under the Fourteenth Amendment that would abridge CRSCC's free speech rights.

CRSCC cites *People ex rel. Hodges v. McGaffey,* 46 P. 930, 931 (Colo. 1896) for the proposition that the Secretary has no discretion to keep a candidate off the ballot because it would deprive a party of the right to select a candidate of their choice. The Court holds that *Hodges* is inapposite. There, two factions of the Republican party both submitted nominations with the Secretary, and the Secretary only included one of the two submitted candidates on the ballot. The Colorado Supreme Court, under a prior Election Code, held the Secretary did not have the discretion to choose between the two factions. There was no discussion whatsoever regarding whether the two candidates were qualified to run for election.

CRSCC spends much of its motion arguing that C.R.S. § 1-4-1204 vests CRSCC with the authority to determine whether a candidate is a *bona fide* candidate under the political party rules. The statute is clear on that point. That, however, does not necessarily translate that if a political party decides to put forth a constitutionally unqualified candidate, then the Secretary has no discretion to exclude that candidate from the ballot. As an example, it is not clear to the Court that should CRSCC put forth a candidate that was not a natural born citizen, then the Secretary is compelled to place

the candidate on the ballot despite knowing the candidate is not qualified. In other words, taking CRSCC's argument to its logical conclusion, if the Party, without any oversight, can choose its preferred candidate, then it could theoretically nominate anyone regardless of their age, citizenship, residency, *et cetera*. Such an interpretation is absurd; the Constitution and its requirements for eligibility are not suggestions, left to the political parties to determine at their sole discretion. The more logical interpretation is that CRSCC can put forth any candidate it wants as *bona fide* pursuant to their own rules, but the Secretary will only put candidates that meet the constitutional and statutory qualifications to be on the ballot. The interests, in other words, are separate, and the Secretary of State's determination as to a candidate's constitutional eligibility does not infringe on the CRSCC's determination pursuant to C.R.S. § 1-4-1204(1)(b) that a candidate is "a bona fide candidate . . . pursuant to political party rules."

Further, the United States Supreme Court has made it clear that a Party's right to put a candidate on the ballot is not unfettered. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997). Here, Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F.App'x at 948.

The Court has already found that the State's interest in assessing the constitutional qualifications of candidates which appear on its ballot does not infringe on the political parties' interest in establishing internal rules and assessing their

candidate's conformity to said rules, but to the extent such interests do overlap, the State's interest clearly predominates. It would be counterintuitive to suggest that the State's interest in preserving the integrity and stability of the electoral process, as well as its interest in discharging its constitutional obligation to enforce federal law, is subordinate to the vicissitudes of party politics. It is the United States Constitution which is the supreme law of the land, not internal political party rules.

Characterizations of the selection of ineligible candidates as a matter of "political choice" are unavailing; a citizen (or group of citizens, for that matter) cannot exempt themselves from the application of the law because they believe, as a matter of "political expression," that there has been no violation. They may, of course, still argue, profess, maintain, and campaign on the belief that there has been no violation of the law, but the freedom to do so does not exempt them from the application of the law any more than a tax protestor's belief that taxation is theft exempts them from paying taxes.

The Court stresses that it is considering these questions in the abstract, in the context of motions to dismiss. The Court makes no judgments on the merits of Intervenor Trump's constitutional fitness as a candidate by way of these rulings. The question which the Court considers here is, again, *if* a political party puts forth a constitutionally ineligible candidate, and *if* the Secretary of State has the legal authority to vet candidate fitness, does it violate the First Amendment for the State to disqualify that candidate on the grounds of his ineligibility? The CRSCC maintains that it does; the Court holds that it does not. To find otherwise would be to permit the political

parties to disregard the requirements of the law and the constitution whenever they decided as a matter of "political expression" or "political choice" that they did not apply.

C. CRSCC Motion for Judgment

In this motion, CRSCC moves this Court to affirmatively grant the relief sought by CRSCC in its Verified Petition as against the Secretary of State. The CRSCC, essentially, seeks a declaration from this Court that:

> an act by the Respondent Secretary of State barring from the ballot a presidential candidate designated by a major political party as qualified, and in the absence of proper disqualification pursuant to the processes Congress has established and otherwise qualified under § 1204 and federal election law, is ultra vires and in violation of [CRSCC's] First Amendment and statutory rights – even if such an act is not ordered by the Court or the Petitioners case is dismissed.

Motion, p. 2. CRSCC seeks this relief through a motion for judgment on the pleadings or, alternatively, through C.R.C.P. 56(h), to the extent the Court's ruling on the issue presented is not dispositive.

Petitioners respond that CRSCC's motion is premature and procedurally improper because motions under C.R.C.P. 12(c) and 56(h) are not permitted until after the pleadings are closed. The Court agrees. Both rules grant leave to file such motions only "[a]fter the pleadings are closed"; or "[a]t any time after the last required pleading" C.R.C.P. 12(c); 56(h). Here, there are multiple pending motions to dismiss. The motion, therefore, is premature, and the Court goes no further.

D. Petitioners' Motion to Dismiss

Petitioners move to dismiss CRSCC's first claim under Rule 12(b)(1). CRSCC seeks "a Declaration pursuant to Colo. R. Civ. P. 57 and C.R.S. § 13-51-105 that

Petitioner [sic] requested relief violates Intervenor's First Amendment rights under the U.S. Constitution and therefore must be denied." Petition, p. 8. Petitioners argue that because this claim does not arise under the Election Code, the Court lacks subject matter jurisdiction to hear it in this expedited election proceeding. Petitioners characterize the claim as "implying that *any* exclusion of an ineligible candidate from the ballot would violate Intervenor's constitutional rights." Motion, p. 3 (emphasis in original).

CRSCC agrees that constitutional issues are indeed not redressable "in the context of proceedings under C.R.S. § 1-1-113(1) and § 1-4-1204(4)," which is why it brings its claim pursuant to C.R.C.P. 57 and C.R.S. § 13-51-101 *et seq*. Response, p. 3. CRSCC asserts that it is not attacking the constitutionality of the code but instead is arguing that the relief Petitioners request would violate the First Amendment and therefore is unavailable to Petitioners.

In its holding that *Frazier* and *Kuhn* are controlling, the Court distinguished between a C.R.S. § 1-1-113 proceeding which could have constitutional implications and an independent constitutional claim brought in a C.R.S. § 1-1-113 proceeding. CRSCC's First Claim seeks a declaration that it would be unconstitutional for the Secretary of State to disqualify Intervenor Trump because of their protected interests in speech and association. *Frazier* and its progeny are clear that C.R.S. § 1-1-113 proceedings are limited in scope and may only consider claims of breach or neglect of duty or other wrongful act under the Colorado Election Code. *See Kuhn*, 418 P.3d at 489. To the extent the CRSCC's First Claim asserts an independent constitutional claim, the Court is

without jurisdiction to consider it. In the Court's view, CRSCC's First Claim does just that. The only relief this Court can afford in a C.R.S. § 1-1-113 proceeding is an order to comply with the Election Code. Thus, a claim that such relief is unconstitutional is no more than a claim that the Election Code is unconstitutional.

To the extent that the relief requested is not available under the Election Code, it cannot (and will not) be ordered by this Court, and the declaration would be moot. To the extent CRSCC fears that the Secretary of State will disqualify Intervenor Trump from the ballot in the absence of an order from the courts and seeks a declaration that doing so would violate their First Amendment rights, such a claim arises from outside the Election Code and may not be considered by this Court in this proceeding. As the *Frazier* court emphasized, "Colorado courts remain entirely open for the adjudication of section 1983 claims, including on an expedited basis if a preliminary injunction is sought." 401 P.3d at 542. The Court therefore GRANTS Petitioners' motion to dismiss and dismisses CRSCC's First Claim.

V. CONCLUSION

For all the reasons stated above, the Court DENIES Donald J. Trump's Motion to Dismiss filed September 22, 2023, DENIES CRSCC's Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5), GRANTS Petitioners' Motion to Dismiss Intervenor's First Claim for Relief under C.R.C.P. 12(b)(1), and DENIES CRSCC's Motion for Judgment on the Pleadings Under Rule 12/Judgment as a Matter of Law Under Rule 56. The Court will address Intervenor Trump's 14th Amendment Motion to Dismiss under separate cover.

DATED: October 20, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge