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COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80202	
Appeal Pursuant to § 1-1-113(3), C.R.S. DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Case No. 2023CV32577	
Petitioners-Appellants, Cross-Appellees: **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHERCASTILIAN,** **v.** **Respondent-Appellee:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, **v.** **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, and **Intervenor-Appellee, Cross-Appellant** **DONALD J. TRUMP.**	▲ COURT USE ONLY▲
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COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S ANSWER BRIEF TO THE APPELLANT ELECTOR'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

This brief serves as the the answer brief of Intervenor-Appellee Colorado State Central Committee. I hereby certify that this brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, as follows. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g)

> X It contains 9,452 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> X For each issue, the answer brief must, under a separate heading placed before the discussion of the issue, state whether the appellee agrees with the appellant's statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

/s/ Benjamin Sisney
Counsel for Appellee

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2. Whether, even though no provision of the Colorado Election Code gives to the Secretary of State authority to enforce presidential constitutional qualifications, a state district court in a Section 1-1-113 proceeding may nonetheless order that a former president presidential candidate is constitutionality disqualified?

3. Whether Section Three of the Fourteenth Amendment provides a self-executing cause of action for individuals to sue to remove candidates from the ballot despite the absence of any authorization for such a suit from Congress?

STATEMENT OF THE CASE

I. Nature of the Case

The Colorado Republican State Central Committee (the "Colorado Republican Party") herein defends the Denver District Court's order, entered on November 17, 2023, ordering the Colorado Secretary of State to place President Donald Trump on the Colorado primary and general presidential ballots. The district court correctly ruled that the President is not an officer of the United States for purposes of disqualification under the Fourteenth Amendment. However, the district court made unsupported legal rulings concerning C.R.S. §§ 1-4-1204 and 1-1-113 and Section Three of the Fourteenth Amendment. Correcting those errors provides an alternative basis for affirmance because neither Colorado law nor the Fourteenth Amendment provide the Secretary of State – and hence the Court – authority to exclude presidential candidates from primary or general elections based on an interpretation of the Constitution and a determination of "insurrection." Congress, not state judges or secretaries of state, enforces the Fourteenth Amendment.

II. Factual Background

The factual summaries contained in the other briefs are sufficient.

III. Procedural History

On September 6, 2023, six Colorado electors filed their *Verified Petition* against Secretary of State Jena Griswold and President Trump in the Denver District Court, seeking in Count I an order under C.R.S. § 1-4-1204 that President Trump should be removed from the ballot due to an alleged constitutional disqualification, and in Count II, a declaratory judgment to the same effect. (App. 111-12)

The Colorado Republican Party intervened with three claims: first, the relief sought was a violation of the Party's First Amendment rights; second, the Fourteenth Amendment does not self-execute through a state disqualification proceeding, and third, the Colorado Election Code does not allow for the Secretary of State to determine constitutional qualifications.

The Electors filed a motion to dismiss the Colorado Republican Party's First Amendment claim, arguing that constitutional claims are not properly adjudicated in a C.R.S. § 1-4-1204 proceeding. (App. 179-188) The district court agreed, dismissing that claim in an October 20, 2023, order on pending dispositive motions. (App. 657-59)

The Colorado Republican Party filed a motion to dismiss the Electors' claims. (App. 163). The Party argued that C.R.S. § 1-4-1204 gives the Secretary of State authority over limited, nondiscretionary requirements for placing candidates on primary election ballots and does not give her the authority to decide constitutional

qualifications for office. The Party's Motion to Dismiss also argued that Section Three of the Fourteenth Amendment does not provide a self-executing cause of action. President Trump also filed several motions to dismiss which made similar statutory and constitutional arguments. The Republican Party adopted President Trump's motions to dismiss. In responding to these motions to dismiss, the Electors dropped their declaratory claim.

The district court denied the motions to dismiss in two orders, one focused on the constitutional issues and one that addressed all other issues. (App. 637-60, App. 687-710)

The court held an evidentiary hearing beginning October 30, addressing all remaining issues, including the factual dispute regarding whether President Trump engaged in an insurrection that would disqualify him from office.

On November 17, 2023, the district court entered a final order, ruling that President Trump engaged in insurrection but nevertheless determining that he is not within the class of persons disqualifiable under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

First, the district court correctly ruled that Section Three of the Fourteenth Amendment does not apply to President Trump. The Fourteenth Amendment provides a list of specific roles it disqualifies from holding office. Former presidents

are not on that list. Nor is President Trump an "officer of the United States." The President appoints officers of the United States, he is not himself one of them. The Fourteenth Amendment applies only to those who take an oath to support the Constitution. The President, unlike the officers of the United States, takes no such oath, but takes a separate, different oath to defend the Constitution. And should this Court have any doubts whatsoever, it should, like the trial court, operate from a presumption in favor of the democratic process.

Second, the Colorado Election Code (the "election code") does not give the Secretary of State the authority to decide constitutional presidential qualifications. Her role is a ministerial one – to enforce the limited, enumerated requirements for ballot access contained in the election code. Section 1-1-113 proceedings are expressly limited to adjudicating whether the Secretary has complied with her limited duties under the election code. And the election code neither explicitly or implicitly authorizes her to exclude presidential candidates from the ballot on constitutional grounds.

The district court improperly resorted to other parts of the election code to justify finding authority to exclude federal candidates for constitutional reasons, but all those statutory provisions reiterate repeatedly that it is the specific requirements for presidential primaries that are to govern the Secretary as she prepares primary

ballots. The Court even reasoned that it had the authority to decide constitutional qualifications, even if the Secretary does not, contrary to the holdings of this Court. The election code's requirements are carefully set out and explicitly do not include constitutional requirements. This limitation reflects the First Amendment rights of political parties. The primary process for major parties is ultimately an internal one in which a party makes decisions for itself. Colorado law does not purport to interfere with that decision.

Third, Section Three of the Fourteenth Amendment does not create a self-executing cause of action. As was reiterated during the drafting and ratification process of the Fourteenth Amendment, and thereafter emphasized repeatedly by the Supreme Court, the Fourteenth Amendment can only be enforced according to the parameters Congress establishes. Courts have regularly acknowledged that, as the text of Section Five of the Fourteenth Amendment clearly indicates, it is Congress, not individuals or the states, that has authority to enforce the Fourteenth Amendment. Congress has not created a cause of action for individuals or state officials to enforce Section Three of the Fourteenth Amendment. Accordingly, no one has the right to disqualify anyone under the Fourteenth Amendment in Colorado courts. This requirement for enabling legislation should not be a surprise; the United States Supreme Court has made this principle just as clear when discussing the rest

of the Fourteenth Amendment. *See Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."). This is, in part, because it would be fundamentally inconsistent with our system of government for someone to be removed from office or the ballot *ipse dixit*, without the protections and guiderails provided by Congress.

In short, as manifestly important as the many substantive issues in this case are, this Court should not even address those questions, but instead recognize the more fundamental hurdle to the Electors' claims: Neither Colorado law nor the Fourteenth Amendment give the Secretary of State the authority to remove candidates based on insurrection.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT AN INDIVIDUAL WHO HAS SOLELY TAKEN THE PRESIDENTIAL OATH IS NOT INCLUDED WITHIN THE LIST OF DISQUALIFIED ROLES UNDER THE FOURTEENTH AMENDMENT.

The plain terms of the disqualification provision of the Fourteenth Amendment include only certain enumerated roles within their scope. Those roles do not include individuals who have taken the presidential oath.

A. Burden of Proof

The Colorado Republican Party agrees that this issue, like other questions of law, is reviewed de novo.

B. The President is Not an Officer of the United States for Purposes of the Fourteenth Amendment.

The Fourteenth Amendment only disqualifies those who serves in specific roles: A person is disqualified only if he "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. Amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies to him only if he was an "officer of the United States." *Id.* But that term as used in Section Three does not cover the President. The presidency is not any of the specific roles enumerated, nor is the President an officer of the United States. "The people do not vote for the 'Officers of the United States.' . . . They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497-98 (2010) (internal citations omitted).

> [U]nder the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

United States v. Mouat, 124 U.S. 303, 307 (1888); *see also* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section Three of the Fourteenth Amendment*, 15 N.Y.U. J. OF LAW AND LIB. 1 (2021); 2 Joseph Story, *Commentaries on the Constitution of the United States* 260 (1833). As the Supreme Court explained in *Mouat*, the Commissions Clause says that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 4. If the President is, as the Appellants reason, in all circumstances an officer of the United States, then the President commissions himself. That is clearly absurd.

Less than a decade after the ratification of the Fourteenth Amendment, at least two Senators posited the same thing, explaining that the President is not an officer of the United States. Senator Newton Booth said that "the President is not an officer of the United States." *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap* 145 (1876). Senator Boutwell likewise explained that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 130. Around the same time, a treatise made clear that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States.'" David McKnight, *The Electoral System of the United States* 346 (1878).

Attorney General Henry Stanbery defined the term officer in the Fourteenth Amendment as "military as well as civil officers of the United States who had taken the prescribed oath." 12 U.S. Op. Att'y. Gen. 141, 158 (1867) (emphasis added). He declared that the phrase "Officers of the United States" includes, "without limitation," any "person who has at any time prior to the rebellion *held any office*, civil or military, *under the United States*, and has taken an official oath to support the Constitution of the United States." 12 U.S. Op. Att'y Gen. 182, 203 (1867) (emphasis added). A president does not take that oath, and thus is clearly not subject to that provision. This definition is explicitly limited to those who take an oath to support the Constitution which the President does not take.

C. The Fourteenth Amendment Applies to Those who Take an Oath to Support the Constitution. The President Takes no Such Oath.

There are two oaths of office in the Constitution. Article VI, Section 3 of the Constitution provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and *all executive and judicial Officers*, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. Art. VI, § 3 (emphasis added). All executive officers take an oath to support the Constitution. But the President does not take such an oath: Article II, Section 1 indicates that the President, instead, takes an oath to "preserve, protect and defend the Constitution of the United

States." U.S. Const. Art. II, § 1. This distinction further indicates that for the purposes of Article VI, Section 3, the President is clearly, explicitly, *not* an officer of the United States.

Moreover, the plain language of Section Three of the Fourteenth Amendment indicates that it disqualifies someone who took an oath "to support the Constitution of the United States." U.S. Const. Amend. XIV, § 3. As is plain from Article II, Section 1, the President does not take that oath, but instead, takes a different oath to defend the Constitution.

How do the Appellants respond to this careful distinction between the two oaths of Article II and Article VI? By arguing that the presidential oath incorporates the latter oath. (Appellant Brief at 29-30). There are many problems with this unsupported argument. The most significant is one delineated by the district court. (App. 997). Of course, in practical effect, protecting and defending the Constitution is similar to supporting it. But the actual language used in the Fourteenth Amendment is the words of Article VI, not Article II. Appellants claim that "[t]he linguistic difference between an oath 'to support' and an oath to 'preserve, protect, and defend' is irrelevant here." (App Br.at 30.). But linguistic differences are exactly how legal analysis proceeds. There are two constitutional oaths, similar in role but

explicitly distinct in language. The one used in the Fourteenth Amendment is simply not the oath President Trump took.

The Constitution's use of distinct language for the two oaths should be understood as two separate terms. As is axiomatic in statutory interpretation, "[i]n interpreting statutory language, we presume that the legislature did not use language idly. . . . Rather, the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008). The Appellants ignore this, but the same is true constitutionally. Words have meaning, and the Fourteenth Amendment's drafters intentionally chose to use the Article VI oath, not that in Article II.

As many of the authorities cited by the appellants also indicate, an oath to "support" the constitution is what is required to be disqualified: "the oath to support the Constitution is the test." *Worthy v. Barrett*, 63 N.C. 199, 202, 204 (1869). President Trump simply never took *that* oath, and thus cannot be subject to the disqualification provision.

D. The Absurd Result the Electors Fear From Affirming Would Actually Be to Resolve Any Doubts Against the Basic Presumption of the Democratic Process.

The district court rightly concluded that any doubts regarding these interpretative questions should be resolved in favor of the democratic process. As

Attorney General Stanbery again noted, "[w]here, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867) (emphasis added). The same is true here. Should this Court have any interpretative doubt, it should resolve that doubt in favor of the democratic process.

The Appellants respond to this principle by arguing that it only applies to "fringe, low-level state officer[s]." (App Br. At 38). This make no sense. It is completely incongruous that courts would defer to the democratic process for local elections, but not for nationwide ones. Instead, the presumption should always be in favor of the people's opportunity to choose. The Appellants focused on the supposedly "absurd" results that would occur if a former president was not disqualified from the ballot. But the real absurdity would be to accept a tenuous, unprecedented legal theory to prevent the voters from picking the candidates of their choice.

II. THE COLORADO SECRETARY OF STATE, UNDER BOTH COLORADO LAW AND UNDER SECTION THREE OF THE FOURTEENTH AMENDMENT, LACKS AUTHORITY TO DISQUALIFY PRESIDENTIAL CANDIDATES.

An appellate court can affirm the trial court's judgment "on any ground supported by the record, whether relied upon or even considered by the trial court."

People v. Aarness, 150 P.3d 1271, 1277 (Colo. 2006). As the United States Supreme Court explained, "the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States v. American R. Express Co.*, 265 U.S. 425, 435 (1924); *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n.20 (1979). Although, as discussed above, the conclusion of the district court was correct, other arguments the court erroneously rejected compel the same conclusion.

A court may only order the Secretary of State to act if the Secretary has a mandatory duty to act according to a provision of the Colorado Election Code. In the absence of that duty, no C.R.S. § 1-1-113 or § 1-4-1204 proceeding is permissible or proper, and the Secretary of State should be prohibited from excluding a candidate who meets *all statutory requirements* for office.

The Election Code does not, in any of its provisions, vest authority in the Secretary to apply discretionary requirements like the Fourteenth Amendment provision upon which the ostensible § 1-1-113 proceeding was based; the statutory authority of the Secretary simply does not extend to quasi-criminal disqualification proceedings. Moreover, the Fourteenth Amendment does not provide a self-executing cause of action; as is long-recognized black-letter law, it is Congress

which has the authority to determine the enforcement mechanisms for the Fourteenth Amendment, not state officials.

A. Standard of Review and Preservation

Because these arguments are presented as alternative grounds for affirmance, this portion of the brief complies with C.A.R. 28(a)(7)(A). This appeal is dependent solely on legal issues relating to the nature of C.R.S. § 1-4-1204 and the legal meaning of the Fourteenth Amendment, reviewed de novo. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (2000).

The legal issues discussed in this section were preserved below, particularly in the Colorado Republican Party's motion to dismiss, (App. 163-78) as well as in the other motions to dismiss filed by President Trump, in which the Colorado Republican Party, following the trial court's instructions, joined rather than reiterating. *See* CO Rep. Motion to Dismiss at 2 (App. 164). The constitutional issues discussed herein were also raised in the State Party's motion to dismiss. (App. 172-74). The Colorado Republican Party also addressed these issues in the proposed findings of fact and conclusions of law it submitted to the district court subsequent to the evidentiary hearing. (App. 783-792).

B. No Provision of the Colorado Election Code Gives the Secretary of State Authority to Make Constitutional Qualification Decisions.

The plain text of C.R.S. § 1-1-113 indicates that it is narrowly limited to addressing wrongful acts under the Colorado Election Code. It only provides jurisdiction if there is a "duty or function under this code," and allows an individual to seek an order that the Secretary comply with a duty "under this code." This mechanism is limited to enforcing specific statutory obligations.

i. *Frazier v. Williams* expressly prohibits the consideration of constitutional claims in a § 1-1-113 proceeding; that rule is unchanged when, as here, the constitutional claim is the sole issue in the case.

This matter was brought through the very limited vehicle of CR.S. § 1-1-113. "[T]he remedy available at the end of a section 1-1-113 proceeding is limited to an order, upon the finding of good cause shown, that the provisions of the Colorado Election Code have been, or must be, substantially complied with*." Frazier v. Williams*, 401 P.3d 541, 545 (2017). The same is true for the more specific presidential primary statute, C.R.S. § 1-4-1204. It contains the same limitation, expressly incorporating section 1-1-113; it only allows the enforcement of the Colorado Election Code.

This Court has repeatedly indicated that constitutional claims are not judiciable in a § 1-1-113 proceeding. In *Williams v. Libertarian Party*, 401 P.3d 558, 559 (2017), this Court rejected a theory of the Court of Appeals that a constitutional claim that "stemmed from the same nucleus of operative facts" as a proper § 1-1-

113 claim could be addressed in a 1-1-113 proceeding. "[A] section 1-1-113 proceeding is limited to allegations of a 'breach or neglect of duty or other wrongful act' under the election code itself. § 1-1-113(1)." *Id.* In its companion case, *Frazier v. Williams*, 401 P.3d 541, 542 (2017), this Court reached the same conclusion. This holding, reaffirmed in *Kuhn v. Williams*, 418 P.3d 478 (2018), necessitates that § 1-1-113 courts cannot address constitutional questions. Their role is instead only to enforce the Colorado Election Code.

If the Appellants' case was about anything, it was about whether Intervenor Trump is disqualified under the Fourteenth Amendment's disqualification clause, a constitutional question. It should have fallen under the *Frazier* rule from the outset. The district court, while acknowledging that this is a constitutional case, nonetheless ruled that "*Frazier* and *Kuhn* are not controlling in the circumstance where the constitutional issue is not a separate claim." (App. 646). There are several problems with this reasoning, for which the court did not provide any support from Colorado precedent. Most important is that this Court never limited *Frazier*'s reasoning to "independent claims," nor did it require a constitutional claim to be based on a "violation of constitutional rights." Rather, *Frazier* and *Kuhn*'s reasoning and holding bar the litigation of *any* constitutional issues in a Section 113 proceeding. "[A]ll three grounds for a section 1-1-113 claim — that is, breach of duty, neglect

of duty, or other wrongful act — all refer to acts that are inconsistent with the Election Code." *Frazier*, 401 P.3d at 545. Constitutional claims should never be addressed in § 1-1-113 proceedings, regardless of their mode of presentation.

In particular, the Court's holding in *Frazier* did not contain any limitation to non-independent claims. "We hold that claims brought pursuant to section 1-1-113 are limited to those alleging a breach or neglect of duty or other wrongful act under the Colorado Election Code." *Frazier*, 401 P.3d at 543. This Court did not limit its holding only to cases where a constitutional claim is a separate claim.

Moreover, not only is limiting *Kuhn* and *Williams* in the way the lower Court did inconsistent with the explicit holding of those cases (a holding that the lower Court here did not quote or address directly in its opinion), it also conflicts with those cases' reasoning. This Court in *Frazier* highlighted the difficulties of expedited constitutional litigation, highlighting "that it is impossible to fully litigate a complex constitutional issue within days or weeks, as is typical of a section 1-1-113 proceeding." *Frazier*, 401 P.3d at 545. As the Appendix in this case will reflect, this case has *not* proceeded like a typical limited § 1-1-113 matter; instead, it has consisted of complex, novel, and involved constitutional litigation of the very kind that this Court made very clear should not be occurring in a § 1-1-113 proceeding. Whether the constitutional arguments brought are independent or not, both the

statute and *Frazier* require that a § 1-1-113 proceeding only concern the application of the Colorado Election Code, not constitutional claims.

ii. Under C.R.S. § 1-4-1204(4), the Colorado Secretary of State's ballot authority extends only to the specific requirements enumerated by the election code, and a court cannot act in a way the code does not require.

In the proceedings below, the Secretary of State conceded, "the Election Code does not explicitly give the Secretary independent authority to determine whether a candidate is disqualified from holding office under Section 3 of the Fourteenth Amendment." (App. 340) She argued that, despite this lack of any explicit authority, she nonetheless has authority to enforce constitutional qualifications. But that is simply not how her enumerated and specific authority works. She can only enforce those requirements that the statute explicitly provides for her to enforce; otherwise, she is powerless. The Secretary has been commanded by the Election Code to enforce enumerated ministerial, non-discretionary requirements. But she has not been given any authority in presidential elections to make complex, discretionary, constitutional determinations.

In 1896, an action was brought to compel the Secretary of State to certify the Republican nominees on the McKinley Republican ticket: "[I]n order that the same may be printed upon the official ballots; the claim advanced being that this is a plain duty enjoined by law, about which the secretary of state has no discretion." *People*

ex rel. Hodges v. McGaffey, 46 P. 930, 931 (Colo. 1896) (emphasis added). This Court agreed, concluding that "it is the plain duty of the secretary of state to certify to the various county clerks the ticket." *Id.* at 932. The Court's explanation of the ministerial responsibility of the secretary of state presages this litigation:

> One of the great political parties, now struggling for control of the national as well as of the state government, will, if the decision of the secretary of state prevails, be deprived of the opportunity of placing its ticket before the people of the state of Colorado, for their suffrage at the approaching election, and the people will, to that extent, be disfranchised.

Id. at 159. The Court made clear that the Secretary of State lacks any discretion to take such a radical step.

The district court attempted to distinguish *McGaffey* in two ways. First, it noted that this Court's *McGaffey* ruling arose "under a prior Election Code." (App. 654). While this is true, no subsequent revision to the election code indicated that earlier precedents were explicitly being overruled or addressed *McGaffey* in the least. Statutes are "not presumed to alter the common law" unless the statute "expressly [so] provides," *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1158 (2019) (citing *Robinson v. Kerr*, 355 P.2d 117, 120 (Colo. 1960)). *McGaffey* remains good law and has not been overruled sub silentio by statute.

The district court also discussed the factual history of that case, involving two rival factions of the Republican Party. (App. 654) That distinction is historically

interesting, but there is nothing about this Court's opinion that indicates that this distinction is by any means legally significant; this Court's holding (which the district court omitted) was that "it is the plain duty of the secretary of state to certify to the various county clerks the ticket." *McGaffe*y, 46 P. at 932. Nothing about the Court's holding was limited to the specific factual situation, the McKinley presidential ticket, before it.

The role of the Secretary of State in the presidential election is purely ministerial, to ensure basic filing requirements for ballot access are met and to disseminate those ballots to the populace. Under C.R.S. § 1-4-1204(1)(b), it is the Colorado Republican Committee that determines who the Republican nominee will be on a ballot. It alone determines whether a candidate is a "bona fide candidate" for president and does so "pursuant to political party rules." *Id.* The Secretary of State plays no role in making this decision.

C.R.S. 1-4-1204(1) specifically indicates that the Secretary's role in presidential primary presidential elections is ministerial. It reads that "the secretary of state *shall certify* the names and party affiliations of the candidates to be placed on any presidential primary election ballots." *Id.* (emphasis added) She is given solely a ministerial, nondiscretionary authority to enforce these election requirements. Every role the Secretary has in the presidential primary process is

ministerial and non-discretionary in nature. This Court has held that where "[t]he Act provides a clear standard for the [state officials] to follow and admits of no discretion in its application," the officials' act is not discretionary. *Bd. of Cnty. Comm'rs v. Fifty-First Gen. Assembly*, 599 P.2d 887, 890 (Colo. 1979); *see Bolt v. Arapahoe Cnty. Sch. Dist. No. Six*, 898 P.2d 525, 538 (1995) (Where a state official's role is prescribed with a "shall," it is ministerial and the state official "has no authority to modify."). C.R.S. 1-4-1204(1) specifically limits the Secretary with a "shall." Her only option is to enforce and follow the clear standards of the statute. She has no authority to go beyond.

None of the statutory provisions of the Colorado Election Code, particularly C.R.S. § 1-4-1204 and § 1-1-113, give to the Colorado Secretary of State any authority to decide constitutional election questions in presidential primaries. Her role is solely ministerial, to enforce the specific, nondiscretionary statutory requirements for election candidates particularly enumerated under the election code. Other courts have reached the same conclusion in recent lawsuits addressing their equivalents of these provisions. In *Growe v. Simon*, No. A23-1354 (Minn., Nov. 8, 2023), the Minnesota Supreme Court issued an order rejecting efforts to keep Former President Trump off the ballot in that state. The court explained in discussing the Minnesota primary, "although the Secretary of State and other election officials

administer the mechanics of the election, this is an internal party election to serve internal party purposes." Likewise, the Michigan Court of Claims just issued an opinion dismissing similar cases and driving home the same points of law. That Court noted that the Michigan election code was "such that the Secretary has neither the affirmative duty nor the authority to separately decide whether Donald J. Trump will be placed on the Michigan presidential primary ballot on the grounds that he is disqualified under Section 3 of the Fourteenth Amendment of the United State Constitution." *Trump v. Benson*, No. 23-000151-MZ (Mich. Court Claims, Nov. 14, 2023), * 2. The Colorado people have likewise not given the Secretary any authority to make constitutional qualification determinations for presidential candidates.

Ultimately, the district court agreed "the Secretary cannot investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment." (App. 962) Nonetheless, the court concluded that *it* has the authority to make constitutional qualification decisions. In so doing, the court referenced federal decisions that broadly refer to a state's interests in protecting elections. But that reasoning ignores this Court's holding in *Frazier*: "t]he remedy available at the end of a section 1-1-113 proceeding is limited to an order, upon the finding of good cause shown, that the provisions of the Colorado Election Code have been, or must be, substantially complied with*." Frazier v. Williams*, 401 P.3d 541, 545 (2017).

If, as the district court explicitly ruled, the Secretary has no authority to adjudicate this Fourteenth Amendment question and cannot, "on her own accord," keep President Trump off the ballot, then the court certainly had no authority to adjudicate that question in her stead. While *Hanlen v. Gessler*, 333 P.3d 41, 50 (Colo. 2014), and *Kuhn v. Williams*, 418 P.3d 478, 485-87 (Colo. 2018), certainly make clear that, in a § 1-1-113 proceeding, the courts are the final arbiter of eligibility, *that determination is still based on compliance with the election code*. In all those cases, courts were adjudicating qualification decisions vested in the Secretary, but with a more ample evidentiary record. Courts were never reviewing new requirements, separate from the Secretary's responsibility, but merely ordering "compliance with the Election Code." *Kuhn*, 418 P.3d at 485. This Court has never suggested that the courts have election code authority separate from that of the Secretary of State. On the contrary, the rule of *Frazier* is that the only remedy is an order for compliance with the Colorado Election Code.

iii. No other provision of the Colorado Election Code vests in the Secretary of State the authority to determine constitutional issues.

The district court recognized that nothing specifically in § 1-4-1204 grants authority to enforce constitutional qualifications. Nontheless, the court erroneously found a purported basis for that authority by looking to other statutory provisions.

The district court relied on C.R.S. § 1-4-1201. (App. 962) That statute, the preface to the Colorado presidential primary election statute, provides that it is the legislative intent that "the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." No part of this statute vests in the Secretary the authority actually to apply the requirements of federal law, or for that matter, national party rules. Instead, it simply is an acknowledgement of the intent of the statute. Viewing C.R.S. § 1-4-1201 as providing a mechanism for the Secretary to hold candidates accountable to the national *party rules* would clearly be incongruous. The same is true for federal law. The statute does not provide a mechanism for the enforcement of federal law, it simply acknowledges that it governs. A simple acknowledgement of the need to conform to federal law does not create any cause of action or vest a state official with any additional sources of authority.

In its final order, the district court also relied on C.R.S. § 1-4-1203(2)(a), reasoning that that statute provides that political parties may participate in a presidential primary only if the party has a "qualified candidate." (App. 962). The statute thereby supposedly incorporates constitutional qualifications including the Fourteenth Amendment. But the full context of that statute indicates otherwise. The statute reads, "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." *Id.* (emphasis added). It does not reference any constitutional qualification. On the contrary, the "qualifications" it refers to are specifically the enumerated statutory qualifications, discussed above.

The district court also relied in its order on C.R.S. § 1-4-1203(3), which provides that 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." (App. 960) Those preexisting administrative powers, so far as candidates for state offices are concerned, undoubtedly include screening candidates for disqualification based on a failure to meet a state residency requirement. *See* § 1-4-501(1) (for state offices, "[t]he designated election official shall not certify the name of any designee or candidate . . . who the designated election official determines is not qualified to hold the office that he or she seeks based on residency requirements"). But the district court failed to address or cite the full language of C.R.S. § 1-4-1203(3). In context, the statute reads, "*Except as otherwise provided in this part 12,* a presidential primary election 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." *Id.* (emphasis

added). As C.R.S. § 1-4-1203(3) expressly indicates, when otherwise provided by part twelve, state requirements for office are inapplicable. And part twelve does, in fact, expressly provide for the requirements for presidential elections, in § 1-4-1204.

The electors below relied on the Supremacy Clause in the United States Constitution, which "'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) (internal citation omitted). This, they reasoned, means that part twelve of the Colorado Election Code must necessarily encompass challenges to candidates under the Fourteenth Amendment.

But the Supremacy Clause cannot provide a basis for any new grant of statutory authority to a state actor or a new cause of action. "It is equally apparent that the Supremacy Clause is not the source of any federal rights, . . . and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-325 (2015). The Secretary of State cannot rely on the Supremacy Clause to claim authority to enforce federal requirements. There would be no limitation to such a claim; the Supremacy Clause encompasses all federal law. If the Supremacy

Clause authorizes the Secretary to enforce federal law, she would have authority under that clause to enforce all federal law, from criminal laws to environmental regulations, clearly a ridiculous outcome. But there is no inherent limitation to the Supremacy Clause reasoning; it would allow the Secretary to enforce anything.

Finally, the district court cited *Hassan v. Colorado*, 495 Fed. Appx. 947, 948 (10th Cir. 2012), an unpublished decision to support excluding candidates. The court in *Hassan* noted the "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." *Id.* But this unpublished dicta does not in actuality support the Appellants' arguments. The court referenced a generalized interest in excluding unqualified candidates. It did not identify any provision of Colorado law that would actually give the Secretary the authority to decide constitutional qualifications.

Moreover, that statement was dicta, because Hassan failed actually to submit the requisite paperwork. *Abdul Karim Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (Colo. D. 2012) ("Defendants further stated that any individual who fails to check the three boxes affirming their eligibility, or who affirmatively discloses that they do not meet the requirements, will not be placed on the Colorado presidential ballot. Due to plaintiff's status as a naturalized American citizen, plaintiff cannot

sign the statement of intent under oath, and therefore cannot access the Colorado presidential ballot."). In other words, the full context of *Hassan* indicates that Hassan was excluded from the ballot for failing to meet the ministerial requirements the Secretary is charged to enforce. Whether the Secretary could go beyond that was simply not at issue. Broad-ranging dicta in an unpublished opinion does not change what actually occurred in *Hassan*. Even more fundamentally, *Hassan* is not binding on this Court, which has supreme authority to interpret the statute. *High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 628 n.1 (Colo. 1984).

In short, no Colorado statute gives the Colorado Secretary of State or a district court the authority to decide constitutional questions regarding presidential primary candidates – and certainly not in a § 1-1-113 proceeding. Whether it be the Fourteenth Amendment, the Twentieth Amendment, or the provisions of Article II of the Constitution, no Colorado statute purports to provide the authority to determine those constitutional qualifications. As this Court has recognized since its examination of the McKinley election in *McGaffey,* "it is the plain duty of the secretary of state to certify to the various county clerks the ticket." *McGaffey*, 46 P. at 932. The Court made clear "that this is a plain duty enjoined by law, about which the secretary of state has no discretion." *Id.* at 931. That reality has remained unchanged. No Colorado statute has since vested in the Secretary of State the

authority to determine constitutional questions regarding presidential candidates, or given the district courts additional electoral authority.

iv. The Colorado Secretary of State lacks the authority to interfere with a political party's decision making-process and interfere with the party's First Amendment rights to select its own candidates.

Under the plain language of C.R.S. § 1-4-1204(1)(b), it is the Colorado Republican Party that determines who the Republican nominees will be on a ballot. The statute clearly indicates that the party alone determines whether a candidate is a "bona fide candidate" for president and does so "pursuant to political party rules." This statutory language reflects the First Amendment rights of the Party.

The district court dismissed the Colorado Republican Party's First Amendment claim as an independent claim when this matter was reduced to a purported § 1-1-113 proceeding. But regardless, the Party's First Amendment rights remain at the center of this litigation, as they are at the center of the protections provided to the Party by C.R.S. § 1-4-1204(1)(b). C.R.S. § 1-4-1204(1)(b) explicitly reflects the Party's authority to make its own political decisions.

Political parties are free to make their own choices, and courts rightly refuse to deny parties the opportunity to set their own requirements in primary elections. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (statute providing that any voter could vote in a party's primary unconstitutional); *Tashjian v. Republican*

Party, 479 U.S. 208 (1986) (statute's requirement that voters in a primary be members of that party unconstitutional). The Supreme Court regularly recognizes the right of a political party to make associational decisions. *Jones*, 530 U.S. at 575 ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."); see also *Duke v. Cleland*, 954 F.2d 1526, 15531 (11th. Cir. 1992). As the Supreme Court has indicated, States may not enact "unreasonably exclusionary restrictions" on ballot access. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369 (1997).

The constitutional problems with the trial Court's decision on this matter are particularly evident: this case involves a *primary* ballot. As the Minnesota Supreme Court explained, "although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes." *Growe v. Simon*, No. A23-1354 (Minn., Nov. 8, 2023). Political parties have a First Amendment right to decide for themselves how they will associate, and a Secretary of State has no legitimate interest in interfering with that right or preventing parties from making their own decisions. Whether the

Colorado Republican Party chooses to support Donald Trump at the Republican National Convention is simply not something the Secretary of State has any authority to decide. The election code reflects the Colorado Republican Party's constitutional right to freely associate and to exercise its political decisions.

C. Under the United States Constitution, Section III of the Fourteenth Amendment Does Not Provide a Self-executing Cause of Action.

Not only has the Secretary *not* been given authority to make presidential qualification decisions by Colorado law, but the Constitution has expressly reserved that authority to Congress. Because Congress has not chosen to do so by creating a cause of action or by giving state secretaries of state the authority to enforce disqualification, the district court lacked any basis to enforce Section Three. The Fourteenth Amendment itself expressly states in Section Five that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This is a clear textual indication that Congress has exclusive authority to enforce, by legislation, the disqualification rule of Section 3.

The United States Supreme Court has regularly declared that the enforcement power of the Fourteenth Amendment lies only in Congress, and Section Five of the Fourteenth Amendment confers the enforcement power on Congress to determine

"whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

In the seminal decision of *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), Chief Justice Salmon Chase, sitting as Circuit judge for Virginia, held that only Congress can provide the means of enforcing Section Three of the Fourteenth Amendment. That case has never been overruled and has been affirmed repeatedly by other courts and authorities. Because the Fourteenth Amendment is not self-executing, the exclusive method for enforcing its provisions is through the provisions Congress establishes for doing so.

i. *Griffin*, which remains good law and has been repeatedly relied on since it was decided, establishes that Section 3 of the Fourteenth Amendment is not self-executing.

In *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), Chief Justice Salmon Chase held that only Congress can provide the means of enforcing Section 3. The district court did not discuss the reasoning or language of *Griffin* at all. (App. 705) Instead, its reasoning regarding *Griffin* reads in full, "But the only precedent cited is *In re Griffin*, 11 F. Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit." *Id. Griffin* is not the only precedent in favor of the argument advanced here, and the lower court's abbreviated reference here misses the mark.

In *Griffin*, a judge and former officer of Confederate Virginia sentenced Caesar Griffin to two years' imprisonment for assault with intent to kill. Griffin filed a federal action, arguing that the Fourteenth Amendment automatically acted to remove the judge from office, "operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

Chief Justice Chase prefaced his analysis of Section 3 with the observation that "it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id.* at 26. Chase reasoned that "it is obviously impossible to do this by a simple declaration . . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* Chase concluded that the Due Process Clause foreclosed the argument that Section 3 automatically disqualifies someone from offense without a trial, as it would be inconsistent "with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave." *Id.* at 26. Moreover, Chief Justice Chase emphatically held that the provisions of Section 3 can only be enforced by Congress. "To accomplish this

ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by Congress." *Id.* He concluded that:

> the intention of the people of the United States, in adopting the Fourteenth Amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course.

Id.; *see also In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same).

Contrary to the reasoning of the district court, state courts and officials have followed *Griffin*. *See, e.g.*, *Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) ("given the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S. Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[I]t has also been held that the Fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same); Mark R. Herring, Va. Attorney General to Lee J. Carter, Delegate, Commonwealth of Virginia Opinion No. 21-003, 2021 Va. AG Lexis 1, 2, n.11

(2021) ("[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing.'") (citing *Griffin*).

The district court relied on three cases, all predating *Griffin*, in order to reject the conclusion that the Fourteenth Amendment is not self-executing: *Worthy v. Barrett*, 63 N.C. 199, 200-01 (1869), *In re Tate*, 63 N.C. 308, 309 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (La. 1869). None of these cases discussed the self-executing question at all; even if they did conflict with *Griffin*, they would constitute much weaker evidence of original meaning than *Griffin*, written by the Chief Justice of the United States. But none of those cases concerned an attempt directly to disqualify a candidate, and certainly not a presidential candidate, pursuant to the Fourteenth Amendment itself.

In North Carolina, a statute incorporated the requirements of the Fourteenth Amendment by reference, providing that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Art. XIV, shall qualify under this act or hold office in this State." *Worthy*, 63 N.C. at 200 (quoting Acts of 1868, Ch. 1, sec. 8). This statute by its terms incorporated the provision of the Fourteenth Amendment as a standard for a state qualification statute, *applicable to state officers*, a statute that is well within a state's authority. No Colorado law exists that does the same thing, and if it did, it would apply only

to state officers. But *Worthy* did not actually involve the enforcement of the Fourteenth Amendment. Instead, it concerned a state statute modelled on the Fourteenth Amendment. That distinction is critical. And this distinction is reinforced by the other cases cited. *In re Tate*, 63 N.C. 308, 309 (1869), did not explicitly indicate this aspect, but it was based explicitly on *Worthy* and its rule.

In the Louisiana case, this context was made even more explicit. A Louisiana statute likewise incorporated the Fourteenth Amendment's provisions. The court explained, "[i]n enacting it the Legislature established a mode of legally ascertaining whether persons holding office under the authority of the State of Louisiana are incompetent to exercise the duties of those offices by reason of the disabilities imposed upon certain classes of people." *Watkins*, 21 La. Ann. at 632. In other words, the State of Louisiana had authority to enact a statute, referencing the Fourteenth Amendment, that served as a standard for qualifications *for state office*. But even still, none of those courts ever suggested that the Fourteenth Amendment itself is self-executing.

ii. *Griffin* is supported by other originalist evidence.

Griffin is the controlling federal case establishing that Section 3 is not self-executing. If there were any doubt, the Chief Justice's analysis is further supported by additional evidence of the original understanding of the Fourteenth Amendment.

The issue of self-execution arose at the framing. Representative Thaddeus Stevens, one of the leading proponents of the Reconstruction Amendments, introduced the Joint Committee's draft of Section Three to the House. During the Congressional framing debates, Stevens responded to concerns that Section Three would be unenforceable, stating explicitly that Section Three was not self-executing. Stevens emphasized that "[i]t will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do." Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendmen*t (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838, at 37 (quoting 2 Reconstruction Amendments, Essential Documents 219 (Kurt Lash ed. 2021).

Likewise, it arose at the time of the ratification. During the ratification debates in Pennsylvania, Thomas Chalfont "explored in detail the necessity and form of congressional enforcement of Section Three." *Id.* (quoting The Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed., Harrisburg 1867) (hereinafter "The Appendix")). He was concerned that the provision could be read as "self-executing and automatically disqualifying certain persons without the need for any prior deliberation and judgment." *Id.* For Chalfont, such a reading, the reading the

district court adopted here, was alarming: "[O]f course there would have to be some kind of trial prior to a person's disqualification." *Id.* at 43 (citing The Appendix, at LXXX). Chalfant assumed that his colleagues would agree that disqualification under Section Three could not occur without a prior adjudication of the person's guilt: "in order to make this section of any effect whatever, the guilt must be established." *Id.* (citing The Appendix, at LXXX). There is no record of anyone at the Pennsylvania ratifying debates disagreeing with him.

Professor Kurt Lash, a leading expert on the Fourteenth Amendment, has concluded from the foregoing history that Chalfont clearly

> presumed that every ratifier in the room agreed with him that no person could properly be disqualified under Section Three prior to an adjudication by an impartial tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise. Although Pennsylvania went on to ratify the Fourteenth Amendment, no member appears to have denied Chalfant's basic assumption that Section Three required enabling legislation.

Id. at 45. Chalmont believed strongly that Congress must enact enabling legislation to avoid due process concerns.

iii. Moreover, the Supreme Court has repeatedly indicated that no provision of the Fourteenth Amendment provides a self-executing cause of action.

For a cause of action to exist under federal law, Congress must authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law

itself, private rights of action to enforce federal law must be created by Congress."). Section Five of the Fourteenth Amendment explicitly confers enforcement power on Congress to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Accordingly, the Supreme Court has consistently indicated that it is Congress alone who has authority to enforce the Fourteenth Amendment. "It is the power of Congress which has been enlarged[.] Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."); *see Cale v. Covington*, 586 F.2d 311, 316-17 (4th Cir. 1978). In some circumstances, the Fourteenth Amendment may be self-executing *as a shield*, providing a constitutional *defense* even if not explicitly provided for by law. But the Supreme Court has made clear that in *no circumstance* is the Fourteenth Amendment a self-executing *sword*, providing in its own force a self-executing cause of action.

Congress can adopt legislation enforcing Section Three. It has chosen not to create a private right of action. In 1994, Congress adopted 18 U.S.C. § 2383, a criminal provision banning insurrection and providing a penalty of disqualification.

President Donald Trump has never been charged with, much less convicted of, violating § 2383. If there is any current enforcement mechanism, that is the statute. By analogy, 42 U.S.C. § 1983 provides the exclusive vehicle for civil claims under Section One of the Fourteenth Amendment. *See, e.g., Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979) (stating that Congress intended 42 U.S.C. § 1983 as an exclusive constitutional remedy and that "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment."); *Foster v. Michigan*, 573 F. App'x. 377, 391 (6th Cir. 2014) ("[W]e have long held that § 1983 provides the exclusive remedy for constitutional violations."); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). State courts can only "apply the Constitution" when constitutional claims are brought before them as Congress prescribed. State courts could only hear a Section Three claim if Congress granted them that authority.

Section Five of the Fourteenth Amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article," including Section Three. U.S. Const., amend. XIV, § 5. Congress has not exercised that power to

authorize private plaintiffs to sue or state courts to adjudicate Section Three. This determination still belongs exclusively to Congress.

CONCLUSION

For all the reasons stated above, the Court should affirm. The Presidency is not within the scope of Section Three of the Fourteenth Amendment and the Secretary of State – and the district court in a purported § 1-1-113 proceeding – lacks the authority to enforce it in usurpation of a major political party's constitutionally and statutorily protected prerogative and in disregard of the party's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 27, 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/Christa K. Lundquist*