DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: September 29, 2023 4:53 PM
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE.	▲ COURT USE ONLY ▲
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**Pro hac vice* admission pending

PETITIONERS' RESPONSE TO INTERVENOR'S MOTION TO DISMISS

The Petition asks the Court to compel Respondent Secretary of State to comply with the Colorado Election Code and to enjoin the Secretary from allowing Respondent Donald Trump access to the ballot. In no way would this relief interfere with Intervenor Colorado Republican State Central Committee's "autonomy, prerogative, and rights." *See* Intervenor's Mot. to Dismiss, 2. Intervenor's Motion to Dismiss presents a blunderbuss of underdeveloped arguments, many already raised elsewhere. It should be denied for three reasons. First, the Court does not have jurisdiction in this case—an expedited proceeding under the Election Code—over Intervenor's First Amendment challenge to the Election Code itself. Second, Petitioners assert a valid and ripe claim under the Election Code. And third, even if the Court did reach Intervenor's First Amendment argument, it is foreclosed by precedent.

Standard of Review

A trial court reviews subject matter jurisdiction in a motion to dismiss under C.R.C.P. 12(b)(1) by examining the substance of the claim based on the facts alleged and the relief requested. The plaintiff has the burden of proving jurisdiction, and evidence outside the

pleadings may be considered to resolve a jurisdictional challenge. *City of Aspen v. Kinder Morgan, Inc*., 143 P.3d 1076, 1078 (Colo. App. 2006).

In reviewing a motion to dismiss under C.R.C.P. 12(b)(5), the Court should "accept all factual allegations in the complaint as true and view those allegations in the light most favorable to the plaintiff." *Winston v. Polis*, 2021 COA 90, ¶ 6. A complaint survives a C.R.C.P. 12(b)(5) motion to dismiss when, as here, it pleads sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief. *Id.*; *see also Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24.

Argument

I. The Court does not have subject matter jurisdiction over Intervenor's First Amendment challenge to the Election Code.

Intervenor argues that Petitioners' suit infringes its First Amendment rights "to freely associate for purposes of engaging in political advocacy and expression." Intervenor's Mot. to Dismiss, 12-13. Despite styling this as a motion to dismiss under C.R.C.P. 12(b)(5), Intervenor restates its Petition and again challenges the constitutionality of the Election Code itself. *See*, *e.g.*, Intervenor's Pet., ¶ 35 (asserting that Petitioners' requested relief under the Election Code "unlawfully deprives Intervenor of its First Amendment rights to engage in protected speech, expression, and association."). As explained in Petitioners' Motion to Dismiss Intervenor's First Claim Under C.R.C.P. 12(b)(5), the Court does not have jurisdiction in this expedited election proceeding to consider Intervenor's First Amendment challenge to the Election Code. Pet'rs' Mot. to Dismiss, 5-8. Petitioners incorporate the arguments in their Motion to Dismiss here.

II. Petitioners' claim under the Election Code is valid and ripe.

Intervenor assertions that Petitioners' claim fails because the Secretary of State's role is "purely ministerial" and because the Secretary is not "about to commit a breach or neglect of duty or other wrongful act" are similarly unpersuasive. *See* Intervenor's Mot. to Dismiss, 4-10, 14-15 (quoting § 1-1-113(1)). Respondent Trump made the same arguments in his Motion to

Dismiss Under C.R.C.P. 12(b)(1) and 12(b)(5). Resp't Trump's Mot. to Dismiss, 12-14. Petitioners explain why their claim under §1-1-113 is valid and ripe in their Response to Trump's Motion to Dismiss. Pet'rs' Resp. to Resp't Trump's Mot. to Dismiss, 7-10, 15-18. They incorporate that explanation here.

Intervenor's reliance on *People ex rel. Hodges v. McGaffey*, 46 P. 930 (Colo. 1896), is misplaced. Intervenor's Mot. to Dismiss, 4-5. There, two rival factions of the same political party filed candidate nominations with the Secretary of State for placement on the ballot. *People ex rel. Hodges*, 46 P. at 930-31. The Secretary certified and placed only one faction's candidates on the ballot. *Id*. The Colorado Supreme Court considered "the jurisdiction of [the Secretary] to pass upon the claims of these rival parties" and to "refus[e] to certify one list of nominations." *Id*. at 931. It held that the Secretary had to place on the ballot both factions' candidates; the Secretary did not have discretion *to choose between the factions*. *Id*. at 931-32. That is a *very* different question than the one at issue here. Petitioners are not a rival faction of the Republican Party, asking the Secretary to certify a different candidate. They only claim that the Secretary cannot place Trump on the Republican presidential primary ballot because he does not meet constitutional requirements for office. *People ex rel. Hodges* is silent on this question. Additionally, *People ex rel. Hodges* considered election laws that predate the current Election Code, limiting its persuasiveness. *See* H.B. 92-1333, 1992 Gen. Assem., 2nd Reg. Sess. (Colo. 1992) (repealing and reenacting the Election Code).

III. Intervenor's First Amendment arguments are contrary to Supreme Court precedent.

Intervenor suggests that if the Secretary does not allow Respondent Trump to access the ballot, she will have infringed upon its First Amendment right to "political association." Intervenor's Mot. to Dismiss, 3-4, 12-13. As previously discussed, the Court does not have jurisdiction in this § 1-1-113 proceeding to consider Intervenor's constitutional challenge to the

Election Code. But Intervenor's argument fails for another reason: the U.S. Supreme Court has already rejected it.

a. *Timmons* forecloses Intervenor's First Amendment associational argument.

The U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), rejected a political party's claimed right to compel ineligible candidates to appear on state ballots. There, the New Party nominated a candidate for Minnesota State Representative, but its nominating petition was refused under state law because he had already filed as a candidate for another party. 520 U.S. at 354. The New Party then claimed, as the Republican Party claims here, that the state law violated "the party's associational rights under the First and Fourteenth Amendments." *Id.* at 355. The Court rejected that argument, explaining:

> The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes … That is, the New Party, and not someone else, has the right to select the New Party's "standard bearer." It does not follow, though, that a party is absolutely entitled to have its nominee *appear on the ballot* as that party's candidate.

Id. at 359 (emphasis added). Because ballot access laws may properly deem a candidate "ineligible for office," the fact that "a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Id.*

To determine whether a state election law violates a party's First Amendment associational rights, courts "weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden[.]" *Timmons*, 520 U.S. at 358 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)); *see also Nat'l Prohibition Party v. State*, 752 P.2d 80 (Colo. 1988) (holding that a political party's rights to access the ballot "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively"). In this context, the State's interests are "in protecting the integrity, fairness, and efficiency of [its] ballots and election processes,"

Timmons, 520 U.S. at 364, "in protecting the integrity of [its] political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections," *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality opinion) (collecting cases). "These state interests constitute the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot," *Utah Republican Party v. Cox*, 892 F.3d 1066, 1084 (10th Cir. 2018), which is infringed when constitutionally ineligible presidential candidates appear on the ballot. *See Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (holding that 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" of the President).

Moreover, state laws ensuring only eligible candidates are placed on ballots for state-run elections do not impermissibly interfere with political parties' associational rights. *Timmons* explained the differences between state laws that regulate access to ballots in state-run elections, which "simply precludes one party's candidate from appearing on the ballot, as that party's candidate," from laws that impermissibly interfere with parties' associational rights by prohibiting political speech and regulating parties' "internal affairs and structure." *See Timmons*, 520 U.S. at 360 (distinguishing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)).

Timmons flatly rejected Intervenor's First Amendment argument. Intervenor's "uncontroversial" right to select its candidates neither implicates nor overrides the foundational state interests served by state laws barring ineligible candidates from the ballot. *See Timmons*, 520 U.S. at 364; *Clements*, 457 U.S. at 965; *Utah Republican Party*, 892 at 1084; *Hassan*, 495 F. App'x at 948. If Trump is deemed to be ineligible, Intervenor's claimed interests must yield to

the overwhelming interests of the state and voting public, including Petitioners, not to have their votes diluted by the placement of an ineligible candidate on the primary ballot. Accepting Intervenor's argument would mean that "anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to clutter and confuse our electoral ballot. Nothing in the First Amendment compels such an absurd result." *Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014).

b. Petitioners' Requested Relief Will Not Prevent Intervenor From Endorsing A Constitutionally Ineligible Presidential Candidate.

The outcome of this litigation will have no impact on Intervenor's ability to engage in the First Amendment association it seeks to protect: its endorsement of Trump. In rejecting the same argument that Intervenor makes here, the Court in *Timmons* noted that even if a candidate is ineligible, "[w]hether the party still wants to endorse [that] candidate . . . is up to the party." 520 U.S. at 360. Similarly, Petitioners here seek only to enjoin *the Secretary* from taking any action that would allow Trump ballot access if this Court finds that Trump is disqualified under the Fourteenth Amendment. *See* Pet., ¶¶ 433-52. Petitioners do not seek to prevent *Intervenor* from *submitting* Trump as a "bona fide candidate" to the Secretary under § 1-4-1204. Whether Intervenor nevertheless submits Trump as its "bona fide candidate" despite his constitutional ineligibility is its own decision.[1]

IV. Intervenor's Other Assertions are Irrelevant, Premature, and Meritless.

Intervenor suggests that the merits of Trump's ineligibility—disqualification under the Fourteenth Amendment—are relevant to its assertion of its First Amendment rights. Intervenor's

[1] Intervenor has already announced that if "a leftwing [sic] activist judge lets [Petitioners] win by abusing a court of law," it "will push to have all of our national delegates selected through our caucus and assembly process and bypass any rigged presidential primary election entirely." Colorado GOP, *Plan to Stop Lawsuit Against Trump* (Sept. 7, 2023), https://perma.cc/3NX3-UA5U. Whether such actions are otherwise lawful, the Secretary's exclusion of Trump from the ballot itself has no relevance to Intervenor's freedom to do so.

Mot. to Dismiss, 10-11. They are not. The *Anderson-Burdick* test evaluates only the First Amendment interest allegedly infringed by an election law and the state's interest in that law's application, not the merits of the underlying claim that would trigger the law at issue. *Timmons*, 520 U.S. at 358; *see also Lindsay*, 750 F.3d at 1063 (applying *Anderson-Burdick* to determine that underage candidate's ineligibility under state law did not violate her First Amendment rights). Thus, Intervenor's assertions regarding how Section 3 of the Fourteenth Amendment is executed, its applicability to different federal officers, and what it considers to be novel questions are irrelevant.

To the extent that Intervenor seeks to litigate the underlying merits of Petitioners' claim, Petitioners will respond to such arguments in accordance with the briefing schedule ordered by the Court.

Conclusion

Petitioners have a strong claim for relief. In restating arguments it and Respondent Trump have made elsewhere, Intervenor has not established otherwise. Intervenor's Motion to Dismiss should be denied.

Date: September 29, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I served this document on September 29, 2023, by Colorado Courts E-filing and/or via electronic mail upon all parties and their counsel:

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