

STATE OF WISCONSIN  
BEFORE THE ELECTIONS COMMISSION

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KIRK C. BANGSTAD  
727 Lorillard Ct,  
Madison, WI 53703

Complainant,

HAND DELIVERED

-vs-

Don M. Millis  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Robert F. Spindell Jr.  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Marge Bostelmann  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Ann S. Jacobs  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Mark L. Thomsen  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Carrie Riepl  
201 W Washington Ave Second Floor,  
Madison, WI 53703

Respondents,

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## **COMPLAINT**

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The Complainant Kirk C. Bangstad alleges as follows;

### **INTRODUCTION**

1. Complainant Kirk C. Bangstad is a registered Wisconsin voter and qualifies as an elector within the meaning of Chapter 5 and 6 of the Wisconsin Statutes. Complainant Bangstad resides in the city of Madison, Dane County.
2. Respondents Don M. Millis, Robert F. Spindell Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, Carrie Riepl are the current Wisconsin Elections Commission Commissioners and are responsible for enforcing election laws in Wisconsin as well as oversight and policy making for the commission.

### **JURISDICTION**

3. This case is brought against Respondents under Wis. Stat. § 5.06 which provides that:  
Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to

correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law.

### THE COMPLAINT

4. Despite the President being the highest-ranking government official in the United States and arguably the most important head of state in the world, there are only four Constitutional requirements that a candidate must meet to serve as President of the United States of America. They must be a natural born citizen, have lived in the United States for at least 14 years, be over the age of 35 and have never engaged in an insurrection after having previously taken an oath of office. Donald J. Trump fails to meet those requirements and may not serve as President of the United States of America.
5. Section 3 of the Fourteenth Amendment to the Constitution of the United States Explains.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken 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, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3;

6. Adopted in the wake of the Civil War, Section 3 of the Fourteenth Amendment imposes a qualification for holding public office in the United States. It bars from office any person who swore an “oath ... to support the Constitution of the United States” as a federal or state officer and then “engaged in insurrection or rebellion against the same, or [gave] aid

or comfort to the enemies thereof,” unless Congress “remove[s] such disability” by a two-thirds vote. U.S. Const. amend XIV, § 3.

7. Section 3 is a “measure of self-defense” designed to preserve and protect American democracy. Cong. Globe, 39th Cong., 1st Sess. 2918 (May 31, 1866) (statement of Sen. Willey). It embodies the Fourteenth Amendment’s framers’ recognition of the grave threat that insurrection against the Constitution poses to the existence and integrity of our Union. “The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.” *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), appeal dismissed sub nom. *Worthy v. Comm’rs*, 76 U.S. 611 (1869).
8. Like other constitutional qualifications based on age, citizenship, and residency, Section 3 is enforceable through civil suits in state court to challenge a candidate’s eligibility to hold public office, including the Office of the President. Neither Section 3’s text nor precedent require a criminal conviction for “insurrection” before a candidate is disqualified.
9. Donald Trump disqualified himself and forfeited his right to serve as President of the United States of America by choosing power over the oath he took as an officer of the United States to uphold the Constitution of the United States and engaging in an insurrection against the Country he swore to protect.
10. Donald Trump’s insurrection against the United States of America occurred on multiple fronts and spanned several months. In fact, Trump and his co-conspirators started preparing to overturn the election results as early as the summer of 2020, with Donald

Trump and his seditious accomplices sowing the seeds of discord among his supporters. They took to TV cable news and social media to begin questioning the legitimacy of America's elections before a single ballot had even been cast. Trump knew he was going to lose the 2020 elections months before November 3, 2020, and began plotting to remain in power by any means necessary.

11. After losing the election on November 3, 2020, Donald Trump put his seditious scheme into action. It began with a media blitz, with Trump and his top advisors spreading lies about voting machines, mail in ballots, and falsely declaring the election was rigged. Trump further demanded that elected official across the country, find him ballots and overturn election results.
12. Unfortunately, Trump and his fellow insurrectionists were not just telling lies about the election and demanding that state election officials break their oaths of office. Trump was also engaged in a conspiracy to submit false and fraudulent slates of electors to the President of the Senate (Vice President Pence), the Senate, and the House of Representatives to the Joint Session of Congress on January 6, 2021, in order to overturn the election.
13. Wisconsin was front and center of Trump's fraudulent elector's scheme. Ten fraudulent electors from Wisconsin met at the State Capitol on December 14, 2020, where they knowingly prepared criminally false documents which asserted that they were duly and lawfully chosen electors from Wisconsin whose votes were entitled to be tallied in the Joint Session on January 6, 2021. The fraudulent electors then compounded their illegal conduct by sending their forged electoral votes to Pence in his capacity as President of

the Senate, without any reservation or condition stating the truth: that the fraudulent electors were not in fact duly and lawfully chosen pursuant to Wisconsin law.

14. The conspiracy to put forth fraudulent electors was devised by Trump's inner circle and carried out by Trump's devoted supporters on Trump's orders. The ultimate goal of the fraudulent elector scheme was to have Mike Pence unilaterally reject the legitimate electoral votes of Wisconsin and six other states for the Biden-Harris ticket and instead count the illegal, fraudulent electoral votes criminally submitted by the fake electors.
15. Donald Trump is currently under Federal indictment for his role in the fraudulent electors plot.
16. Fortunately for the rule of law and the survival of the Republic, Vice President Pence refused to buckle under the relentless pressure applied by Trump and his fellow insurrectionists, and he counted the electoral votes according to law, exactly as it had been done for every other presidential election in the nation's history.
17. On January 6, 2021, while Trump's co-conspirators were trying to defraud the American electorate inside the house chambers, Trump was outside at his "stop the steal" rally with his followers who had been enraged by the lies spread by Trump and his fellow insurrectionists over the previous months. After the rally one of the most shameful scenes in the history of the United States played out on Donald Trump's orders.
18. Until the January 6, 2021, the peaceful transition of presidential power had served as a hallmark of America's great democracy. For 231 years, even amidst the Civil War, no candidate for president had ever attempted to remain in power by ordering his followers to violently take control of the United States government. Trump ended that tradition.

19. Just shy of four years after taking an oath to “preserve, protect and defend” the Constitution as President of the United States, Trump tried to overthrow the results of the 2020 election, leading to a violent insurrection at the United States Capitol to stop the lawful transfer of power to his successor. By instigating this unprecedented assault on the American constitutional order, Trump violated his oath and disqualified himself under the Fourteenth Amendment from holding public office, including the Office of the President.
20. The core facts demonstrating Trump’s disqualification are a matter of public record. He dishonestly and unlawfully tried to overturn the 2020 election results through multiple avenues. When that failed, he summoned tens of thousands of enraged supporters for a protest in Washington, D.C. on January 6, 2021—the date that Congress and the Vice President would meet to certify the results of the 2020 presidential election under the Twelfth Amendment to the Constitution and the Electoral Count Act, 3 U.S.C. § 15.
21. Among those Trump mobilized for the January 6<sup>th</sup> insurrection were violent extremists and now convicted seditionists whom he famously instructed to “stand back and stand by.” Others were supporters Trump had inflamed for months with the lie that the 2020 election would be “rigged” and was being “stolen” from them. Once his supporters were assembled at the White House Ellipse, President Trump repeated that incendiary lie and directed them to march on the Capitol, knowing many were armed and prepared for violence. He urged them to “fight like hell” to “Stop the Steal”—i.e., stop Vice President Mike Pence and Congress from lawfully certifying the Electoral College votes designating Joseph R. Biden, Jr. the 46th President of the United States.
22. Before January 6th, Trump was told repeatedly by lawyers and top officials that Pence

could not lawfully overturn the election results. And Pence rebuked Trump's coercive demands to do so. Undeterred, Trump continued to exert public pressure on Pence on January 6th. He put his own Vice President in the crosshairs of what became a violent mob, stressing that "if Mike Pence does the right thing, we win the election."

23. President Trump's mob then went on to violently storm and seize the United States Capitol, a feat even the Confederacy never achieved during the Civil War. The mob forced Vice President Pence and Members of Congress to flee for their lives and halt their constitutional duties. Their attack disrupted the peaceful transfer of presidential power for the first time in American history.
24. By 1:21 p.m., President Trump knew the Capitol was under attack, and Vice President Pence had announced publicly he would not overturn the election results. While watching the assault unfold on television, Trump poured fuel on the fire. He sent a tweet at 2:24 p.m. targeting Pence for lacking the "courage" to overturn the election. The tweet caused the mob to surge and chant "hang Mike Pence!" It predictably exacerbated the violence that Trump knew was underway, something Trump knew full well would happen in response to the tweet.
25. Trump failed to take any action to stop the attack for nearly three hours as his mob ransacked the United States Capitol, brutally assaulted police officers, and called for the murder of elected officials. He refused to deploy a federal response or call off his mob despite his affirmative constitutional duty to "take Care that the Laws be faithfully executed" and his role as Commander-in-Chief of the military, U.S. Const. art. II, §§ 2, 3, including the D.C. National Guard.



26. Rather than defending the Capitol, President Trump exploited the violence and leveraged it to pressure Members of Congress to further delay the election certification.
27. It was only after three hours of barbaric violence broadcast on television and repeated pleas from his senior staff and family that Trump posted a video at 4:17 p.m. instructing his mob to “go home,” adding that he “love[d]” them and understood their “pain” over an “election that was stolen from us.” Many in the mob did not leave the Capitol grounds until Trump told them to. And Trump called off the mob only after it seemed clear they would not achieve his goal of stopping Congress’s certification of the election results. Later that night, the President of the United States justified this deadly attack on the seat of his own government, tweeting at 6:01 p.m.: “These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots. ... Remember this day forever!”
28. President Trump was the mob’s leader, and the mob was his weapon. The mob traveled from throughout the country to Washington because the President summoned them there. He instructed the mob to march on the Capitol and they complied. Many in the mob left the Capitol grounds only when, after hours of violence against police officers and interference with Congress’s constitutionally-mandated duties, Trump belatedly told them to leave. Through their flags, banners, clothing, and chants, the mob made clear they were there for Trump.
29. President Trump’s weaponized mob carried out the most significant breach of the Capitol building since the War of 1812. Their attack led to deaths, injuries to more than one hundred law enforcement officers, and more than \$2.7 billion in property damage and

losses. A Capitol Police officer whom the mob had attacked died the next day, and four other officers died by suicide in the following months.

30. The January 6th attack was the culmination of a multi-part scheme to use lies, coercion, intimidation, and violence against government officials to overturn the 2020 election results. The threat was broad. It was directed at Republicans and Democrats alike.

Targets included the Vice President of the United States, federal and state legislators, election officials, and the Supreme Court. The goal was to unlawfully keep Trump in office, invalidating the votes of more than 81 million Americans who cast ballots for Biden in the 2020 election.

31. On January 20, 2017, Trump took the Presidential Oath of Office, swearing to “faithfully execute the Office of President of the United States,” and “to the best of [his] Ability, preserve, protect and defend the Constitution of the United States.” U.S. Const. art. II § 1, cl. 8

32. Taking this oath made Trump subject to disqualification because the President of the United States is an “officer of the United States” within the meaning of Section 3 of the Fourteenth Amendment to the United States Constitution.

33. The conclusion that the President is an officer of the United States follows from the Constitution’s plain text. The Constitution refers to the President holding an “Office” 25 times, including in the Oath of Office Clause. See U.S. Const. art. I, § 3, art. II, §§ 1, 4, amends. XII, XXII, XV. Because that “Office” is within the federal executive branch, it is necessarily an office “of the United States.” And one who holds an “office” is an “officer.”

34. Further, Trump himself has conceded in court filings that “[t]he President of the United States” is an “officer ... of the United States.” President Donald J. Trump’s Mem. of Law. in Opp. to Mot. to Remand, *People v. Trump*, 1:23-cv-3773-AKH, ECF No. 34, at 2–10 (S.D.N.Y., filed June 15, 2023); see also *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503 (D.C. Cir. 2020).
35. That an event constitutes an “insurrection” can be proven by widespread governmental recognition alone. A Civil War era jury charge by Supreme Court Justice Stephen Field, sitting as a circuit justice, explained that the “existence of the [Confederate] rebellion [was] a matter of public notoriety, and like matters of general and public concern to the whole country, may be taken notice of by judges and juries.” *United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863). Justice Field explained that “public documents” such as “proclamations of the president” and “acts of congress” were “sufficient proof” of the Confederate rebellion’s existence for purposes of charges under a statute criminalizing participation in “rebellion or insurrection.” *Id.*
36. The existence of the January 6th insurrection is similarly a “matter of public notoriety” supported by bipartisan acts of Congress, congressional reports, presidential statements, judicial decisions, and other “public documents.”
37. All three branches of the federal government have referred to the January 6th attack as an “insurrection” and the participants as “insurrectionists,” including bipartisan majorities of both Houses of Congress during Trump’s impeachment and in legislation honoring police officers who defended the Capitol.
38. The January 6th Select Committee—a bipartisan congressional committee established to

“investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex ... and ... interference with the peaceful transfer of power,” H. Res. 503, 117th Cong. § 3(1)—concluded in its final report that the January 6th attack was an insurrection within the meaning of Section 3 of the Fourteenth Amendment.

39. Although Section 3 disqualification does not require a criminal conviction or impeachment for any offense, a federal grand jury has indicted Trump on four criminal counts relating to his efforts to subvert the 2020 election results: (1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371; (2) conspiracy to obstruct an official proceeding in violation of 18 U.S.C. § 1512(k); (3) obstruction of, and attempt to obstruct, an official proceeding in violation of 18 U.S.C. § 1512(c)(2), 2; and (4) conspiracy against citizens’ constitutional right to vote and to have one’s vote counted in violation of 18 U.S.C. § 241, a statute originally codified after the Civil War to counteract political violence against newly enfranchised Black citizens, *see* First Ku Klux Klan Act, 16 Stat. 140 (May 31, 1870).
40. Separately, a Georgia grand jury has indicted Trump on 13 criminal charges relating to a sweeping “conspiracy to unlawfully change the outcome of the [2020] election in favor of Trump” through false statements, forgery, solicitation of public officers to violate their oaths to the Constitution, and other state felonies.
41. Finally, The Colorado Supreme Court ruled on December 19, 2023, in *Anderson v. Griswold* that Donald J. Trump previously took an oath as an officer of the United States, and then participated in an insurrection against the United States disqualifying him to

serve as President of the United States and appear on the Colorado Primary ballot under Section 3 of the Fourteenth Amendment to the United States Constitution. *See Generally* Exhibit 1, Colorado Supreme Court Decision in *Anderson v. Griswold*.

42. A bipartisan majority of the House of Representatives also impeached Trump for “incitement of insurrection,” and a bipartisan majority of the Senate voted to convict him, with several Senators voting against conviction (and the final vote falling below the requisite two thirds supermajority) based “on the theory that the Senate lacked jurisdiction to try a former president.”
43. Since January 6, 2021, Trump has publicly affirmed his disloyalty to the Constitution and his allegiance to the insurrectionists who seized the Capitol for him. He has called the insurrectionists “patriots,”<sup>1</sup> vowed to give many “full pardons with an apology” if he becomes President again,<sup>2</sup> financially supported them,<sup>3</sup> and hugged on camera a convicted January 6th defendant who has said that Pence and Members of Congress who voted to certify Biden’s victory should be executed for treason.<sup>4</sup>
44. Trump also continues to propagate the lie he used to summon the mob to Washington: that the 2020 election was stolen. In December 2022, he disturbingly called for the “termination of . . . the Constitution” to correct “Massive Fraud” in the election.<sup>5</sup> And he

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<sup>1</sup> David Cohen, Trump on Jan. 6 insurrection: ‘These were great people’, Politico, July 11, 2021, <https://www.politico.com/news/2021/07/11/trump-jan-6-insurrection-these-were-great-people499165>.

<sup>2</sup> Mariana Alfaro, *Trump vows pardons, government apology to Capitol rioters if elected*, Washington Post, Sept. 1, 2022, <https://www.washingtonpost.com/nationalsecurity/2022/09/01/trump-jan-6-rioters-pardon/>.

<sup>3</sup> *Id.*

<sup>4</sup> Ryan J. Reilly and Olympia Sommer, *Donald Trump embraces Jan. 6 defendant who wants Mike Pence executed*, NBC News, Apr. 28, 2023, <https://www.nbcnews.com/politics/donaldtrump/donald-trump-embraces-jan-6-defendant-wants-pence-executed-rcna81958>.

<sup>5</sup> Kristen Holmes, *Trump calls for the termination of the Constitution in Truth Social post*, CNN, Dec. 4, 2022, <https://www.cnn.com/2022/12/03/politics/trump-constitution-truthsocial/index.html>.

continues to fan the flames of political violence among his supporters against judges, prosecutors, and other government officials.<sup>6</sup> He is precisely the threat to American democracy the Fourteenth Amendment’s framers had in mind when they adopted Section 3’s prohibition on constitutional oath-breakers holding office.

45. Trump swore an oath to “preserve, protect and defend” the Constitution upon assuming the Office of the President on January 20, 2017, and then engaged in insurrection against the Constitution on and around January 6, 2021, he is disqualified under Section 3 of the Fourteenth Amendment from “hold[ing] any office ... under the United States,” including the Office of the President.
46. Despite his constitutional disqualification, Trump is presently a “candidate” under Wisconsin and federal law for the 2024 Republican presidential primary election.
47. The presidential preference primary process begins on the second Tuesday in December before a presidential election year. By 5pm on that date “the state chairperson of each recognized political party listed on the official ballot at the last gubernatorial election whose candidate for governor received at least 10 percent of the total votes cast for that office may certify to the commission that the party will participate in the presidential preference primary” under Wis Stat. § 8.12(1)(a).
48. On January 2, 2024, a committee will be convened at the capitol from each party certified under Wis Stat. § 8.12(1)(a) consisting of, various elected officials and party leaders who select which candidates will appear on the presidential preference primary ballots. “The

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<sup>6</sup> See, e.g., Eric Garcia, *Trump attacks judge’s family and calls Alvin Bragg a ‘criminal’ at Mara-Lago despite court warning*, The Independent, Apr. 6, 2023, <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-alvin-bragg-wifespeech-b2315221.html>.

committee shall submit to the commission all candidates whose candidacy is generally advocated or recognized in the national news media throughout the United States” as well as any other candidates the committee believes would be appropriate under Wis Stat. § 8.12(1)(b).

49. Once an individual is selected to appear on a presidential preference primary ballot, they then have the opportunity to affirmatively opt out of participating in the Presidential Primary, but absent their affirmative decision to opt out, they will appear on the ballot under Wis Stat. § 8.12(1)(d).

50. As Donald J. Trump is a candidate whose candidacy is “generally advocated or recognized in the national news media throughout the United States his name will be provided to the Wisconsin Elections Commission for placement on the Republican presidential preference primary ballot.

51. Wis Stat. 505(1) explains that “The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing”

52. Section 3 of the Fourteenth Amendment to the United States Constitution is an election law as it speaks to the qualifications of individuals to hold office.

53. Similarly, as governmental officials of the State of Wisconsin, the Respondents have an obligation to support the Constitution of the United States.

54. As such, the Respondents have a duty to the Constitution of the United States and the Laws of Wisconsin to deny Trump access to Wisconsin ballots during the 2024 Republican presidential preference primary.

55. The Complainant believes the Respondents intend to illegally and unconstitutionally allow Donald Trump ballot access for the 2024 Republican presidential preference primary.

56. Wis Stat. § 8.30(1)(c) provides the Respondents with the authority to refuse ineligible candidates ballot access.

### **REQUEST FOR RELIEF**

WHEREFORE, the Complainant requests the following relief:

1. That Respondents Don M. Millis, Robert F. Spindell Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, Carrie Riepl are the current Wisconsin Elections Commission Commissioners find that Donald J. Trump is disqualified from serving as President of the United States of America under Section 3 of the Fourteenth Amendment to the United States Constitution.
2. That Respondents Don M. Millis, Robert F. Spindell Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, Carrie Riepl are the current Wisconsin Elections Commission Commissioners refuse Donald J. Trump access to the 2024 Republican presidential preference primary ballot.



**CERTIFICATION**

**I, Kirk C. Bangstad, being first duly sworn upon oath, state that I personally read the above complaint and that the above allegations are true and correct based on my personal knowledge and, as to those allegations stated on information and belief, I believe them to be true.**

Signature   
State of Wisconsin )

) ss

County of Dane )

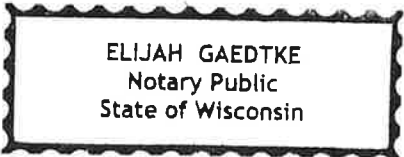
Signed and sworn to before me this 28 day of December, 2023.

Notary Public or Person Authorized  
to Administer Oaths



My commission expires  
Or, is permanent.

**My Commission Expires  
April 18, 2026**



## Exhibit 1

Colorado Supreme Court Decision from *Anderson v. Griswold*

Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Judicial Branch's homepage at <http://www.courts.state.co.us>. Opinions are also posted on the Colorado Bar Association's homepage at <http://www.cobar.org>.

ADVANCE SHEET HEADNOTE  
December 19, 2023

2023 CO 63

**No. 23SA300, *Anderson v. Griswold* – Election Law – Fourteenth Amendment – First Amendment – Political Questions – Hearsay.**

In this appeal from a district court proceeding under the Colorado Election Code, the supreme court considers whether former President Donald J. Trump may appear on the Colorado Republican presidential primary ballot in 2024. A majority of the court holds that President Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the United States Constitution. Because he is disqualified, it would be a wrongful act under the Election Code for the Colorado Secretary of State to list him as a candidate on the presidential primary ballot. The court stays its ruling until January 4, 2024, subject to any further appellate proceedings.

**The Supreme Court of the State of Colorado**  
2 East 14th Avenue • Denver, Colorado 80203

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**2023 CO 63**

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**Supreme Court Case No. 23SA300**  
*Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)*  
District Court, City and County of Denver, Case No. 23CV32577  
Honorable Sarah B. Wallace, Judge

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**Petitioners-Appellants/Cross-Appellees:**

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi  
Wright, and Christopher Castilian,

v.

**Respondent-Appellee:**

Jena Griswold, in her official capacity as Colorado Secretary of State,

**and**

**Intervenor-Appellee:**

Colorado Republican State Central Committee, an unincorporated association,

**Intervenor-Appellee/Cross-Appellant:**

Donald J. Trump.

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**Order Affirmed in Part and Reversed in Part**

*en banc*

December 19, 2023

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**PER CURIAM.**  
**CHIEF JUSTICE BOATRIGHT** dissented.  
**JUSTICE SAMOUR** dissented.  
**JUSTICE BERKENKOTTER** dissented.



PER CURIAM.<sup>1</sup>

¶1 More than three months ago, a group of Colorado electors eligible to vote in the Republican presidential primary – both registered Republican and unaffiliated voters (“the Electors”) – filed a lengthy petition in the District Court for the City and County of Denver (“Denver District Court” or “the district court”), asking the court to rule that former President Donald J. Trump (“President Trump”) may not appear on the Colorado Republican presidential primary ballot.

¶2 Invoking provisions of Colorado’s Uniform Election Code of 1992, §§ 1-1-101 to 1-13-804, C.R.S. (2023) (the “Election Code”), the Electors requested that the district court prohibit Jena Griswold, in her official capacity as Colorado’s Secretary of State (“the Secretary”), from placing President Trump’s name on the presidential primary ballot. They claimed that Section Three of the Fourteenth Amendment to the U.S. Constitution (“Section Three”) disqualified President Trump from seeking the presidency. More specifically, they asserted that he was ineligible under Section Three because he engaged in insurrection on January 6, 2021, after swearing an oath as President to support the U.S. Constitution.

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<sup>1</sup> Consistent with past practice in election-related cases with accelerated timelines, we issue this opinion per curiam. *E.g.*, *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478; *In re Colo. Gen. Assemb.*, 332 P.3d 108 (Colo. 2011); *In re Reapportionment of Colo. Gen. Assemb.*, 647 P.2d 191 (Colo. 1982).

¶3 After permitting President Trump and the Colorado Republican State Central Committee (“CRSCC”; collectively, “Intervenors”) to intervene in the action below, the district court conducted a five-day trial. The court found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three. *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). But, the district court concluded, Section Three does not apply to the President. *Id.* at ¶ 313. Therefore, the court denied the petition to keep President Trump off the presidential primary ballot. *Id.* at Part VI. Conclusion.

¶4 The Electors and President Trump sought this court’s review of various rulings by the district court. We affirm in part and reverse in part. We hold as follows:

- The Election Code allows the Electors to challenge President Trump’s status as a qualified candidate based on Section Three. Indeed, the Election Code provides the Electors their only viable means of litigating whether President Trump is disqualified from holding office under Section Three.
- Congress does not need to pass implementing legislation for Section Three’s disqualification provision to attach, and Section Three is, in that sense, self-executing.
- Judicial review of President Trump’s eligibility for office under Section Three is not precluded by the political question doctrine.

- Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error.
- The district court did not abuse its discretion in admitting portions of Congress’s January 6 Report into evidence at trial.
- The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an “insurrection.”
- The district court did not err in concluding that President Trump “engaged in” that insurrection through his personal actions.
- President Trump’s speech inciting the crowd that breached the U.S. Capitol on January 6, 2021, was not protected by the First Amendment.

¶5 The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot.

¶6 We do not reach these conclusions lightly. We are mindful of the magnitude and weight of the questions now before us. We are likewise mindful of our solemn duty to apply the law, without fear or favor, and without being swayed by public reaction to the decisions that the law mandates we reach.

¶7 We are also cognizant that we travel in uncharted territory, and that this case presents several issues of first impression. But for our resolution of the Electors’ challenge under the Election Code, the Secretary would be required to include President Trump’s name on the 2024 presidential primary ballot.

Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court.

### **I. Background**

¶8 On November 8, 2016, President Trump was elected as the forty-fifth President of the United States. He served in that role for four years.

¶9 On November 7, 2020, Joseph R. Biden, Jr., was elected as the forty-sixth President of the United States. President Trump refused to accept the results, but President Biden now occupies the office of the President.

¶10 On December 14, 2020, the Electoral College officially confirmed the results: 306 electoral votes for President Biden; 232 for President Trump. President Trump continued to challenge the outcome, both in the courts and in the media.

¶11 On January 6, 2021, pursuant to the Twelfth Amendment, U.S. Const. amend. XII, and the Electoral Count Act, 3 U.S.C. § 15, Congress convened a joint session to certify the Electoral College votes. President Trump held a rally that morning at the Ellipse in Washington, D.C. at which he, along with several others,

spoke to the attendees. In his speech, which began around noon, President Trump persisted in rejecting the election results, telling his supporters that “[w]e won in a landslide” and “we will never concede.” He urged his supporters to “confront this egregious assault on our democracy”; “walk down to the Capitol . . . [and] show strength”; and that if they did not “fight like hell, [they would] not . . . have a country anymore.” Before his speech ended, portions of the crowd began moving toward the Capitol. Below, we discuss additional facts regarding the events of January 6, as relevant to the legal issues before us.

¶12 Just before 4 a.m. the next morning, January 7, 2021, Vice President Michael R. Pence certified the electoral votes, officially confirming President Biden as President-elect of the United States.

¶13 President Trump now seeks the Colorado Republican Party’s 2024 presidential nomination.

## **II. Procedural History**

¶14 On September 6, 2023, the Electors initiated these proceedings against the Secretary in Denver District Court under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the Secretary’s authority to list President Trump “as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three].”

¶15 President Trump intervened and almost immediately filed a Notice of Removal to federal court, asserting federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a), 1446. In light of the removal, the Denver District Court closed the case on September 8. On September 12, the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing and the Secretary had neither joined nor consented to the removal.

¶16 Once the Electors filed proof with the Denver District Court that all parties had been served, the court reopened the case on September 14. At a status conference four days later, on September 18, the Secretary emphasized that she must certify the candidates for the 2024 presidential primary ballot by January 5. *See* § 1-4-1204(1). The court set the matter for a five-day trial, beginning on October 30. On September 22, with the parties' input, the court issued expedited case management deadlines for a host of matters, including the disclosure of expert reports, witness lists and exhibits, as well as for briefing and argument on several motions. The court also granted CRSCC's motion to intervene on October 5.

¶17 On October 11, the Secretary's office received (1) President Trump's signed and notarized statement of intent to run as a candidate for a major political party in the presidential primary; (2) the approval form for him to do so, signed by the chair of the Colorado Republican Party, asserting that President Trump was "bona

vide and affiliated with the [Republican] party”; and (3) the requisite filing fee. *See* § 1-4-1204(1)(c).

¶18 On October 20, the district court issued an Omnibus Order addressing many outstanding motions. Regarding President Trump’s motions, the court reached three conclusions that are relevant now: (1) the Electors’ petition involved constitutional questions, but remained “a challenge against an election official based on her alleged duties under the Election Code,” and “such a claim [was] proper under [section] 1-1-113 as a matter of procedure”; (2) “[section] 1-4-1204 expressly incorporates [section] 1-1-113, and [section] 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is ‘about to’ take an improper or wrongful act” – thus, because the Electors had alleged such an act, the matter was ripe for decision; and (3) it could not conclude, as a matter of law, that the Fourteenth Amendment excludes a candidate from the presidential primary ballot or that the Secretary has the authority to determine candidate qualifications, so those issues would be determined at the trial.

¶19 Regarding CRSCC’s motions, the court, in relevant part, concluded that the state does not violate a political party’s First Amendment associational rights by excluding constitutionally ineligible candidates from the presidential primary ballot, but also rejected CRSCC’s argument to the extent it purported to raise an

independent constitutional claim beyond the proper scope of a section 1-1-113 proceeding.

¶20 On October 23, President Trump filed a petition for review in this court, asking us to exercise original jurisdiction to halt the scheduled trial. Four days later, we denied the petition without passing judgment on the merits of any of President Trump's contentions.

¶21 On October 25, the district court denied President Trump's Fourteenth-Amendment-based motion to dismiss. As relevant now, the court concluded that (1) it would not dismiss the case under the political question doctrine, but it reserved the right to revisit the doctrine "to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress"; (2) whether Section Three is self-executing is irrelevant because section 1-4-1204 allows the Secretary to exclude constitutionally disqualified candidates, and states "can, and have, applied Section [Three] pursuant to state statutes without federal enforcement legislation"; and (3) it would reserve for trial the issues of whether Section Three applies to a President and whether President Trump had engaged in insurrection.

¶22 The trial began, as scheduled, on October 30. The evidentiary portion lasted five days, with closing arguments almost two weeks later, on November 15.



During those two weeks, the Electors, the Secretary, President Trump, and CRSCC submitted proposed findings of fact and conclusions of law. The court issued its written final order on November 17, finding, by clear and convincing evidence, that the events of January 6 constituted an insurrection and President Trump engaged in that insurrection. The court further concluded, however, that Section Three does not apply to a President because, as the terms are used in Section Three, the Presidency is not an “office . . . under the United States” nor is the President “an officer of the United States” who had “previously taken an oath . . . to support the Constitution of the United States.” U.S. Const. amend. XIV, § 3; *see Anderson*, ¶¶ 299–315. Accordingly, the Secretary could not exclude President Trump’s name from the presidential primary ballot. *Anderson*, Part VI. Conclusion.

¶23 On November 20, both the Electors and President Trump sought this court’s review of the district court’s rulings under section 1-1-113(3). We accepted jurisdiction of the parties’ cross-petitions. Following extensive briefing from the parties and over a dozen amici, we held oral argument on December 6 and now issue this ruling.

### III. Analysis

¶24 We begin with an overview of Section Three. We then address threshold questions regarding (1) whether the Election Code provides a basis for review of the Electors’ claim, (2) whether Section Three requires implementing legislation

before its disqualification provision attaches, and (3) whether Section Three poses a nonjusticiable political question. After concluding that these threshold issues do not prevent us from reaching the merits, we consider whether Section Three applies to a President. Concluding that it does, we address the admissibility of Congress’s January 6 Report (the “Report”) before reviewing, and ultimately upholding, the district court’s findings of fact and conclusions of law in support of its determination that President Trump engaged in insurrection. Lastly, we consider and reject President Trump’s argument that his speech on January 6 was protected by the First Amendment.<sup>2</sup>

#### **A. Section Three of the Fourteenth Amendment and Principles of Constitutional Interpretation**

¶25 The end of the Civil War brought what one author has termed a “second founding” of the United States of America. See Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019). Reconstruction ushered in the Fourteenth Amendment, which includes Section Three, a provision

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<sup>2</sup> President Trump also listed a challenge to the traditional evidentiary standard of proof for issues arising under the Election Code as a potential question on appeal, claiming that “[w]hen particularly important individual interests such as a constitutional right [is] at issue, the proper standard of proof requires more than a preponderance of the evidence.” As noted above, the district court held that the Electors proved their challenge by clear and convincing evidence. And because President Trump chose not to brief this issue, he has abandoned it. See *People v. Eckley*, 775 P.2d 566, 570 (Colo. 1989).

addressing what to do with those individuals who held positions of political power before the war, fought on the side of the Confederacy, and then sought to return to those positions. See National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, <https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%201866,Rights%20to%20formerly%20enslaved%20people> [<https://perma.cc/5EZU-ABV3>] (explaining that the Fourteenth Amendment was passed by Congress on June 13, 1866, and officially ratified on July 9, 1868); see also Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

¶26 Section Three provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken 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, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3.

¶27 In interpreting a constitutional provision, our goal is to prevent the evasion of the provision’s legitimate operation and to effectuate the drafters’ intent. *People v. Smith*, 2023 CO 40, ¶ 20, 531 P.3d 1051, 1055. To do so, we begin with

Section Three’s plain language, giving its terms their ordinary and popular meanings. *Id.* “To discern such meanings, we may consult dictionary definitions.”

*Id.*

¶28 If the language is clear and unambiguous, then we enforce it as written, and we need not turn to other tools of construction. *Id.* at ¶ 21, 531 P.3d at 1055. However, if the provision’s language is reasonably susceptible of multiple interpretations, then it is ambiguous, and we may consider “the textual, structural, and historical evidence put forward by the parties,” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and we will construe the provision “in light of the objective sought to be achieved and the mischief to be avoided,” *Smith*, ¶ 20, 531 P.3d at 1055 (quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254).

¶29 These principles of constitutional interpretation apply to all sections of this opinion in which we address the meaning of any constitutional provision.

### **B. The State Court Has the Authority to Adjudicate a Challenge to Presidential Candidate Qualifications Under the Election Code**

¶30 The Electors’ claim is grounded in sections 1-4-1204 and 1-1-113 of the Election Code. They argue that it would be a breach of duty or other wrongful act under the Election Code for the Secretary to place President Trump on the presidential primary ballot because he is not a “qualified candidate” based on

Section Three's disqualification. § 1-4-1203(2)(a), C.R.S. (2023). The Electors therefore seek an order pursuant to section 1-1-113 directing the Secretary not to list President Trump on the presidential primary ballot for the election to be held on March 5, 2024 (or any future ballot).

¶31 President Trump and CRSCC contend that Colorado courts lack jurisdiction over the Electors' claim and that the Electors cannot state a proper section 1-1-113 claim, in part because the Electors' claim is a "constitutional claim" that cannot be raised in a section 1-1-113 action under this court's decisions in *Frazier v. Williams*, 2017 CO 85, 401 P.3d 541, and *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478 (per curiam). CRSCC also argues that the Secretary lacks authority to interfere with a political party's decision-making process or to interfere with the party's First Amendment right of association to select its own candidates. Lastly, President Trump argues that the expedited procedures under section 1-1-113 are insufficient to evaluate the Electors' claim.

¶32 Before considering each of these arguments in turn, we first explain the standard of review for statutory interpretation and then provide an overview of the Election Code provisions at issue. Turning to Intervenor's contentions, we first conclude that the district court had jurisdiction to adjudicate the Electors' claim under section 1-1-113. But, recognizing that the ability to exercise *jurisdiction* here does not mean the Electors can state a *proper claim* under section 1-1-113, we

explore whether states have the constitutional power to assess presidential qualifications. We conclude that they do, provided their legislatures have established such authority by statute. Analyzing the relevant provisions of the Election Code, we then conclude that the General Assembly has given Colorado courts the authority to assess presidential qualifications and, therefore, that the Electors have stated a proper claim under sections 1-4-1204 and 1-1-113. We next address Intervenors' related arguments and conclude that limiting the presidential primary ballot to constitutionally qualified candidates does not interfere with CRSCC's associational rights under the First Amendment. Finally, we conclude that section 1-1-113 provides sufficient due process for evaluating whether a candidate satisfies the constitutional qualifications for the office he or she seeks.

### **1. Standard of Review**

¶33 We review the district court's interpretation of the relevant statutes de novo. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 16, 462 P.3d 1081, 1084. In doing so, "[o]ur primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574 (alteration in original) (quoting *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)). When a term is undefined, "we construe a statutory term in accordance with its ordinary or natural meaning." *Id.* (quoting *Cowen v. People*, 2018 CO 96, ¶ 14,

431 P.3d 215, 218). If the language is clear, we apply it as written. *Ferrigno Warren*, ¶ 16, 462 P.3d at 1084.

¶34 If, however, the language is reasonably susceptible of multiple interpretations, we may turn to other tools of construction to guide our interpretation. *Cowen*, ¶ 12, 431 P.3d at 218. These may include consideration of the purpose of the statute, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. § 2-4-203(1), C.R.S. (2023). We also avoid constructions that would yield illogical or absurd results. *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶ 27, 531 P.3d 986, 993.

## **2. Presidential Primaries Under the Election Code**

¶35 Before addressing the merits, we provide a brief overview of the Election Code’s provisions relating to presidential primary elections. Article VII, Section 11 of the Colorado Constitution commands the General Assembly to “pass laws to secure the purity of elections, and guard against abuses of the elective franchise.” Pursuant to this constitutional mandate, the Secretary’s duties under the Election Code include supervising the conduct of primary and general elections in the state and enforcing the provisions of the Election Code. § 1-1-107(1)(a)–(b), (5), C.R.S. (2023).

¶36 Part 12 of article 4 of the Election Code governs presidential primary elections. *See generally* §§ 1-4-1201 to -1207, C.R.S. (2023).<sup>3</sup> Section 1-4-1201, C.R.S. (2023), explains that “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 and national political party rules governing presidential primary elections.” This reference indicates that the legislature envisioned part 12 as operating in harmony with

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<sup>3</sup> Before 1990, Colorado’s political parties used caucuses to nominate their presidential candidates. That year, Colorado voters adopted a referred measure establishing presidential primary elections. *See generally* Ch. 42, sec. 1-2, §§ 1-4-1101 to -1104, 1990 Colo. Sess. Laws 311, 311-13. The legislature later amended these statutes as part of a 1992 repeal and reenactment of the Election Code. *See* Ch. 118, sec. 7, §§ 1-4-1201 to -1207, 1992 Colo. Sess. Laws 624, 696-99. These amendments added the precursor to current section 1-4-1204(4): they permitted “challenges concerning the right of any candidate’s name to appear on the ballot of the presidential primary election” but directed the Secretary (not a court) to hear and assess the validity of such challenges. Ch. 118, sec. 7, § 1-4-1203(4), 1992 Colo. Sess. Laws at 697-98.

Colorado eliminated presidential primary elections in 2003. Ch. 24, sec. 6, 2003 Colo. Sess. Laws 495, 496. In 2016, however, voters restored such elections through Proposition 107, a citizen-initiated measure. Proposition 107, Ballot Initiative No. 140, <https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf> [https://perma.cc/7TX8-J59L]. Proposition 107 largely preserved the pre-2003 version of section 1-4-1204(4) that vested the Secretary with the power to hear challenges to the listing of presidential primary candidates. *Id.* at 61. In a 2017 clean-up bill, the General Assembly adopted several amendments to the citizen-initiated measure “to facilitate the effective implementation of the state’s election laws.” S.B. 17-305, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). Relevant here, the legislature directed challenges under section 1-4-1204(4) away from the Secretary and instead to the district court through section 1-1-113 proceedings. *Id.* at 4-5. Section 1-4-1204(4) has remained otherwise unchanged since its reenactment.



federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.

¶37 The Election Code limits participation in the presidential primary to “qualified” candidates. § 1-4-1203(2)(a) (“[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election.”<sup>4</sup> (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is “qualified to assume” the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a “qualified candidate” is the “statement of intent” (or “affidavit of intent”) filed with the Secretary.<sup>5</sup> *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized “statement of intent”); § 1-4-1205 (requiring a write-in candidate to file a notarized

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<sup>4</sup> In full, the quoted language reads: “[E]ach 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.” § 1-4-1203(2)(a). The phrase “pursuant to this section” sheds no light on the meaning of “qualified candidate.” Section 1-4-1203 simply establishes the mechanics of presidential primaries, such as the date of the primary, elector party affiliation rules, and the content of primary ballots. § 1-4-1203(1), (2)(a), (4). Thus, “pursuant to this section” modifies the “presidential primary election” in which qualified candidates are entitled to participate: an election conducted in accordance with section 1-4-1203.

<sup>5</sup> In this context, the legislature appears to have used “statement” and “affidavit” interchangeably.

“statement of intent” in order for votes to be counted for that candidate and stating that “such affidavit” must be accompanied by the requisite filing fee).

¶38 The Secretary’s statement-of-intent form for a major party presidential primary candidate requires the candidate to affirm via checkboxes that he or she meets the qualifications set forth in Article II of the U.S. Constitution for the office of President; specifically, that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. Colo. Sec’y of State, *Major Party Candidate Statement of Intent for Presidential Primary*, <https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf> [<https://perma.cc/YA3X-3K9T>] (“Intent Form”); *see also* U.S. Const. art. II, § 1, cl. 5. The form further requires the candidate to sign an affirmation that states, “I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law.*”<sup>6</sup> Intent Form, *supra* (emphasis added). No party has challenged the Secretary’s authority to require candidates to provide this information on the statement-of-intent form.

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<sup>6</sup> The Affidavit of Intent for write-in candidates for the presidential primary has the same requirements. *Affidavit of Intent for Presidential Primary Write-In Designation*, Colo. Sec’y of State (last updated June 20, 2023), <https://www.sos.state.co.us/pubs/elections/Candidates/files/PresidentialPrimaryWrite-In.pdf> [<https://perma.cc/V83P-HLAD>].

¶39 Section 1-4-1204(1) requires the Secretary to “certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots” not later than sixty days before the presidential primary election. For the 2024 election cycle, that deadline is January 5, 2024.

¶40 Section 1-4-1204(1) further states:

The only candidates whose names shall be placed on ballots for the election shall be those candidates who:

....

(b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and

(c) Have submitted to the secretary not later than eighty-five days before the date of the presidential primary election, a notarized candidate’s statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors . . . .

For the 2024 election cycle, the deadline to submit these items was December 11, 2023.

¶41 Section 1-4-1204(4) allows for “challenge[s] to the listing of any candidate on the presidential primary election ballot.” Any such challenge must be brought “no later than five days after the filing deadline for candidates” and “must provide notice . . . of the alleged impropriety that gives rise to the complaint.” *Id.* The district court must hold a hearing no later than five days after the challenge is filed

to “assess the validity of all alleged improprieties.” *Id.* The statute does not limit the length or content of the hearing; it does, however, require the district court to issue findings of fact and conclusions of law no later than forty-eight hours after the hearing concludes. *Id.* “The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.” *Id.*

¶42 Challenges under section 1-4-1204(4) must be brought through the special statutory procedure found in section 1-1-113 for adjudicating controversies that arise under the Election Code. § 1-4-1204(4) (providing that any challenge to the listing of a candidate on the presidential primary ballot “must be made in writing and filed with the district court in accordance with section 1-1-113(1)” and “any order entered by the district court may be reviewed [by the supreme court] in accordance with section 1-1-113(3)”).

¶43 Section 1-1-113 has deep roots in Colorado election law. It originated in an 1894 amendment to Colorado’s Australian Ballot Law, first adopted by the Eighth General Assembly in 1891. Ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65. Much like its present-day counterpart, the original provision established procedures for adjudicating controversies between election officials and any candidate, political party officers or representatives, or persons making nominations.<sup>7</sup> *Id.*

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<sup>7</sup> Over time, the legislature amended the law to strengthen the courts’ power to resolve election disputes. For example, in 1910, the General Assembly passed

¶44 The current version of section 1-1-113 establishes (with exceptions not relevant here) “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) (emphasis added). It provides:

When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code *has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith *perform the duty or to desist from the wrongful act*

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primary election legislation (not then applicable to presidential elections) authorizing district courts to accept verified petitions alleging, among other things, “that the name of any person has been or is about to be wrongfully placed upon” primary ballots and to order the Secretary (among other election officials) to correct such errors. Ch. 4, § 25, 1910 Colo. Sess. Laws. 15, 33. The 1910 law also gave this court the power to review the district court’s decision. *Id.* at 34; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 657 (Colo. 1924) (confirming that if a proper entity “has violated a duty with which it is charged under the act, the court has power to direct it to correct the wrong”).

In 1963, the General Assembly repealed and reenacted Colorado’s Election Code. *See generally* Ch. 118, 1963 Colo. Sess. Laws 360. The 1963 code allowed for “any elector” to show “by verified petition . . . that any neglect of duty or wrongful act by any person charged with a duty under this act has occurred or is about to occur,” mirroring the language in today’s section 1-1-113. Ch. 118, § 203, 1963 Colo. Sess. Laws at 457. The legislature’s next reenactment of the code in 1992 codified this procedure at section 1-1-113. Ch. 118, sec. 1, § 1-1-113, 1992 Colo. Sess. Laws 624, 635.

or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphases added).

¶45 Section 1-1-113 proceedings also provide for expedited, albeit discretionary, appellate review in this court. § 1-1-113(3). Either party may seek review from this court within three days after the district court proceedings conclude. *Id.* If this court declines jurisdiction of the case, the district court’s decision is final and is not subject to further appellate review. *Id.*

¶46 Although Colorado’s expedited statutory procedure for litigating election disputes may be unfamiliar nationally, our courts, particularly the Denver District Court (the proper venue when the Secretary is the named respondent), are accustomed to section 1-1-113 litigation. Such cases arise during virtually every election cycle, and this court has exercised jurisdiction many times to review these disputes. *E.g., Kuhn*, ¶ 1, 418 P.3d at 480; *Frazier*, ¶ 1, 401 P.3d at 542; *Carson v. Reiner*, 2016 CO 38, ¶ 1, 370 P.3d 1137, 1138; *Hanlen v. Gessler*, 2014 CO 24, ¶ 3, 333 P.3d 41, 42. Moreover, it is not uncommon for section 1-1-113 cases to require courts to take evidence and grapple with complex legal issues. *E.g., Ferrigno Warren*, ¶¶ 9–13, 462 P.3d at 1083–84 (describing a district court hearing, held one month after the petitioner filed her verified petition and after the parties filed briefing, to determine whether “substantial compliance” was the appropriate standard for a minimum signature requirement, how to apply that standard, and

whether, based on a four-factor test, a prospective U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 4, 15–18, 418 P.3d at 480–82 (describing a district court hearing to assess evidence and testimony concerning the residency of seven circulators of a petition to reelect a congressional representative); *Meyer v. Lamm*, 846 P.2d 862, 867 (Colo. 1993) (requiring an evidentiary hearing in district court that involved, among other things, the content of ballots cast for a write-in candidate). Even early cases recognized that the original 1894 provision “contemplate[d] the taking of evidence where the issues require[d] it.” *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897).

### **3. The District Court Had Jurisdiction to Adjudicate the Electors’ Claim Under the Election Code**

¶47 President Trump argues that the district court lacked jurisdiction over the Electors’ section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate’s qualifications. A district court has jurisdiction pursuant to section 1-1-113(1) when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act.

¶48 The district court plainly had jurisdiction under section 1-1-113 to hear the Electors’ claim. First, the Electors are “eligible elector[s]” within the meaning of the Election Code because, as Republican and unaffiliated voters, they are

“person[s] who meet[] the specific requirements for voting at a specific election”; namely, the Republican presidential primary election. § 1-1-104(16), C.R.S. (2023); *see also* § 1-4-1203(2)(b) (providing that unaffiliated voters may vote in presidential primary elections); § 1-7-201(1), C.R.S. (2023) (identifying eligible electors for the purpose of primary elections). Second, the Electors timely filed their verified petition under sections 1-1-113 and 1-4-1204(4) in the proper district court. Third, their petition was filed against the Secretary, an election official charged with duties under the Election Code. *See* § 1-1-107 (prescribing the powers and duties of the Secretary); § 1-4-1204(1) (“[T]he secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots.”). And fourth, the petition alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not constitutionally qualified to hold office.

¶49 Though it does not affect the district court’s *jurisdiction*, President Trump’s assertion that the Secretary does not have a duty under the Election Code to determine a candidate’s constitutional qualification raises the question of whether the Electors presented a *proper claim*. To answer that question, we must first determine whether, generally, states have the authority to determine presidential qualifications.



#### 4. States Have the Authority to Assess Presidential Candidates' Qualifications

¶50 “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . .” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution delegates to states the authority to prescribe the “Times, Places and Manner” of holding congressional elections, U.S. Const. art. I, § 4, cl. 1, and states retain the power to regulate their own elections, *Burdick*, 504 U.S. at 433. States exercise these powers through “comprehensive and sometimes complex election codes,” regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (“*Celebrezze*”); *see also, e.g.*, § 1-4-501(1), C.R.S. (2023) (setting qualifications for state office candidates). These powers are uncontroversial and well-explored in U.S. Supreme Court case law.

¶51 But does the U.S. Constitution authorize states to assess the constitutional qualifications of presidential candidates? We conclude that it does.

¶52 Under Article II, Section 1, each state is authorized to appoint presidential electors “in such Manner as the Legislature thereof may direct.” U.S. Const. art. II, § 1, cl. 2. So long as a state’s exercise of its appointment power does not run afoul of another constitutional constraint, that power is plenary. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

¶53 But voters no longer choose between slates of electors on Election Day. *Chiafalo*, 140 S. Ct. at 2321. Instead, they vote for presidential candidates who serve as proxies for their pledged electors. *Id.* Accordingly, states exercise their plenary appointment power not only to regulate the electors themselves, but also to regulate candidate access to presidential ballots. Absent a separate constitutional constraint, then, states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President. And nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to such candidates. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

¶54 No party in this case has challenged the Secretary's authority to require a presidential primary candidate to confirm on the required statement-of-intent form that he or she meets the Article II requirements of age, residency, and citizenship, and to further attest that he or she "meet[s] all qualifications for the office prescribed by law." Moreover, several courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots. *See id.* (upholding California's refusal to place a twenty-seven-year-old candidate on the presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2012) (affirming the Secretary's decision to exclude a naturalized citizen from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp.

109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois’s exclusion of a thirty-one-year-old candidate from the presidential ballot).

¶55 As then-Judge Gorsuch recognized in *Hassan*, it is “a state’s legitimate interest in protecting the integrity and practical functioning of the political process” that “permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.” 495 F. App’x at 948.

¶56 The question then becomes whether Colorado has exercised this power through the Election Code. We conclude that it has. Section 1-4-1204(4) is Colorado’s vehicle for advancing these state interests. When eligible electors challenge the Secretary’s listing on the presidential primary ballot of a candidate who is not constitutionally qualified to assume office, section 1-4-1204(4), as exercised through a proceeding under section 1-1-113, offers an exclusive remedy under the Election Code. *See* § 1-1-113(4).

### **5. The Electors Have Stated a Proper Claim That Is Not Precluded by *Frazier* and *Kuhn***

¶57 President Trump argues that the Electors’ claim cannot be properly litigated in a section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate’s qualifications and because this court’s precedent bars the litigation of constitutional claims in a section 1-1-113 action. Although we agree that the Secretary has no duty to independently investigate the qualifications of a presidential primary candidate, we conclude that the Electors may

nevertheless challenge a candidate's qualifications under section 1-4-1204(4), and that the Electors' claim here is not a "constitutional claim" precluded by our decisions in *Frazier* and *Kuhn*.

¶58 In presidential primary elections, the Secretary's duty is to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." § 1-4-1204(1). The conditions that must be satisfied before she can exercise this duty are limited to timely receiving (1) confirmation that the prospective candidate is a "bona fide candidate" under the party's rules, (2) a notarized statement of intent from the candidate, and (3) the requisite filing fee or a petition signed by at least 5,000 eligible electors affiliated with the candidate's political party who reside in Colorado. § 1-4-1204(1)(b)-(c).

¶59 Where a candidate does not submit (or cannot comply with) the required attestations on the statement of intent form, the Secretary cannot list the candidate on the ballot. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (D. Colo. 2012), *aff'd* 495 F. App'x at 948. But if the contents of a signed and notarized statement of intent appear facially complete (i.e., the candidate has filled out the Secretary's form confirming that he or she meets the Article II requirements of age, residency, and citizenship, and further attesting that he or she "meet[s] all qualifications for the office prescribed by law"), the Secretary has no duty to further investigate the

accuracy or validity of the information the prospective candidate has supplied.<sup>8</sup> To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

¶60 The fact that the Secretary has complied with her section 1-4-1204(1) duties does not, however, foreclose a challenge under section 1-4-1204(4). As discussed above, section 1-4-1204(4) permits “[a]ny challenge to the listing of any candidate on the presidential primary election ballot,” using section 1-1-113(1) as a procedural vehicle. Section 1-1-113(1), in turn, creates a cause of action for electors alleging a breach of duty *or other wrongful act* under the code. *See Frazier*, ¶ 3, 401 P.3d at 542 (construing “wrongful act” in section 1-1-113 as limited to a wrongful act under the Election Code). Section 1-1-113 then requires the district court—not the election official—to adjudicate an eligible elector’s challenge to a candidate’s eligibility. *Carson*, ¶ 8, 370 P.3d at 1139 (observing that the Election Code reflects an intent for challenges to the qualifications of a candidate to be

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<sup>8</sup> In contrast, with respect to elections for state office, section 1-4-501(1), C.R.S. (2023), provides that “[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.” (Emphasis added.) This provision for state office expressly charges the Secretary with a duty to investigate whether a candidate “meets any requirements of the office relating to registration, residence, or property ownership,” among others. *Id.*

resolved by the courts); *Hanlen*, ¶ 40, 333 P.3d at 50 (“[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility.”).

¶61 As we have explained, the Secretary has complied with her limited duty to accept President Trump’s properly completed paperwork. But the Electors have alleged an impending “wrongful act,” which is “more expansive than a ‘breach’ or ‘neglect of duty.’” *Frazier*, ¶ 16, 401 P.3d at 545 (quoting § 1-1-113(1)). Indeed, section 1-1-113 “clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,” *Carson*, ¶ 17, 370 P.3d at 1141, including any act that is “inconsistent with the Election Code,” *Frazier*, ¶ 16, 401 P.3d at 545.

¶62 We conclude that certifying an unqualified candidate to the presidential primary ballot constitutes a “wrongful act” that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code. Nothing in section 1-4-1204(4) limits challenges under that provision to those based on a breach of the Secretary’s duties under section 1-4-1204. And section 1-4-1203(2)(a) clearly limits participation in the presidential primary to political parties fielding “qualified” candidates. Although section 1-4-1203(2)(a) does not define “qualified,” nearby provisions regarding write-in candidates indicate that “qualified” refers to a candidate’s qualifications for office. As with bona fide major party candidates under section 1-4-1204(1), write-in candidates for the presidential primary must

file a “notarized candidate statement of intent.” § 1-4-1205. Under the Election Code, such statements for all write-in candidates (regardless of the type of election) must indicate that the candidate “desires the office and is *qualified* to assume its duties if elected.” § 1-4-1101(1) (emphasis added). The Election Code’s explicit requirement that a write-in candidate be “qualified” to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be “qualified” in the same manner.<sup>9</sup>

¶63 Reading the Election Code as a whole, then, we conclude that “qualified” in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President. It has to, as section 1-4-1203(2)(a) supplies the only textual basis in the Election Code for the Secretary’s authority to require a presidential primary candidate to attest to his or her qualifications for office in the candidate statement (or affidavit) of intent. Moreover, to read “qualified” *not* to encompass federal constitutional qualifications would undermine the purpose of the Election Code — “to secure the

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<sup>9</sup> This interpretation is further supported by the Election Code’s treatment of uncontested primaries. The Election Code allows the Secretary to cancel a primary when every political party has no more than one affiliated candidate, whether that candidate is certified to the presidential primary ballot pursuant to section 1-4-1204(1) or is a write-in candidate entering under section 1-4-1205. § 1-4-1203(5). Because the General Assembly plainly treats such candidates as equivalent for purposes of 1-4-1203(5), we conclude that the legislature also viewed the “qualified” requirement in both provisions as equivalent.

purity of elections” – while compromising the Secretary’s ability to advance that purpose. Colo. Const. art. VII, § 11; § 1-1-107(1), (5).

¶64 We therefore reject such an interpretation as contrary to the purpose of the Election Code. Instead, we conclude that, under the Election Code, “qualified” candidates for the presidential primary are those who, at a minimum, are qualified to hold office under the provisions of the U.S. Constitution.

¶65 We recognize that the Supreme Court has twice declined to address whether Section Three—which *disqualifies* an oath-breaking insurrectionist from *holding* office—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute “qualification[s]” for office because “both sides agree[d] that [the candidate] was not ineligible under” Section Three or any other, similar provision); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing “no need to resolve” the same question regarding Section Three in a case concerning the propriety of *additional* qualifications for office). But lower courts, when presented squarely with the question, have all but concluded that Section Three is the functional equivalent of a qualification for office. *See, e.g., Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) (“Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct



from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected.”); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at \*24 (N.M. Dist. Ct. Sept. 6, 2022) (“Section Three imposes a qualification for public office, much like an age or residency requirement . . .”).

¶66 We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office, at least for the purposes of the section 1-1-113 claim here. Either way, it would be a wrongful act for the Secretary to list a candidate on the presidential primary ballot who is not “qualified” to assume the duties of the office. Moreover, because Section Three is a “part of the text of the Constitution,” assessing a candidate’s compliance with it for purposes of determining their eligibility for office does not improperly “add qualifications to those that appear in the Constitution.” *U.S. Term Limits*, 514 U.S. at 787 n.2. Doing so merely renders the list of constitutional qualifications more complete.

¶67 Nor are we persuaded by President Trump’s assertion that Section Three does not bar him from *running for or being elected to* office because Section Three bars individuals only from *holding* office. *Hassan* specifically rejected any such distinction. 495 Fed. App’x at 948. There, the candidate argued that even if Article II “properly holds him ineligible to *assume the office of president*,” Colorado could

not “deny him a place on the ballot.” *Id.* The *Hassan* panel concluded otherwise. *Id.* In any event, the provisions in the Election Code governing presidential primary elections do not recognize such a distinction. Rather, as discussed above, those provisions require all presidential primary candidates to be constitutionally “qualified” before their names are added to the presidential primary ballot pursuant to section 1-4-1204(1).

¶68 Were we to adopt President Trump’s view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II. *See* U.S. Const. art. II, § 1, cl. 5 (setting forth the qualifications to be “eligible to the Office of President” (emphasis added)). It would mean that the state would be powerless to exclude a twenty-eight-year-old, a non-resident of the United States, or even a foreign national from the presidential primary ballot in Colorado. Yet, as noted, several courts have upheld states’ exclusion from ballots of presidential candidates who fail to meet the qualifications for office under Article II. *See Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App’x at 948; *Ogilvie*, 357 F. Supp. at 113.

¶69 Lastly, we reject President Trump and CRSCC’s argument that state courts may not hear the Electors’ claim because this court’s precedent bars the litigation of constitutional claims in a section 1-1-113 action. *See Frazier*, ¶ 3, 401 P.3d at 542;

*Kuhn*, ¶ 55, 418 P.3d at 489. The Electors have not asserted a constitutional claim, so *Frazier* and *Kuhn* do not control here.

¶70 Both *Frazier* and *Kuhn* addressed whether a petitioner could shoehorn a claim challenging the constitutionality of the Election Code into a section 1-1-113 proceeding. *Frazier*, ¶ 6, 401 P.3d at 543; *Kuhn*, ¶ 55, 418 P.3d at 489. In *Frazier*, we concluded that section 1-1-113 is not a proper vehicle to resolve claims under 42 U.S.C. § 1983 because they do not arise under the Election Code and because the sole remedy available under section 1-1-113 is a court order directing compliance with the Election Code. *Frazier*, ¶¶ 17-18, 401 P.3d at 545. Similarly, in *Kuhn*, we held that to the extent the candidate sought to challenge the constitutionality of the petition circulator residency requirement under the Election Code, the court lacked jurisdiction to address such arguments in a section 1-1-113 proceeding. ¶ 55, 418 P.3d at 489.

¶71 Here, however, the Electors do not challenge the constitutionality of the Election Code. Nor do they allege a violation of the Constitution. Instead, they allege a “wrongful act” under section 1-1-113. That the Electors’ claim has constitutional implications or requires interpretation of a constitutional provision does not make it a separate “constitutional claim” of the sort prohibited by *Frazier* and *Kuhn*. And neither President Trump nor CRSCC suggests that a section 1-1-113 claim cannot have constitutional implications. Indeed, as the Secretary

notes in her brief, there is nothing “particularly unusual about a section 1-1-113 proceeding raising constitutional issues.”

¶72 As discussed above, the Electors’ claim is that the Secretary will commit a wrongful act under the Election Code if she lists a candidate on the presidential primary ballot who is not qualified for office. While this claim requires resolving constitutional questions, it remains a challenge brought by eligible electors against an election official regarding an alleged wrongful act under the Election Code. Section 1-1-113 is the “exclusive” vehicle for litigating such challenges prior to an election; the Electors have no other viable option. § 1-1-113(4).

### **6. Limiting Presidential Primary Ballot Access to Constitutionally Qualified Candidates Does Not Interfere with CRSCC’s First Amendment Rights**

¶73 CRSCC argues that section 1-4-1204(1)(b) vests it with the sole authority to determine who the Republican nominees will be on a ballot – a reflection, CRSCC contends, of its constitutional right to freely associate and exercise its political decisions. *See* U.S. Const. amend. I; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (“The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas.”). Taken to its logical end, CRSCC’s position is that it has a First Amendment right to deem any person to be a “bona fide candidate” pursuant to their party rules, § 1-4-1204(1)(b), and subsequently mandate that individual’s

placement on the presidential ballot, without regard to that candidate's age, residency, citizenship, *see* U.S. Const. art. II, § 1, cl. 5, or even whether the candidate has already served two terms as President, *see id.* at amend. XXII ("No person shall be elected to the office of the President more than twice . . ."). We disagree with this position.

¶74 As a threshold matter, we acknowledge that the district court dismissed CRSCC's argument on this issue, ruling that it raised a separate constitutional claim improperly litigated in a section 1-1-113 action. *Anderson*, ¶ 12. We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113. *See Kuhn*, ¶ 55, 418 P.3d at 489; *Frazier*, ¶ 3, 401 P.3d at 542. But to the extent that CRSCC argues in its Answer Brief that the Secretary lacks authority to interfere with CRSCC's associational rights, we respond briefly to those concerns.

¶75 We distinguish between (1) CRSCC's right to decide the candidates with whom it affiliates and recognizes as bona fide, and (2) CRSCC's ability to place candidates on the presidential primary ballot. CRSCC's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and "[a]s a result, political parties' government, structure,

and activities enjoy constitutional protection,” *Timmons*, 520 U.S. at 358. In other words, CRSCC is well within its rights to choose with whom it affiliates and to decide which candidates it recognizes as bona fide. “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 (noting that a “particular candidate might be ineligible for office,” for example).

¶76 As a practical matter, any state election law governing the selection and eligibility of candidates affects, to some degree, the fundamental right to associate with others for political ends. *Celebrezze*, 460 U.S. at 788. Even so, “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¶77 Accordingly, to determine if a state election law impermissibly burdens a party’s associational rights, courts must weigh the “‘character and magnitude’” of the burden imposed by the rule “against the interests the State contends justify that burden,” and then consider whether the state’s interests make the burden necessary. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Limiting ballot access “to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.” *Burdick*, 504 U.S. at 440 n.10.

¶78 Here, the Election Code limits presidential primary ballot access to only qualified candidates. Such a restriction is an “eminently reasonable” regulation that does not severely burden CRSCC’s associational rights. To hold otherwise would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of “political expression” or “political choice,” that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land. U.S. Const. art. VI, cl. 2.

### **7. Section 1-1-113 Proceedings Provide Adequate Due Process for Litigants**

¶79 Lastly, President Trump asserts that section 1-1-113 is not a valid way to litigate complex constitutional legal and factual issues. He complains of unfairness inherent in the expedited procedures that section 1-1-113 demands. But President Trump’s argument disregards how the Electors’ claim proceeded here.

¶80 Initially, we note that to the extent President Trump purports to challenge the constitutionality of section 1-1-113 under the Fourteenth Amendment’s Due Process clause as a defense to the Electors’ claim, he raises precisely the type of independent constitutional claim he recognizes is barred by *Kuhn*. See *Kuhn*, ¶ 55, 418 P.3d at 489. As discussed above, constitutional challenges to provisions of the Election Code fall outside the scope of a proper section 1-1-113 challenge because these expedited statutory proceedings entertain only one type of claim—election

officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code. See *Kuhn*, ¶ 55, 418 P.3d at 489; § 1-1-113(1); accord *Frazier*, ¶¶ 17–18, 401 P.3d at 545.

¶81 Furthermore, because section 1-1-113 proceedings are designed to address election-related disputes, they move quickly out of necessity. *Frazier*, ¶ 11, 401 P.3d at 544 (“Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day.”). Lawyers who practice in this area are well-aware of this. Looming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate’s access to the ballot. And a state’s interest in “protecting the integrity of the election process and avoiding voter confusion,” *Lindsay*, 750 F.3d at 1063 (citing *Timmons*, 520 U.S. at 364–65), allows a state to expedite the process by which a candidate’s qualifications, once challenged, are subsequently determined. That the form of section 1-1-113 proceedings reflects their function—to expeditiously resolve pre-election disputes over an election official’s wrongful act—does not mean these proceedings lack due process.

¶82 Nor does the need for expedited proceedings in election disputes preclude a district court from using traditional means of case management in a section



1-1-113 proceeding to construct a schedule that accommodates legally or factually complex issues. See *Ferrigno Warren*, ¶¶ 8–13, 462 P.3d at 1083 (explaining that the district court ordered briefing and held a hearing one month after the candidate filed a section 1-1-113 petition). President Trump contends that the expedited nature of section 1-1-113 proceedings do not provide time for the kinds of procedures he believes the complexities of this case require—for example, filing C.R.C.P. 12 motions testing the legal sufficiency of the Electors’ claims before the litigation proceeds, allowing for extended discovery and disclosure procedures, and providing the opportunity to depose expert witnesses. But he has never specifically articulated how the district court’s approach lacked due process. He certainly does not contend that he was prejudiced because the district court moved too *slowly* or failed to resolve the case in a week. He made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered. Moreover, his arguments throughout this case have focused predominantly on questions of law and not on disputed issues of material fact.

¶83 In addition, the district court took many steps to address the complexities of the case. For example, the first hearing in this case was a status conference on September 18—four days after the case was reopened after being remanded from federal court. In recognition of the complexity of the case, the district court—with the parties’ input—adopted a civil-case-management approach to the litigation

that afforded the parties the opportunity to be heard on a wide range of substantive issues.

¶184 The district court's case-management approach worked. After permitting multiple intervenors to participate, the district court allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged. It then issued three substantive rulings on these motions, including an omnibus ruling addressing four of Intervenors' motions, all in advance of the trial. The trial took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window section 1-4-1204(4) requires.

¶185 In short, the district court admirably – and swiftly – discharged its duty to adjudicate this complex section 1-1-113 action, substantially complying with statutory deadlines while demonstrating the flexibility inherent in such a proceeding to address the various issues raised by Intervenors. And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense. If any case suggests that it is *not* impossible to “fully litigate a

complex constitutional issue within days or weeks,” this is it. *Frazier*, ¶ 18 n.3, 401 P.3d at 545 n.3.

¶86 For these reasons, we conclude that the Election Code allows Colorado’s courts, through challenges brought under sections 1-4-1204(4) and 1-1-113, to assess the constitutional qualifications of a candidate—and to order the Secretary to exclude from the ballot candidates who are not qualified. These provisions advance Colorado’s “legitimate interest in protecting the integrity and practical functioning of the political process” by allowing the Secretary to “exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office.” *Hassan*, 495 F. App’x at 948. Moreover, these provisions neither infringe on a political party’s associational rights nor compromise the validity of a court’s rulings on complex factual and legal issues. Rather, they provide a robust vehicle through which to protect the purity of Colorado’s elections.<sup>10</sup> See Colo. Const. art. VII, § 11.

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<sup>10</sup> We note that Colorado’s Election Code differs from other states’ election laws. Michigan’s election law, for example, does not include the term “qualified candidate,” does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State’s responsibilities in the context of presidential primary elections. See Mich. Comp. Laws §§ 168.613, 168.620a (governing presidential primary elections in Michigan). The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the “affidavit of identity” that other candidates must submit to indicate that they “meet[] the constitutional and statutory qualifications for the office sought.” See *Davis v. Wayne Cnty. Election*

¶87 Because the Electors have properly invoked Colorado’s section 1-1-113 process to challenge the listing of President Trump on the presidential primary ballot as a wrongful act, we proceed to the other threshold questions raised by Intervenors.

### **C. The Disqualification Provision of Section Three Attaches Without Congressional Action**

¶88 The Electors’ challenge to the Secretary’s ability to certify President Trump as a qualified candidate presumes that Section Three is “self-executing” in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress. Because Congress has not authorized state courts to enforce Section Three, Intervenors argue that this court may not consider President Trump’s alleged disqualification under Section Three in this section 1-1-113 proceeding.<sup>11</sup> We disagree.

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*Comm’n*, No. 368615, 2023 WL 8656163, at \*14 (Mich. Ct. App. Dec. 14, 2023) (unpublished order) (quoting Mich. Comp. Laws § 168.558(1)–(2)). Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate. *Id.* at \*16.

<sup>11</sup> Intervenors and their supporting amici occasionally assert that the Electors’ claim is brought pursuant to Section Three and that the Section is not self-executing in the sense that it does not create an independent private right of action. But as mentioned above, the Electors do not bring any claim directly under Section Three. Their claim is brought under Colorado’s Election Code, and resolution of that claim requires an examination of President Trump’s qualifications in light of

¶89 The only mention of congressional power in Section Three is that “Congress may by a vote of two-thirds of each House, remove” the disqualification of a former officer who had “engaged in insurrection.” U.S. Const. amend. XIV, § 3. Section Three does not determine who decides whether the disqualification has attached in the first place.

¶90 Intervenors, however, look to Section Five of the Fourteenth Amendment, which provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article,” to argue that congressional authorization is necessary for any enforcement of Section Three. *Id.* at § 5. This argument does not withstand scrutiny.

¶91 The Supreme Court has said that the Fourteenth Amendment “is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.” *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). To be sure, in the *Civil Rights Cases*, the Court was directly focused on the Thirteenth Amendment, so this statement could be described as dicta. But an examination of the Thirteenth, Fourteenth, and Fifteenth Amendments

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Section Three. The question of “self-execution” that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

("Reconstruction Amendments") and interpretation of them supports the accuracy and broader significance of the statement.

¶92 Section Three is one of four substantive sections of the Fourteenth Amendment:

- Section One: "No State *shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor *shall* any State deprive any person of life, liberty, or property, without due process of law . . . ."
- Section Two: "Representatives *shall* be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."
- Section Three: "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."
- Section Four: "The validity of the public debt of the United States . . . *shall* not be questioned."

U.S. Const. amend. XIV, §§ 1-4 (emphases added). Section Five is then an enforcement provision that applies to each of these substantive provisions. *Id.* at § 5. And yet, the Supreme Court has held that Section One is self-executing. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds*

as recognized in *Ramirez v. Collier*, 595 U.S. 411, 424 (2022). Thus, while Congress may enact enforcement legislation pursuant to Section Five, congressional action is not *required* to give effect to the constitutional provision. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five gives Congress authority to “determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,” but not disputing that the Fourteenth Amendment is self-executing).

¶93 Section Two, moreover, was enacted to eliminate the constitutional compromise by which an enslaved person was counted as only three-fifths of a person for purposes of legislative apportionment. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 51–52), <https://ssrn.com/abstract=4532751>. The self-executing nature of that section has never been called into question, and in the reapportionment following passage of the Fourteenth Amendment, Congress simply treated the change as having occurred. See *The Apportionment Act of 1872*, 17 Stat. 28 (42nd Congress) (apportioning Representatives to the various states based on Section Two’s command without mentioning, or purporting to enforce, the Fourteenth Amendment). Similarly, Congress never passed enabling legislation to effectuate Section Four.

¶94 The same is true for the Thirteenth Amendment, which abolished slavery and involuntary servitude. Section One provides the substantive provision: “Neither slavery nor involuntary servitude . . . *shall* exist within the United States . . . .” U.S. Const. amend. XIII, § 1 (emphasis added). Section Two provides the enforcement provision: “Congress shall have power to enforce this article by appropriate legislation.” *Id.* at § 2. Discussing this Amendment, the Supreme Court recognized that “legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it,” but that “[b]y its own unaided force it abolished slavery” and was “undoubtedly self-executing without any ancillary legislation.” *The Civil Rights Cases*, 109 U.S. at 20.

¶95 Like the other Reconstruction Amendments, the Fifteenth Amendment, which established universal male suffrage, contains a substantive provision— “[t]he right of citizens of the United States to vote *shall* not be denied or abridged . . . on account of race, color, or previous condition of servitude”— followed by an enforcement provision— “[t]he Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XV, §§ 1-2 (emphasis added). As with Section One of both the Thirteenth and Fourteenth Amendments, the Supreme Court has explicitly confirmed that the Fifteenth Amendment is self-executing. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Section One of the Fifteenth Amendment “has always been



treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice”).

¶96 There is no textual evidence that Congress intended Section Three to be any different.<sup>12</sup> Furthermore, we agree with the Electors that interpreting any of the Reconstruction Amendments, given their identical structure, as not self-executing would lead to absurd results. If these Amendments required legislation to make them operative, then Congress could nullify them by simply not passing enacting legislation. The result of such inaction would mean that slavery remains legal; Black citizens would be counted as less than full citizens for reapportionment; non-white male voters could be disenfranchised; and any individual who engaged in insurrection against the government would nonetheless be able to serve in the

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<sup>12</sup> It would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not. *See* U.S. Const. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); *id.* at § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”); *id.* at art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent.

¶97 Intervenor's argue that certain historical evidence requires a different conclusion as to Section Three. We generally turn to historical and other extrinsic evidence only when the text is ambiguous, which it is not here. Nonetheless, we will consider these historical claims in the interest of providing a thorough review.

¶98 Intervenor's first highlight a statement Representative Thaddeus Stevens made during the Congressional framing debates: "[Section Three] 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 the right to do." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866); *see also* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 42 (Oct. 3, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4591838>. But as one of the amici points out, this statement referenced a deleted portion of Section Three that disenfranchised all former Confederates until 1870. In any event, given the complex patchwork of perspectives and intentions expressed when drafting these constitutional provisions, we refuse to cherry-pick individual statements from extensive debates to ground our analysis. *See generally* Baude & Paulsen, *supra* (manuscript at 39–53).

¶99 Intervenor next direct us to the non-binding opinion written by Chief Justice Salmon Chase while he was riding circuit: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) (“*Griffin’s Case*”).<sup>13</sup> There, Caesar Griffin challenged his criminal conviction as null and void because under Section Three, the judge who had entered his conviction was disqualified from holding judicial office, having formerly sworn a relevant oath as a state legislator and then engaged in insurrection by continuing to serve as a legislator in Virginia’s Confederate government. *Id.* at 22–23. It was undisputed that the judge fell within Section Three’s scope, but the question Chief Justice Chase sought to answer was whether Section Three “operat[ed] 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.

¶100 In interpreting the scope of the provision, Chief Justice Chase observed that, after the end of the Civil War but before the Fourteenth Amendment was ratified, many southern states had established, with the approval of the federal government, provisional governments to keep society functioning. *Id.* at 25; *see*

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<sup>13</sup> Between 1789 and 1911, U.S. Supreme Court justices traveled across the country and, together with district court judges, sat on circuit courts to decide cases. *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *Cardozo L. Rev.* 1753 (2003). Decisions written by the justices while they were riding circuit were not decisions of the Supreme Court.

also Baude & Paulsen, *supra* (manuscript at 36). And, within these provisional governments, many offices were filled with citizens who would fall within Section Three's scope. *Griffin's Case*, 11 F. Cas. at 25. Chief Justice Chase observed that giving Section Three a literal construction, as Griffin advocated, would "annul all official acts performed by these officers. No sentence, no judgment, no decree, . . . no official act [would be] of the least validity." *Id.* He reasoned that it would be "impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states." *Id.*

¶101 And so, Chief Justice Chase turned to what he termed the "argument from inconveniences" and the interpretive canon that, when faced with two or more reasonable interpretations, the interpretation "is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* He then explained that, while it was not "improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office," it could also "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 25-26. To find the provision self-executing under the circumstances, he argued, would be contrary to due process because it would, "at

once without trial, deprive[] a whole class of persons of offices held by them.” *Id.* at 26.

¶102 Chief Justice Chase therefore concluded that the object of the Amendment – “to exclude from certain offices a certain class of persons” – was impossible to do “by a simple declaration, whether in the constitution or in an act of congress . . . . For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate.” *Id.* To accomplish “this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable; and . . . can only be provided for by congress.” *Id.* Thus, Chief Justice Chase concluded that Section Three was not self-executing. *Id.*

¶103 *Griffin’s Case* concludes that congressional action is needed before Section Three disqualification attaches, but this one case does not persuade us of that point. Intervenors and amici assert that *Griffin’s Case* “remains good law and has been repeatedly relied on.” Because the case is not binding on us, the fact that it has not been reversed is of no particular significance. And the cases that cite it do so either with no analysis – *e.g.*, *State v. Buckley*, 54 Ala. 599 (1875), and *Rothermel v. Meyerle*, 136 Pa. 250 (1890) – or for the inapposite proposition that Section Three does not create a self-executing cause of action – *e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978), and *Hansen v. Finchem*, CV 2022-004321 (Sup. Ct.

of Ariz., Maricopa Cnty. Apr. 22, 2022), *aff'd on other grounds*, 2022 WL 1468157 (May 9, 2022). Moreover, *Griffin's Case* has been the subject of persuasive criticism. See, e.g., Magliocca, *Amnesty and Section Three*, *supra*, at 105–08 (critiquing the case because the other provisions of the Fourteenth Amendment were understood as self-executing and the notion that Section Three was not self-executing was inconsistent with congressional behavior at the time); Baude & Paulsen, *supra* (manuscript at 37–49) (criticizing Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction).

¶104 Although we do not find *Griffin's Case* compelling, we agree with Chief Justice Chase that “it must be ascertained what particular individuals are embraced by the definition.” 11 F. Cas. at 26. While the disqualification of Section Three attaches automatically, the determination that such an attachment has occurred must be made before the disqualification holds meaning. And Congress has the power under Section Five to establish a process for making that determination. But the fact that Congress *may* establish such a process does not mean that disqualification pursuant to Section Three can be determined *only* through a process established by Congress. Here, the Colorado legislature has established a process—a court proceeding pursuant to section 1-1-113—to make the determination whether a candidate is qualified to be placed on the presidential

primary ballot. And, for the reasons we have already explained, that process is sufficient to permit a judicial determination of whether Section Three disqualification has attached to a particular individual.

¶105 We are similarly unpersuaded by Intervenors’ assertions that Congress created the only currently available mechanism for determining whether a person is disqualified pursuant to Section Three with the 1994 passage of 18 U.S.C. § 2383. That statute makes it a crime to “assist[] or engage[] in any rebellion or insurrection against the authority of the United States.” True, with that enactment, Congress criminalized the same conduct that is disqualifying under Section Three. All that means, however, is that a person charged and convicted under 18 U.S.C. § 2383 would *also* be disqualified under Section Three. It cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law.

¶106 In summary, based on Section Three’s plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors’ reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action. Intervenors’ contrary arguments do not persuade us otherwise.

¶107 That said, our conclusion that implementing legislation from Congress is unnecessary for us to proceed under section 1-1-113 does not resolve the question of whether doing so would violate the separation of powers among the three branches of government. We turn to this justiciability question next.

#### **D. Section Three Is Justiciable**

¶108 President Trump next asserts that presidential disqualification under Section Three presents a nonjusticiable political question. Again, we disagree.

¶109 “In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine is a narrow exception to this rule, and a court may not avoid its responsibility to decide a case merely because it may have “political implications.” *Id.* at 195–96 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983)).

¶110 A controversy involves a nonjusticiable political question when, as relevant here, “there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) (noting that “[t]he nonjusticiability of a political question is primarily a function of the separation of powers” and identifying the above-described instances, and four



others not relevant here, as examples of political questions). The requisite textual commitment must be “[p]rominent on the surface of any case.” *Baker*, 369 U.S. at 217.

¶111 Here, President Trump argues that this case is nonjusticiable because, in his view, the Constitution and federal law commit the question of the qualifications of a presidential candidate to Congress. The Electors point out that President Trump did not argue before us that the questions presented in this appeal are also nonjusticiable based on a lack of judicially discoverable and manageable standards, and therefore, he arguably waived any such argument. We nevertheless address that issue, again in the interest of providing a thorough review.

### **1. No Textually Demonstrable Constitutional Commitment to Congress of Section Three Disqualification**

¶112 Contrary to President Trump’s assertions, we perceive no constitutional provision that reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

¶113 As discussed in Part B.4 above, Article II, Section 1, Clause 2 of the Constitution empowers state legislatures to direct how presidential electors are

appointed, and the Supreme Court has recognized that this provision affords the states “far-reaching authority over presidential electors, absent some other constitutional constraint.” *Chiafalo*, 140 S. Ct. at 2324. In furtherance of this delegation of authority, “the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections,” the “selection and qualification of candidates,” among other things. *Storer*, 415 U.S. at 730. The Election Code is an example of such a “comprehensive” code to regulate state and federal elections. And the fact that Article II, Section 1, Clause 4 authorizes Congress to determine the time for choosing the electors and the date on which they vote does not undermine the substantial authority provided to the states to regulate state and federal elections.

¶114 In our view, Section Three’s text is fully consistent with our conclusion that the Constitution has not committed the matter of presidential candidate qualifications to Congress. As we have noted, although Section Three requires a “vote of two-thirds of each House” to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place. *See* U.S. Const. amend. XIV, § 3. Moreover, if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three, as President Trump asserts, then this would nullify Section Three’s supermajority requirement.

¶115 President Trump’s reliance on Article II, Section 1, Clause 5 of the Constitution and on the Twelfth, Fourteenth, and Twentieth Amendments is misplaced. We address each of these provisions, in turn.

¶116 Article II, Section 1, Clause 5 provides that no person shall be eligible to serve as President unless that person is “a natural born Citizen” who is at least thirty-five years of age and who has resided in the United States for at least fourteen years. This provision, however, says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate’s qualifications are challenged. *See id.*

¶117 The Twelfth Amendment charges the Electoral College with the task of selecting a candidate for President and then transmitting the electors’ votes to the “seat of the government of the United States,” and it provides the procedure by which the electoral votes are to be counted. U.S. Const. amend. XII. Nothing in the Twelfth Amendment, however, vests the Electoral College with the power to determine the eligibility of a presidential candidate. *See Elliott v. Cruz*, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff’d*, 134 A.3d 51 (Pa. 2016) (mem.). Nor does the Twelfth Amendment give Congress “control over the process by which the President and Vice President are normally chosen, other than the very limited one of determining the day on which the electors were to ‘give their votes.’” *Id.* at 651 (citing U.S. Const. amend. XII). And although the Twelfth Amendment provides

for the scenario in which no President is selected by March 4 and specifies that no person constitutionally ineligible to serve as President shall be eligible to serve as Vice President, the Amendment does not assign to Congress (nor to any other branch) the task of determining whether a candidate is qualified in the first place.

¶118 Section Five of the Fourteenth Amendment authorizes Congress to pass legislation to enforce the provisions of the Fourteenth Amendment, but as discussed above, the Fourteenth Amendment is self-executing, and congressional action under Section Five is not required to animate Section Three's disqualification of insurrectionist oath-breakers. Nor does Section Five delegate to Congress the authority to determine the qualifications of presidential candidates to hold office. U.S. Const. amend. XIV, § 5.

¶119 Finally, the Twentieth Amendment, in relevant part, empowers Congress to enact procedures to address the scenario in which neither the President nor the Vice President qualifies for office before the time fixed for the beginning of their terms. U.S. Const. amend. XX, § 3. By its express language, however, this Amendment applies post-election. *Id.* (referring to the "President elect" and "Vice President elect"). Moreover, the Amendment says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office.

¶120 For these reasons, we perceive no textually demonstrable constitutional commitment to Congress of the authority to assess presidential candidate qualifications, and neither President Trump nor his amici identify any constitutional provision making such a commitment. In reaching this conclusion, we are unpersuaded by the cases on which President Trump and his amici rely, which are predicated on inferences they assert can be drawn from one or more of the foregoing constitutional provisions or on the fact that the cases had political implications. *See, e.g., Taitz v. Democrat Party of Miss.*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at \*12-16 (S.D. Miss. Mar. 31, 2015); *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at \*5-7 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146-47 (N.D. Cal. 2008); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2010); *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at \*11-12 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd in part, dismissed in part*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015). As noted above, such inferences are insufficient to establish the requisite clear textual commitment to a coordinate branch of government, *see Baker*, 369 U.S. at 217, and we may not avoid our duty to decide a case merely because it may have political implications, *Zivotofsky*, 566 U.S. at 195-96.

¶121 Moreover, we may not conflate “actions that are textually *committed*” to a coordinate political branch with “actions that are textually *authorized*.” *Stillman v. Dep’t of Defense*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev’d on other grounds sub nom., Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). The Supreme Court has prohibited courts from adjudicating only the former. *Zivotofsky*, 566 U.S. at 195. Absent an affirmative constitutional *commitment*, we cannot abdicate our responsibility to decide a case that is properly before us. *Id.* at 194.

## **2. Section Three Involves Judicially Discoverable and Manageable Standards**

¶122 The question of whether there are judicially discoverable and manageable standards for determining a case is not wholly separate from the question of whether the matter has been textually committed to a coordinate political department. *Nixon*, 506 U.S. at 228. “[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.” *Id.* at 228–29.

¶123 As we have said, President Trump has not argued before us that Section Three lacks judicially discoverable and manageable standards, and we believe for good reason. Section Three disqualifies from certain delineated offices persons who have “taken an oath . . . to support the Constitution of the United States” as an “officer of the United States” and who have thereafter “engaged in insurrection or rebellion.” U.S. Const. amend. XIV, § 3. Although, as we discuss below, the

meanings of some of these terms may not necessarily be precise, we can discern their meanings using “familiar principles of constitutional interpretation” such as “careful examination of the textual, structural, and historical evidence put forward by the parties.” *Zivotofsky*, 566 U.S. at 201.

¶124 Indeed, in this and other contexts, courts have readily interpreted the terms that we are being asked to construe and have reached the substantive merits of the cases before them. *See, e.g., United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,079) (defining “engage” as that term is used in Section Three); *United States v. Rhine*, No. 210687 (RC), 2023 WL 2072450, at \*8 (D.D.C. Feb. 17, 2023) (defining “insurrection” in the context of ruling on a motion in limine in a criminal prosecution arising out of the events of January 6); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983) (defining “insurrection” in the context of an insurance policy exclusion); *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930) (defining “insurrection” as that term is used in a section of the U.S. Code), *aff’d*, 49 F.2d 1077 (2d Cir. 1931); *Hearon v. Calus*, 183 S.E. 13, 20 (S.C. 1935) (defining “insurrection” as that term is used in a provision of the South Carolina constitution).

¶125 Accordingly, we conclude that interpreting Section Three does not “turn on standards that defy judicial application.” *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211). In so concluding, we respectfully disagree with the Michigan

Court of Claims’ finding that the interpretation of the terms now before us constitutes a nonjusticiable political question merely because “there are . . . many answers and gradations of answers.” *Trump v. Benson*, No. 23000151-MZ, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff’d sub nom. Davis v. Wayne Cnty. Election Comm’n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023). In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us.

¶126 For these reasons, we conclude that the issues presented here do not, either alone or together, constitute a nonjusticiable political question. We thus proceed to the question of whether Section Three applies to the President.

### **E. Section Three Applies to the President**

¶127 The parties debate the scope of Section Three. The Electors claim that this potential source of disqualification encompasses the President. President Trump argues that it does not, and the district court agreed. On this issue, we reverse the district court.

¶128 Section Three prohibits a person from holding any “office, civil or military, under the United States” if that person, as “an officer of the United States,” took an oath “to support the Constitution of the United States” and subsequently



engaged in insurrection. U.S. Const. amend. XIV, § 3. Accordingly, Section Three applies to President Trump only if (1) the Presidency is an “office, civil or military, under the United States”; (2) the President is an “officer of the United States”; and (3) the presidential oath set forth in Article II constitutes an oath “to support the Constitution of the United States.” *Id.* We address each point in turn.

### **1. The Presidency Is an Office Under the United States**

¶129 The district court concluded that the Presidency is not an “office, civil or military, under the United States” for two reasons. *Anderson*, ¶¶ 303–04; *see* U.S. Const. amend. XIV, § 3. First, the court noted that the Presidency is not specifically mentioned in Section Three, though senators, representatives, and presidential electors are. The court found it unlikely that the Presidency would be included in a catch-all of “any office, civil or military.” *Anderson*, ¶ 304; *see* U.S. Const. amend. XIV, § 3. Second, the court found it compelling that an earlier draft of the Section specifically included the Presidency, suggesting that the drafters intended to omit the Presidency in the version that passed. *See Anderson*, ¶ 303. We disagree with the district court’s conclusion, as our reading of both the constitutional text and the historical record counsel that the Presidency is an “office . . . under the United States” within the meaning of Section Three.

¶130 When interpreting the Constitution, we prefer a phrase’s normal and ordinary usage over “secret or technical meanings that would not have been

known to ordinary citizens in the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Dictionaries from the time of the Fourteenth Amendment’s ratification define “office” as a “particular duty, charge or trust conferred by public authority, and for a public purpose,” that is “undertaken by . . . authority from government or those who administer it.” Noah Webster, *An American Dictionary of the English Language* 689 (Chauncey A. Goodrich ed., 1853); see also 5 *Johnson’s English Dictionary* 646 (J.E. Worcester ed., 1859) (defining “office” as “a publick charge or employment; magistracy”); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (“An office is defined to be ‘a public charge or employment,’ . . .”). The Presidency falls comfortably within these definitions.

¶131 We do not place the same weight the district court did on the fact that the Presidency is not specifically mentioned in Section Three. It seems most likely that the Presidency is not specifically included because it is so evidently an “office.” In fact, no specific *office* is listed in Section Three; instead, the Section refers to “any office, civil or military.” U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an “office” in the Constitution. Instead, senators and representatives are referred to as “members” of their respective bodies. See U.S. Const. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications

of its own Members . . . .”); *id.* at § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); *id.* at art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

¶132 Indeed, even Intervenors do not deny that the Presidency is an office. Instead, they assert that it is not an office “under the United States.” Their claim is that the President and elected members of Congress *are* the government of the United States, and cannot, therefore, be serving “under the United States.” *Id.* at amend. XIV, § 3. We cannot accept this interpretation. A conclusion that the Presidency is something other than an office “under” the United States is fundamentally at odds with the idea that all government officials, including the President, serve “we the people.” *Id.* at pmb1. A more plausible reading of the phrase “under the United States” is that the drafters meant simply to distinguish those holding federal office from those held “under any State.” *Id.* at amend. XIV, § 3.

¶133 This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an “Office” twenty-five times. *E.g., id.* at art. I, § 3, cl. 5 (“The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice

President, or when he shall exercise *the Office of President of the United States.*” (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that “[n]o Person except a natural born Citizen . . . shall be eligible to the *Office of President*” and “[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years” (emphases added)). And it refers to an office “under the United States” in several contexts that clearly support the conclusion that the Presidency is such an office.

¶134 Consider, for example, the Impeachment Clause, which reads that Congress can impose, as a consequence of impeachment, a “disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.” *Id.* at art. I, § 3, cl. 7. If the Presidency is not an “office . . . under the United States,” then anyone impeached – including a President – could nonetheless go on to serve as President. *See id.* This reading is nonsensical, as recent impeachments demonstrate. The Articles of Impeachment brought against both President Clinton and President Trump asked for each man’s “removal from office[,] and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.” Articles of Impeachment Against William Jefferson Clinton, H. Res. 611, 105th Cong. (Dec. 19, 1998); *see also* Articles of Impeachment Against Donald J. Trump, H. Res. 755, 116th Cong. (Dec. 8, 2019); Articles of Impeachment Against Donald J. Trump, H. Res. 24, 117th Cong. (Jan 13, 2021). Surely the impeaching members of Congress

correctly understood that either man, if convicted and subsequently disqualified from future federal office by the Senate, would be unable to hold the Presidency in the future.

¶135 Similarly, the Incompatibility Clause states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. Const. art. I, § 6, cl. 2. To read “office under the United States” to exclude the Presidency would mean that a sitting President could also constitutionally occupy a seat in Congress, a result foreclosed by basic principles of the separation of powers. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (“The principle of separation of powers . . . was woven into the [Constitution] . . . . The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called ‘Ineligibility’ and ‘Incompatibility’ Clauses contained in Art. I, s 6 . . . .”), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¶136 Finally, the Emoluments Clause provides that “no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8. To read the

Presidency as something other than an office under the United States would exempt the nation's chief diplomat from these protections against foreign influence. But Presidents have long sought dispensation from Congress to retain gifts from foreign leaders, understanding that the Emoluments Clause required them to do so.<sup>14</sup>

¶137 The district court found it compelling that an earlier draft of the proposed Section listed the Presidency, but the version ultimately passed did not. *Anderson*, ¶ 303. As a starting point, however, we are mindful that “it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.” *Heller*, 554 U.S. at 590. And the specifics of the change from the

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<sup>14</sup> See, e.g., H. Rep. No. 23-302, at 1-2 (Mar. 4, 1834) (discussing the receipt of gifts from the Emperor of Morocco and noting that the President's “surrender of the articles to the Government” satisfied the “constitutional provision in relation to their acceptance”); 14 Abridgement of the Debates of Congress from 1789 to 1856, 140-41 (Thomas Hart Benton ed., 6 1860) (displaying (1) a letter from the Secretary of State to the Imaum of Muscat indicating that the President “directed” the Secretary to refuse the Imaum's gifts “under existing constitutional provisions” and (2) a letter from the President requesting that Congress allow him to accept the gifts); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (providing that the President is “authorized” to sell some of the Imaum's gifts and place the proceeds in the U.S. Treasury); Joint Resolution No. 20, A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, Mar. 15, 1862, 12 Stat. 616 (directing the King of Siam's gifts and letters to be placed in “the collection of curiosities at the Department of the Interior”).

earlier draft to what was ultimately passed do not demonstrate an intent to exclude the Presidency from the covered offices.

¶138 The draft proposal provided that insurrectionist oath-breakers could not hold “the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held *under appointment from the President of the United States, and requiring the confirmation of the Senate.*” Cong. Globe., 39th Cong., 1st Sess. 919 (1866) (emphasis added). Later versions of the Section—including the enacted draft—removed specific reference to the President and Vice President and expanded the category of office-holder to include “any office, civil or military” rather than only those offices requiring presidential appointment and Senate confirmation. See U.S. Const. amend. XIV, § 3.

¶139 It is hard to glean from the limited available evidence what the changes across proposals meant. But we find persuasive amici’s suggestion that Representative McKee, who drafted these proposals, most likely took for granted that his second proposal included the President. While nothing in Representative McKee’s speeches mentions why his express reference to the Presidency was removed, his public pronouncements leave no doubt that his subsequent draft proposal still sought to ensure that rebels had absolutely no access to political power. Representative McKee explained that, under the proposed amendment,

“the loyal alone shall rule the country” and that traitors would be “cut[] off . . . from all political power in the nation.” Cong. Globe, 39th Cong., 1st Sess. 2505 (1866); see also Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 22–23 (Univ. of Md. Legal Stud. Rsch. Paper No. 2023-16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4591133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133) (“*Our Questions, Their Answers*”); Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* 106, 114 (2023) (indicating that Representative McKee desired to exclude all oath-breaking insurrectionists from all federal offices, including the Presidency). When considered in light of these pronouncements, the shift from specifically naming the President and Vice President in addition to officers appointed and confirmed to the broadly inclusive “any officer, civil or military” cannot be read to mean that the two highest offices in the government are excluded from the mandate of Section Three.

¶140 The importance of the inclusive language — “any officer, civil or military” — was the subject of a colloquy in the debates around adopting the Fourteenth Amendment. Senator Reverdy Johnson worried that the final version of Section Three did not include the office of the Presidency. He stated, “[T]his amendment does not go far enough” because past rebels “may be elected President or Vice President of the United States.” Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). So, he asked, “why did you omit to exclude them? I do not understand them to be



excluded from the privilege of holding the two highest offices in the gift of the nation.” *Id.* Senator Lot Morrill fielded this objection. He replied, “Let me call the Senator’s attention to the words ‘or hold any office, civil or military, under the United States.’” *Id.* This answer satisfied Senator Johnson, who stated, “Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.” *Id.* This colloquy further supports the view that the drafters of this Amendment intended the phrase “any office” to be broadly inclusive, and certainly to include the Presidency.

¶141 Moreover, Reconstruction-Era citizens—supporters and opponents of Section Three alike—understood that Section Three disqualified oath-breaking insurrectionists from holding the office of the President. *See* Montpelier Daily Journal, Oct. 19, 1868 (writing that Section Three “excludes leading rebels from holding offices . . . from the Presidency downward”). Many supporters of Section Three defended the Amendment on the ground that it would exclude Jefferson Davis from the Presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 *Brit. J. Am. Legal Stud.* (forthcoming 2023) (manuscript at 7–10), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4440157](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157); *see also, e.g.,* *Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (arguing that foregoing

Section Three would “render Jefferson Davis eligible to the Presidency of the United States,” and “[t]here is something revolting in the very thought”).

¶142 Post-ratification history includes more of the same. For example, Congress floated the idea of blanket amnesty to shield rebels from Section Three. See Vlahoplus, *supra*, (manuscript at 7–9). In response, both supporters and dissenters acknowledged that doing so would allow the likes of Jefferson Davis access to the Presidency. See *id.*; see also, e.g., *The Pulaski Citizen, The New Reconstruction Bill*, Apr. 13, 1871, at 4 (acknowledging as a supporter of amnesty that it would “make even Jeff. Davis eligible again to the Presidency”); *The Chicago Tribune*, May 24, 1872 (asserting that amnesty would make rebels “eligible to the Presidency of the United States”); *Indiana Progress*, Aug. 24, 1871 (similar).

¶143 We conclude, therefore, that the plain language of Section Three, which provides that no disqualified person shall “hold any office, civil or military, under the United States,” includes the office of the Presidency. This textual interpretation is bolstered by constitutional context and by history surrounding the enactment of the Fourteenth Amendment.

## **2. The President Is an Officer of the United States**

¶144 We next consider whether a President is an “officer of the United States.” U.S. Const., amend. XIV, § 3. The district court found that the drafters of Section Three did not intend to include the President within the catch-all phrase “officer

of the United States,” and, accordingly, that a current or former President can engage in insurrection and then run for and hold any office. *Anderson*, ¶ 312; see U.S. Const., amend. XIV, § 3. We disagree for four reasons.

¶145 First, the normal and ordinary usage of the term “officer of the United States” includes the President. As we have explained, the plain meaning of “office . . . under the United States” includes the Presidency; it follows then that the President is an “officer of the United States.” See *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) (“An interpretation of the Constitution in which the holder of an ‘office’ is not an ‘officer’ seems, at best, strained.”). Indeed, Americans have referred to the President as an “officer” from the days of the founding. See, e.g., *The Federalist* No. 69 (Alexander Hamilton) (“The President of the United States would be an officer elected by the people . . .”). And many nineteenth-century presidents were described as, or called themselves, “chief executive officer of the United States.” See *Vlahoplus, supra* (manuscript at 17–18) (listing presidents).

¶146 Second, Section Three’s drafters and their contemporaries understood the President as an officer of the United States. See *Graber, Our Questions, Their Answers, supra*, at 18–19 (listing instances); see also *Cong. Globe*, 39th Cong., 1st Sess. 915 (1866) (referring to the “chief executive officer of the country”); *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) (“We have no *officers* in this government,

*from the President* down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.” (emphases added)).

¶147 President Trump concedes as much on appeal, stating that “[t]o be sure, the President is an officer.” He argues, however, that the President is an officer of the Constitution, not an “officer of the United States,” which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a “colloquial sense,” and thus have no bearing on the term’s use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term “officer” according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the “normal and ordinary as distinguished from technical meaning” should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

¶149 We also find Attorney General Stanbery’s opinions on the meaning of Section Three significant. In one opinion on the subject, Stanbery explained that

the term “‘officer of the United States,’ within [Section Three] . . . is used in its most general sense, and without any qualification, as legislative, or executive, or judicial.” The Reconstruction Acts, 12 Op. Att’y. Gen. 141, 158 (1867) (“*Stanbery I*”). And in a second opinion on the topic, he observed that the term “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.” The Reconstruction Acts, 12 Op. Att’y. Gen. 182, 203 (1867) (“*Stanbery II*”).

¶150 Third, the structure of Section Three persuades us that the President is an officer of the United States. The first half of Section Three describes the offices protected and the second half addresses the parties barred from holding those protected offices. There is a parallel structure between the two halves: “Senator or Representative in Congress” (protected office) corresponds to “member of Congress” (barred party); “any office . . . under the United States” (protected office) corresponds to “officer of the United States” (barred party); and “any office . . . under any State” (protected office) also has a corresponding barred party in “member of any State legislature, or as an executive or judicial officer of any State.” U.S. Const. amend. XIV, § 3. The only term in the first half of Section Three that has no corresponding officer or party in the second half is “elector of President and Vice President,” which makes sense because electors do not take

constitutionally mandated oaths so they have no corresponding barred party. *Id.*; *see also id.* at art. II, § 1 (discussing a presidential elector’s duties without reference to an oath); *id.* at art. VI (excluding presidential electors from the list of positions constitutionally obligated to take an oath to support the Constitution). Save electors, there is a perfect parallel structure in Section Three. *See* Baude & Paulsen, *supra* (manuscript at 106).

¶151 Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no room to conclude that “officer of the United States” was used as a term of art. *Id.* The drafters of Section Three were motivated by a sense of betrayal; that is, by the existence of a broken oath, not by the type of officer who broke it: “[A]ll of us understand the meaning of the third section,” Senator John Sherman stated, “[it includes] those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office . . . .” *Cong. Globe*, 39th Cong., 1st Sess. 2899 (1866); *see also id.* at 2898 (Senator Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreeing that “the theory” of Section Three was “that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office.”); *id.* at 3035–36 (Senator John B. Henderson

explaining that “[t]he language of this section is so framed as to disfranchise from office . . . the leaders of any rebellion hereafter to come.”); *Powell*, 27 F. Cas. at 607 (summarizing the purpose of Section Three: “[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability.”). A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section’s purpose.

¶152 We therefore conclude that “officer of the United States,” as used in Section Three, includes the President.

### **3. The Presidential Oath Is an Oath to Support the Constitution**

¶153 Finally, we consider whether the oath taken by the President to “preserve, protect and defend the Constitution,” U.S. Const. art. II, § 1, cl. 8, is an oath “to support the Constitution of the United States,” *id.* at amend. XIV, § 3. The district court found that, because the presidential oath’s language is more particular than the oath referenced in Section Three, the drafters did not intend to include former Presidents. *Anderson*, ¶ 313. We disagree.

¶154 Article VI of the Constitution provides that “all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to

support this Constitution.”<sup>15</sup> U.S. Const. art. VI, cl. 3. Article II specifies that the President shall swear an oath to “preserve, protect and defend the Constitution.” *Id.* at art. II, § 1, cl. 8. Intervenors contend that because the Article II oath does not include a pledge to “support” the Constitution, an insurrectionist President cannot be disqualified from holding future office under Section Three on the basis of that oath.

¶155 This argument fails because the President is an “executive . . . Officer[]” of the United States under Article VI, albeit one for whom a more specific oath is prescribed. *Id.* at art. VI, cl. 3 (“The 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 . . .”). This conclusion follows logically from the accepted fact that the Vice President is also an executive officer. True, the Vice President takes the more general oath prescribed by federal law, *see* 5 U.S.C. § 3331 (noting that anyone “except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take” an oath including a pledge to “support and defend the Constitution”),

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<sup>15</sup> Article VI, however, does not provide any specific form of oath or affirmation.



but it makes no sense to conclude that the Vice President is an executive officer under Article VI but the President is not.

¶156 The language of the presidential oath – a commitment to “preserve, protect, and defend the Constitution” – is consistent with the plain meaning of the word “support.” U.S. Const. art. II, § 1, cl. 8. Modern dictionaries define “support” to include “defend” and vice versa. *See, e.g., Support*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/support> [https://perma.cc/WGH6-D8KU] (defining “support” as “to uphold or defend as valid or right”); *see also Defend*, at *id.*, <https://www.merriam-webster.com/dictionary/defend> [https://perma.cc/QXQ7-LRKX] (defining “defend” as “to maintain or support in the face of argument or hostile criticism”). So did dictionaries from the time of Section Three’s drafting. *See, e.g., Samuel Johnson, A Dictionary of the English Language* (5th ed. 1773) (“defend”: “to stand in defense of; to protect; to support”); Noah Webster, *An American Dictionary of the English Language* 271 (Chauncey A. Goodrich, ed., 1857) (“defend”: “to support or maintain”).

¶157 The specific language of the presidential oath does not make it anything other than an oath to support the Constitution. Indeed, as one Senator explained just a few years before Section Three’s ratification, “the language in [the presidential] oath of office, that he shall protect, support [sic], and defend the Constitution, makes his obligation more emphatic and more obligatory, if possible,

than ours, which is simply to support the Constitution.” Cong. Globe, 37th Cong., 3d Sess. 89 (1862). And, in fact, several nineteenth-century Presidents referred to the presidential oath as an oath to “support” the Constitution. See James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1897*, Vol. 1 at 232, 467 (Adams, Madison), Vol. 2 at 625 (Jackson), Vol. 8 at 381 (Cleveland).

¶158 In sum, “[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.” *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). The most obvious and sensible reading of Section Three, supported by text and history, leads us to conclude that (1) the Presidency is an “office under the United States,” (2) the President is an “officer . . . of the United States,” and (3) the presidential oath under Article II is an oath to “support” the Constitution.

¶159 President Trump asks us to hold that Section Three disqualifies every oath-breaking insurrectionist *except the most powerful one* and that it bars oath-breakers from virtually every office, both state and federal, *except the highest one in the land*. Both results are inconsistent with the plain language and history of Section Three.

¶160 We therefore reverse the district court’s finding that Section Three does not apply to a President and conclude that Section Three bars President Trump from

holding the office of the President if its other provisions are met; namely, if President Trump “engaged in insurrection.” U.S. Const. amend. XIV, § 3.

¶161 Before addressing the district court’s findings that President Trump engaged in insurrection, however, we consider President Trump’s challenge to the admissibility of a congressional report on which the district court premised some of its findings.

#### **F. The District Court Did Not Err in Admitting Portions of the January 6 Report**

¶162 President Trump asserts that the district court wrongly admitted into evidence thirty-one findings from a congressional report drafted by the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (“the Committee”), which recounted the Committee’s investigation of the facts, circumstances, and causes of the attack on the Capitol. *See* H.R. Rep. No. 117-663 (Dec. 22, 2022) (“the Report”). In President Trump’s view, the Report is an untrustworthy, partisan political document and therefore constituted inadmissible hearsay under Rule 803(8)(C) of the Colorado Rules of Evidence. We are unpersuaded. Under the deferential standard of review that governs, we perceive no error by the district court in admitting portions of the Report into evidence at trial.

¶163 We review a district court’s evidentiary rulings for an abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25, 428 P.3d 517, 524. “A court abuses its discretion

only if its decision is ‘manifestly arbitrary, unreasonable, or unfair.’” *Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, ¶ 74, 285 P.3d 986, 1008 (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t*, 196 P.3d 892, 899 (Colo. 2008)). We may not consider “whether we would have reached a different result,” but only “whether the trial court’s decision fell within a range of reasonable options.” *Id.* (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006)).

¶164 Hearsay statements are out-of-court statements offered in court for the truth of the matter asserted. CRE 801(c). Such statements are generally inadmissible, CRE 802, but CRE 803(8) creates an exception for “reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law.” This exception, however, applies only if the report is trustworthy. *Id.*

¶165 The Federal Rules of Evidence (on which our evidentiary rules were modeled) contain a near-identical exception to Colorado Rule 803(8), *see* Fed. R. Evid. 803(8), so we may look to federal case law interpreting the federal rule for guidance on how to assess trustworthiness, *see Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 10, 287 P.3d 112, 115 (noting that, although we are “not bound to interpret our rules . . . the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions

interpreting those rules for guidance”); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982) (“[C]ase law interpreting the federal rule is persuasive in analysis of the Colorado rule.”). Under federal law, courts are instructed to “assume[] admissibility in the first instance.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). Thus, “the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy.” *Barry v. Trs. of Int’l Ass’n*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). The federal courts have also identified four non-exclusive factors to help courts determine trustworthiness: “(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems.” *Id.* at 97; see *Beech Aircraft*, 488 U.S. at 167 n.11.

¶166 The district court employed the foregoing presumption and four factors to analyze the Report.<sup>16</sup> The court determined that “the first three *Barry* factors weigh

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<sup>16</sup> We also review a district court’s trustworthiness analysis for an abuse of discretion. See *United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) (“Under [Fed. R. Evid. 803(8)], this Court must decide whether the district court abused its discretion by ‘[g]iving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant.’” (quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 266 (3d Cir. 1983))); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984) (“Rule 803(8)(C) also requires that the report not be subject to circumstances indicating a lack of trustworthiness. This determination is within the discretion of the trial court.”); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821–22 (10th Cir. 1981) (“We believe that ‘the trial court

strongly in favor of reliability.” *Anderson*, ¶ 24. President Trump focuses his admissibility challenge on the fourth factor: “possible motivation problems.” *Barry*, 467 F. Supp. 2d at 97.

¶167 First, President Trump claims the Report was biased against him because all nine Committee members voted in favor of impeaching him before their investigation began. Timothy Heaphy, Chief Investigative Counsel for the Committee, testified at trial, however, that although members “certainly had . . . hypotheses that were a starting point,” such hypotheses did not impair the members’ ability to be fair and impartial. *Anderson*, ¶ 26. The district court found “Mr. Heaphy’s testimony on this subject to be credible and h[eld] that any perceived animus of the committee members towards [President] Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable.” *Id.* We see no abuse of discretion. *See People v. Pitts*, 13 P.3d 1218, 1221 (Colo. 2000) (“It is the function of the trial court, and not the reviewing court, to weigh evidence and determine the credibility of the witnesses.”).

¶168 Second, President Trump believes that the political backdrop against which the Report was created makes it unreliable. This argument proves too much. All

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is the first and best judge of whether tendered evidence meets th[at] standard of trustworthiness and reliability . . .’ and [w]e cannot say the trial court abused its discretion by refusing to admit the report.” (quoting *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944))).

congressional reports contain some level of political motivation, yet neither CRE 803(8) nor the corresponding federal rule declares such reports per se inadmissible; instead, as the district court explained, a court is at liberty to admit what it deems trustworthy. *See Anderson*, ¶ 28; *see, e.g., Barry*, 467 F. Supp. 2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F. Supp. 2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982) (admitting Congressional Committee report), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984).

¶169 Third, President Trump asserts that because Democrats outnumbered Republicans seven to two on the Committee, the Report's findings are necessarily biased. The district court determined that although the Report "would have further reliability had there been greater Republican participation," that deficit did not demonstrate "motivation problems." *Anderson*, ¶¶ 29–30. The district court observed that House Republicans opted to boycott the Committee after then-Speaker of the House Nancy Pelosi agreed to seat only three of the five Republicans recommended to her. *Id.* at ¶ 30. Despite then-Speaker Pelosi's "unprecedented" move, *id.*, the district court noted that "the two Republicans who did sit . . . were both duly elected Republicans," *id.* at ¶ 31; "[t]he investigative staff included . . . many Republican[]" lawyers, *id.* at ¶ 32; "the staffing decisions did

not include any inquiry into political affiliation,” *id.*; and “[t]he overwhelming majority of witnesses . . . were [President] Trump administration officials and Republicans,” *id.* at ¶ 33. The court reasoned that “[t]hese facts all cut against Intervenors’ argument that lack of participation of the minority party resulted in . . . unreliable conclusions.” *Id.* at ¶ 34.

¶170 Again, we perceive no abuse of discretion. CRE 803(8) assumes admissibility, *Barry*, 467 F. Supp. 2d at 96, and President Trump has not met his burden of demonstrating that, contrary to the evidence the district court highlighted, the Report suffered from motivation problems. *See id.* Moreover, we remain mindful that this is a four-factor inquiry. No single factor is dispositive. Instead, any perceived shortcomings as to one must be weighed against the strengths of the others. Whatever the “possible motivation problems,” the weight of the other three factors remains. As the district court explained, (1) passage of time does not impugn the Report, as the investigation began six months after the attack and was completed in under two years; (2) the investigative staff consisted of highly skilled lawyers, including two former U.S. Attorneys; and (3) there was a formal ten-day hearing in which seventy witnesses testified under oath. *Anderson*, ¶ 24. So, not only was the court’s analysis of the fourth factor reasonable, but it also did not abuse its discretion in reaching its broader conclusion that the Report was trustworthy.