DATE FILED: September 29, 2023 6:01 PM

DISTRICT COURT, DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

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.

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Case No. 2023CV32577

Courtroom: 209

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SECRETARY OF STATE'S OMNIBUS RESPONSE TO MOTIONS TO DISMISS

INTRODUCTION

As Colorado's chief state election official, the Secretary of State is responsible for certifying candidates to the presidential primary ballot. § 1-4-1204(1), C.R.S. But 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.

The Secretary therefore welcomes the Court's involvement and direction on this important matter raising the question of whether former President Donald J. Trump's conduct as alleged, and presumably to be proven, by Petitioners renders him disqualified to appear on Colorado's presidential primary ballot. In light of the prima facie showing presented in the Verified Petition and the evidence cited there, the Secretary believes that Mr. Trump incited the insurrection. The Secretary therefore requests that the Court determine, as a threshold matter, whether Section 3 of the 14th Amendment applies, through the Colorado Election Code, for ballot access purposes. In light of the Secretary's position and the imminence of the Secretary's coming action on Mr. Trump's submission seeking access to the presidential primary ballot, this matter is ripe for the Court's adjudication.

Consistent with the Secretary of State's practice in other challenges to a candidate's qualifications to appear on the ballot, the Secretary does not anticipate presenting any affirmative evidence in this case. *See, e.g.*, *Elmore v. Griswold*,

2022CV32668 (Denver Dist. Ct. 2022) (challenge to candidate's residency). But as Colorado's chief state election official and the frequent defender of the Election Code, the Secretary has significant institutional interests in the uniform application of the Election Code and § 1-1-113. Both are implicated by certain arguments advanced in the motions to dismiss filed here. The Secretary therefore offers the following response to some of the arguments raised in those motions.

ARGUMENT

The Verified Petition in this case brings two claims: (1) injunctive relief under § 1-4-1204 and § 1-1-113 and (2) declaratory relief under § 13-51-105 and C.R.C.P. 57(a). The Secretary agrees that the claims here are properly presented in a section 1-1-113 action. Further, because this is a proper section 1-1-113 action, the parties' claims for declaratory relief are unnecessary and may not be heard in this proceeding, nor may Mr. Trump's special motion to dismiss under Colorado's anti-SLAPP statute be considered.[1]

I. This is a proper § 1-1-113 action.

Petitioners' first cause of action invokes both § 1-4-1204(4) and § 1-1-113. Section 1-4-1204 was added to the Election Code in 2016 as part of Proposition 107 and has not been litigated in any prior cases. Section 1-4-1204(4) expressly

[1] In light of the Secretary's limited involvement in this lawsuit, this brief does not respond to every argument raised in each of the four motions to dismiss.

incorporates section 1-1-113 for challenges "to the listing of any candidate on the presidential primary ballot." § 1-4-1204(4). Such challenges "must be . . . filed with the district court in accordance with section 1-1-113(1)." § 1-4-1204(4).

Section 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." § 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 this 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]." § 1-1-113(1) (emphasis added). Section 1-1-113 proceedings are narrow and might not resolve all claims and counterclaims between parties. Rather, "the 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*, 2017 CO 85, ¶ 17.

Petitioners contend that the Secretary's impending action to certify Mr. Trump to the ballot will constitute a breach of the Election Code. *See* Verified Pet. ¶¶ 446-447. As stated above, the Election Code does not explicitly state that the Secretary must, or may, determine whether a candidate has violated Section 3 of

the Fourteenth Amendment. But the Secretary has sworn a solemn oath to uphold the U.S. Constitution and to effectuate its requirements. The Secretary agrees that a constitutionally ineligible candidate should not be included on a ballot. *See* § 1-4-1201 ("In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law[.]"); § 1-4-1203(2)(a) ("Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate entitled to participate* in the presidential primary election is entitled to participate in the Colorado presidential primary election." (emphasis added)). Just as a thirty-year-old should not be listed on a ballot for president because that would violate Section 1 of Article II, neither should a candidate who is determined to have violated Section 3 of the Fourteenth Amendment if that section applies to the candidate's request for ballot access.

As Proposition 107 makes clear, election officers who administer the presidential primary "have the same powers and shall perform the same duties for presidential primary elections as they provide by law for other" elections. § 1-4-1203(3). Those preexisting administrative powers, so far as candidates for state offices are concerned, include screening candidates for disqualification based on a failure to meet the 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"). These administrative powers for races involving state candidates focus on screening to ensure that a candidate meets the affirmative state-law qualifications for office of citizenship, voter registration, and residency. *See id.* (for state offices, "[t]he designated election official shall not certify the name of any designee or candidate who fails to swear or affirm under oath that he or she will fully meet the qualifications for office if elected; or who is unable to provide proof that he or she meets any requirements of the office relating to registration, residence, or property ownership").

The Secretary therefore agrees that Petitioners have stated a claim under section 1-1-113 arising from their premise that certifying Mr. Trump to the ballot, if they prove he is disqualified under Section 3 of the Fourteenth Amendment, may be contrary to Colorado's Election Code and may constitute a breach of her duties. The case therefore may, and should, proceed exclusively under section 1-1-113.

Mr. Trump argues that because Petitioners' claim is premised on the federal constitution, it cannot be heard in a section 1-1-113 proceeding. This overstates precedent. It is undoubtedly true that a petitioner cannot include a claim in a section 1-1-113 proceeding that the election official's conduct violates his federal constitutional rights. *See Frazier*, 2017 CO 85, ¶ 17 (holding that "section 1983 claims cannot be adjudicated through section 1-1-113 proceedings"). Nor can a

petitioner seek to invalidate a state law as unconstitutional in a section 1-1-113 proceeding. *See Kuhn v. Williams*, 2018 CO 30M, ¶ 55 ("[T]o the extent the Lamborn Campaign challenges the constitutionality of the circulator residency requirement in [the Election Code], this court lacks jurisdiction to address such arguments in a section 1-1-113 proceeding."). This is because "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*, 2017 CO 85, ¶ 10.

But Petitioners' claim here is consistent with *Frazier* and *Kuhn*. They do not seek to invalidate a state law under the federal constitution. Nor do they allege that certifying Mr. Trump to the ballot would violate their federal rights, independent of any state law. Instead, Petitioners argue that certifying Mr. Trump to the primary ballot would itself violate Colorado's Election Code because he is disqualified from holding the office of President. Colorado courts have "the power to resolve issues regarding candidate eligibility." *Hanlen*, 2014 CO 24, ¶ 44. Those qualifications are usually imposed by state law, while in this case, the grounds for disqualification are imposed by the federal constitution. But *Frazier* does not close the courthouse doors to such a claim. Just as petitioners can bring Election Code challenges to other qualifications of a candidate to appear on the ballot—such as whether the candidate gathered a sufficient number of valid signatures to petition onto the ballot (*Griswold v. Ferrigno Warren*, 2020 CO 34), or satisfies any residency requirements

(*Figueroa v. Speers*, 2015 CO 12)—Petitioners may challenge whether Mr. Trump is "a qualified candidate entitled to participate" in Colorado's presidential primary election even if it requires determination of an underlying federal constitutional question. § 1-4-1203(2)(a). A contrary rule would bar courts from considering whether a candidate who is under 35 years old or is not a natural born citizen may be certified to the presidential primary ballot. *See* U.S. Const. art. II, § 1. Section 1-1-113 is not so restrictive.

Finally, Mr. Trump argues that he is not a proper defendant in a section 1-1-113 action. Trump Mot. at 7. This is technically true, as section 1-1-113 only contemplates actions against officials charged with responsibilities under the Election Code. But as a practical matter, candidates who will be impacted by a ruling in a section 1-1-113 action routinely seek and are granted intervention and are permitted to fully participate as parties. *See, e.g.*, *Laird v. Griswold*, 2022CV31099 (Denver Dist. Ct.) (granting intervention to candidate in case challenging whether he submitted sufficient signatures to be placed on the ballot); *Schneider v. Griswold*, 2020CV31415 (Denver Dist. Ct.) (granting intervention to candidate in case challenging candidate's nomination for office at party assembly). It does not appear that Mr. Trump is requesting to be dismissed as a party and have the case proceed without him. In any event, his presence as a party in no way inhibits this action from proceeding under section 1-1-113.

II. Because this is a section 1-1-113 action, all parties' claims for declaratory relief are barred.

Both Petitioners and the Colorado Republican Party as intervenor have asserted claims for declaratory judgment. These claims should not be considered in a section 1-1-113 summary proceeding.[2]

Frazier is controlling. 2017 CO 85. The Court there held that petitioners could not join a section 1983 claim with a section 1-1-113 claim. Three primary reasons supported *Frazier*'s holding. First, "the language of section 1-1-113 limits the claims that can be brought to those alleging a breach or neglect of duty or other wrongful act under the Colorado Election Code." *Frazier*, 2017 CO 85, ¶ 12. A section 1983 claim, by contrast, alleges violation of the plaintiff's federal rights, not noncompliance with Colorado's Election Code. Second, the remedy for a section 1-1-113 claim is, "upon a finding of good cause, . . . an order requiring substantial compliance with the provisions of this code." § 1-1-113(1). That is neither the standard nor the remedy for a section 1983 claim. *See Frazier*, 2017 CO 85, ¶ 17. Finally, the procedural elements of a section 1-1-113 claim—including a highly

[2] The Secretary is not separately moving to dismiss any parties' claims, because she believes that this proceeding can and should proceed as a section 1-1-113 proceeding regardless of whether declaratory judgment relief is available at the end of the process. But because this issue is raised, directly or indirectly, in papers filed by the other parties, the Secretary offers the following analysis of the proper scope of section 1-1-113 proceedings and relief based on her role as Colorado's "chief state election official," §§ 1-1-107(1)(e) and 1-1.5-101(1)(h), who "supervise[s] the conduct of primary . . . elections in this state." § 1-1-107(1)(a).

expedited and discretionary appeal process and limitations on who may file a section 1-1-113 claim—are also incompatible with section 1983. *See id.* ¶ 18. "[G]iven the substantial inconsistencies between section 1983 and section 1-1-113 proceedings, section 1-1-113 does not provide an appropriate procedure for adjudicating section 1983 claims." *Id.*

These rationales all apply to the parties' declaratory judgment claims. Neither Petitioners' nor the Colorado Republican Party's declaratory judgment claims allege noncompliance with the Election Code, but rather seek a declaration concerning other rights and relations of the parties. Similarly, an order directing substantial compliance with the Election Code is not the remedy for a declaratory judgment claim. The remedy for such a claim is a declaration of "rights, status, and other legal relations." § 13-51-105.

Finally, joining the declaratory judgment claims to an expedited and summary section 1-1-113 proceeding is inconsistent with the Colorado Rules of Civil Procedure and would fail to afford parties their full procedural rights. A section 1-1-113 action is a "special statutory proceeding" to which the Rules of Civil Procedure do not apply "insofar as they are inconsistent or in conflict with the procedure and practice provided by" section 1-1-113. C.R.C.P. 81(a). But a declaratory judgment action is not a special statutory proceeding. A party defending a declaratory judgment action is entitled to conduct discovery, engage in motions practice, and

seek summary judgment, procedures that are typically unavailable in a section 1-1-113 action. *See* C.R.C.P. 57(g), (i), (m); *accord* Trump Mot. to Dismiss 7-9. And critically, the losing party in a declaratory judgment claim has a right to appeal the adverse judgment to the Colorado Court of Appeals. *See* C.A.R. 1(a)(1). A dissatisfied party in a section 1-1-113 action has just three days to file an appeal to the Colorado Supreme Court, and that Court may "decline[] to review the proceedings," in which case "the decision of the district court shall be final and not subject to further appellate review." § 1-1-113(3). Declaratory judgment claims, like section 1983 claims, thus cannot be litigated in a summary section 1-1-113 action.

III. An anti-SLAPP motion to dismiss is incompatible with section 1-1-113 actions.

Finally, Mr. Trump has filed a motion to dismiss under § 13-20-1101, commonly referred to as the anti-SLAPP (strategic lawsuits against public participation) statute. Such a motion is incompatible with a section 1-1-113 action.

A special motion to dismiss under the anti-SLAPP statute requires a plaintiff to establish a reasonable likelihood that the plaintiff will prevail based on the pleadings and supporting or opposing affidavits. §§ 13-20-1101(3)(a), (b). Such a motion seeks to save a defending party from the burdens of discovery (which is stayed pending resolution of the special motion to dismiss) and to ensure a prompt hearing on the merits of the motion (within 28 days of the filing of the motion). § 13-20-1101(5), (6). The statute thus "provides a mechanism to make an early

assessment about the merits of a lawsuit." *Anderson v. Senthilnathan*, 2023 COA 88, ¶ 9. But these concerns are inapplicable in section 1-1-113 actions, which are "summary proceeding[s] designed to quickly resolve challenges . . . prior to election day." *Frazier*, 2017 CO 85, ¶ 11. Upon information and belief, discovery has never been ordered by any trial court in such expedited proceedings involving candidates for state or federal office, and the merits hearings in section 1-1-113 actions are usually held before the statutory deadline for a hearing on a special motion to dismiss under the anti-SLAPP statute. In short, a section 1-1-113 proceeding is designed to provide a final merits determination more quickly than an anti-SLAPP motion to dismiss can be adjudicated.

Further, the appellate procedures applicable to an anti-SLAPP motion to dismiss are completely incompatible with a section 1-1-113 action. Consistent with the need for speedy resolution of election matters, section 1-1-113 provides an automatic right to a discretionary appeal straight to the Colorado Supreme Court, which must be brought within three days of the district court's final order. § 1-1-113(3). By contrast, "an order granting or denying a special motion to dismiss is appealable to the Colorado court of appeals." § 13-20-1101(7). If anti-SLAPP motions to dismiss are permitted in section 1-1-113 actions, the statutory purpose of providing fast and conclusive resolution of election disputes could be defeated by these appellate procedures. Significantly, an order granting ***or*** denying a special

motion to dismiss is immediately appealable. *See id.* Accordingly, any party seeking to delay a section 1-1-113 could simply file an anti-SLAPP motion to dismiss in a section 1-1-113 action and then appeal it even if it's denied, potentially mooting the underlying section 1-1-113 action itself while the appellate process plays out.

Because the two statutory schemes are incompatible, section 1-1-113 should prevail in election contests as the more specific statute. The anti-SLAPP statute applies generally to civil "causes of action." But "general legislation does not repeal conflicting special statutory . . . provisions unless the intent to do so is clear and unmistakable." *Colo. Civ. Rights Comm'n ex rel. Ramos v. Regents of Univ. of Colo.*, 759 P.2d 726, 733 (Colo. 1988) (quotations omitted); *see also State, Motor Vehicle Div. v. Dayhoff*, 609 P.2d 119, 121 (Colo. 1980) ("[W]here specific and general statutes conflict, the provisions of the specific statute prevail."); § 2-4-205 (similar). Section 1-1-113 is the more specific statute, as it provides 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." § 1-1-113(4). In light of this specific and narrow authorization for section 1-1-113 actions, its procedures should apply instead of the anti-SLAPP statutory procedures.

CONCLUSION

The Secretary respectfully contends that this matter should proceed solely as a § 1-1-113 action and requests the Court's direction in this important matter.

DATED: September 29, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, I served a true and complete copy of the foregoing **SECRETARY OF STATE'S OMNIBUS RESPONSE TO MOTIONS TO DISMISS,** upon all parties and their counsel by e-filing with the ICCES system maintained by the court.

/s/ Michael Kotlarczyk