DATE FILED: November 29, 2023 10:37 AM
FILING ID: A5F9E50F32F8A
CASE NUMBER: 2023SA300

COLORADO SUPREME COURT Ralph A. Carr Judicial Center 2 East 14th Avenue, Denver, CO 80203 Court of Appeals Case No. 2023CV032577 Hon. Sarah B. Wallace Application for review under § 1-1-113(3), C.R.S., Denver District Court No. 2023CV032577 Hon. Sarah B. Wallace **Petitioners-Appellants:** 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** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.	▲ Court Use Only ▲
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BRIEF OF AMICUS CURIAE COLORADO COMMON CAUSE AND MARY ESTILL BUCHANAN IN SUPPORT OF PETITIONERS-APPELLANTS NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, AND CHRISTOPHER CASTILIAN

Certificate Of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

This brief complies with the word limits set forth in C.A.R. (g) as it contains 4,166 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

/s/William R. Reinken
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Statement of Interests

Amici Curiae have spent decades working in various capacities to ensure that Colorado has free and fair elections and a functional and thriving democratic process.

Common Cause is a nonpartisan, grassroots organization dedicated to fair elections, due process, and working to ensure that government at all levels may be more democratic, open, and responsive to the interests of the electorate. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 1.5 million members nationwide and local organizations in 36 states. Common Cause is a leader in the fight for open, honest, and fair elections throughout the United States, and in Colorado through Colorado Common Cause. Common Cause has long supported efforts to protect the integrity of elections and to ensure stable governing processes rooted in a deep respect for the rule of law over the rule of individuals or cults of personality. Consistent with that mission, Colorado Common Cause strengthens democracy in the state by promoting public participation in government and defending civil rights by protecting the right to vote.

Mary Estill Buchanan has been a tireless public servant in Colorado. She served two terms as Colorado Secretary of State (from 1974 to 1983) and was the first woman to hold the office in the state's then-98-year existence. After graduating

from Wellesley College and Harvard Business School, Buchanan and her family moved to Colorado in 1963, where she began a career as a labor-management consultant. During her time in office, Secretary Buchanan was the only Republican in statewide office, working across the aisle to ensure effective and efficient administration of Colorado's elections. As Secretary, Buchanan championed and implemented reforms to improve election, candidate, and office holder transparency. Prior to her time as Secretary of State, Buchanan served on the Colorado State Board of Agriculture and the Colorado Commission on the Status of Women, creating and chairing the Women in Government Committee to recruit and elect women to public office. As a private citizen, Buchanan has continued to be a strong advocate for democracy and women in public service.[1]

I. Introduction

The District Court has heard the evidence in this case, weighed the credibility of the witnesses, and issued an extremely thorough order addressing not only the central question of whether Trump broke his oath as "an officer of the United States" by engaging in insurrection against the Constitution, but also the attendant questions of jurisdiction and justiciability. Upon its review of the evidence and applicable law,

[1]No party's counsel authored this brief in whole or in part. No party, no party's counsel, nor any other person other than Common Cause, its members, and/or its counsel, contributed money for the preparation or submission of this brief.

the District Court found unequivocally that "[Donald] Trump engaged in an insurrection on January 6, 2021, through incitement, and that the First Amendment does not protect Trump's speech." Final Order of the District Court, November 17, 2021, ¶ 298. The District Court also determined that the President of the United States is not "an officer of the United States" for purposes of the Disqualification Clause of the Fourteenth Amendment to the United States Constitution. *Id.* ¶ 313. *Amici* respectfully submit that the District Court correctly decided the issue of Trump's engagement in insurrection, but incorrectly decided the question of whether the President is "an officer of the United States."

Whether the findings and conclusions of the District Court are ultimately affirmed or reversed, *amici* respectfully urge this Court to keep the focus of the appeal fixed upon the substantive merits of the case – the question of whether Trump broke his oath by engaging in insurrection against the Constitution, and whether such engagement bars him from holding the office of the Presidency in the future – rather than the other procedural or jurisdiction challenges that the District Court has heard and rejected from Mr. Trump. The Supreme Court of the United States may ultimately have the final word on the meaning of the Disqualification Clause, but this Court has the unique and powerful opportunity to frame that question in the way it should be framed. To frame the question in terms of jurisdiction or justiciability

would not only be a legal error, but also a grave disservice to the Petitioners, the Intervenor, and ultimately to the eligible electors of Colorado. *Amici* pray that such error may be avoided on appeal.

II. Challenges to Jurisdiction, Justiciability, and the Appeal to Populism

Challenges to jurisdiction, justiciability, and the appeal to broad principles of populism were raised by Mr. Trump's attorneys at every opportunity in the District Court. The District Court comprehensively addressed and rejected these challenges.[2] Mr. Trump has now conveyed his intent to renew each of these challenges in his appeal to this Court. He will argue, either directly or indirectly, that his procedural or jurisdictional challenges – though rejected by the trial court without exception – create an environment in which the underlying substantive question of whether he is disqualified because he engaged in insurrection cannot be answered with certainty, and therefore should not be answered at all.[3] To accept this argument would be a grave error, and Colorado Common Cause urges the Court to affirm with confidence the rulings of the District Court as to each of Mr. Trump's challenges. The ability to

[2]Mr. Trump's efforts in this regard were summarized by the District Court at paragraphs 5 to 17 of its Final Order.

[3]This strategy was quite explicitly deployed in Mr. Trump's opening statement at trial: "When something's close or ambiguous or a stretch or an unusual argument, you don't interpret it as a way to cancel the opportunity for people to choose their representatives." 10/30/23 Tr. 58:15-24 (Mr. Gessler).

interpret the text of the Constitution – "to say what the law is" under *Marbury v. Madison*, 5 U.S. 137, 178 (1804) – is the key historical prerogative of the judiciary, and this prerogative should not be surrendered at such a critical historical juncture simply because the question before the Court is significant.

A. Challenges to the Court's Jurisdiction

Mr. Trump has repeatedly argued that the District Court (and by extension this court) lack "jurisdiction" (in one sense or another, without much specificity, and without clear authority) to decide the dispositive question at hand. The argument is an empty one. "In Colorado, district courts are courts of general jurisdiction, and have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided in the state constitution." *Wood v. People*, 255 P.3d 1136, 1140 (Colo. 2011) (internal quotations omitted); *see also* Colo. Const. art. VI, § 9. Even if analysis of the Disqualification Clause were deemed a purely federal question, "state and federal courts have concurrent jurisdiction unless Congress has affirmatively given exclusive jurisdiction to the federal courts" – and no such exclusive jurisdiction has been given with respect to the questions here presented. *See Telluride Co. v. Varley*, 934 P.2d 888, 890 (Colo. App. 1997).

Regardless of the national scope of Mr. Trump's profile and candidacy, the question of whether he is constitutionally qualified to appear on the Colorado ballot

may absolutely be decided by the Colorado courts. Under the Colorado election code, "the power to resolve issues regarding candidate eligibility resides with the courts." *Hanlen v. Gessler*, 2014 CO 24, 44, 333 P.3d 41, 51. This includes questions regarding "[t]he qualification of any candidate," which "may be challenged by an eligible elector." Colo. Rev. Stat. 1-4-501(3). When the qualification of a candidate for office is contested by an eligible elector, "the court shall . . . determine whether the candidate meets the qualifications for the office." *Id.* Once the court has made its determination, it is the legal duty of the Secretary of State to enforce that adjudication (as it is the Secretary of State's duty, *inter alia*, "to supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections."). Colo. Rev. Stat. 1-1-107. "[A] state's legitimate interest in protecting the integrity and practical functioning of the political process **permits it to exclude from the ballot candidates who are constitutionally prohibited from holding office**." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (upholding exclusion of constitutionally ineligible presidential candidate from a Colorado ballot) (emphasis added).

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7, 166 L. Ed. 1 (2006); *see also Colorado Libertarian Party v. Secretary of State of Colo.*, 817

P.2d 998, 1004 (Colo. 1991) (acknowledging "the state's compelling interest in maintaining the integrity of its ballot access system"). Moreover, each state has the responsibility "to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Storer v. Brown*, 415 U.S. 724, 733, 94 S. Ct. 1274, 1280, 39 L. Ed. 2d 714 (1974). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections," and "as a practical matter, 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 v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245 (1992).

Trump's attempts to dismiss *Hassan* and other authority are based on his erroneous and dangerous premise that courts should not enforce the Constitution against candidates who are popular with some portion of the electorate. But questions of constitutional qualification for public office – the core question that emanates from the Disqualification Clause – cannot be deferred on the basis of a candidate's relative popularity. Our framers have made clear that a candidate's popularity does not supersede the Constitution – if it did, Trump would never have become president at all. U.S. Const. art. II, § 1, cl. 2. In this instance, the full question of Mr. Trump's disqualification must now be answered by *this* Court under

Colo. Rev. Stat. 1-4-501(3). The Secretary of State has rightly expressed that she will then enforce the Court's decision on this question, as her own oath of office requires. 10/30/23 Tr. 64:14 – 21 (Mr. Sullivan) (noting that "[the Secretary] welcomes the Court's direction on whether [Mr. Trump's] actions rise to such a level as to disqualify him from appearing on the presidential primary ballot in Colorado," and that "she will, of course, follow the Court's judgment on that question.").

B. Challenges to Justiciability

In support of the fallacious argument that the question of Mr. Trump's constitutional disqualification is not "ripe for review," Mr. Trump and his supporters will likely draw this Court's attention to the Minnesota Supreme Court's recent decision in *Growe v. Simon,* A23-1354 (Nov. 8, 2023). In *Growe*, the Minnesota Supreme Court refused to address the question of constitutional disqualification in the context of a party primary, finding instead that "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." *Id.* at 3 (*citing De La Fuente v. Simon,* 940 N.W.2d 477, 492 (Minn. 2020)). The linchpin of the court's decision in *Growe* was a relatively unique provision of the Minnesota election code that provides that "[e]ach party participating in a presidential nomination primary must determine which

candidates are to be placed on the presidential nomination primary ballot for that party." *See* Minn. Stat. §207A.13, subd. 2(a) (discussed at length in *De La Fuente*). In light of the Minnesota election code's express deference to party discretion at the primary stage, the Court in *Growe* refused to address "the claim that it would be error for the Secretary of State to place former President Trump's name on the ballot for the 2024 *general* election," finding that this claim was neither ripe nor "about to occur" as the election code required.

In a footnote to its decision in *De La Fuente*, the Minnesota Supreme Court recognized that only "a few other states" allow political parties to determine unilaterally which candidates will appear on a presidential primary ballot. *De La Fuente*, 940 N.W.2d at 495, fn. 17. **Colorado is not one of those states.** As discussed at length in Section II(A), *supra*, the Colorado election code allows for challenges to a candidate's qualifications or ballot eligibility to be brought by "eligible electors" (such as the Petitioners) within certain prescribed timeframes. Once those challenges are brought, "the power to resolve issues regarding candidate eligibility resides with the courts" under *Hanlen v. Gessler*, and it falls to Colorado's Secretary of State to honor and enforce the court's eligibility decisions without regard to the preferences of political parties.

Questions regarding Mr. Trump's constitutional qualification and ballot eligibility have been raised. They have been raised by eligible electors. They have been raised in a timely manner and in keeping with the procedural requirements of the Colorado election code. The Minnesota Supreme Court found a ripeness issue rooted in a unique provision of its own state's law: a complete statutory deference to political parties on candidate eligibility decisions at the primary balloting stage. No such provision – and therefore no such ripeness issue – exists in Colorado. Under the Colorado election code, this question is ripe for review, and (as *Hanlen* recognizes) it has fallen to the Colorado courts to answer the candidate qualification question on its merits. The District Court has done so, and it is the District Court's ruling on the merits – rather than any other question of justiciability – that must now be the focus of this Court.

Not only is the question of Mr. Trump's disqualification ripe for review; it is imperative that it be resolved in time to allow the orderly administration of Colorado's presidential primary. The risks of delaying a decision on the question of qualification are illustrated by the case of *Figueroa v. Speers*, 2015 CO 12, 343 P.3d 967. In *Figueroa*, a school board candidate named Amy Speers was elected to office but later found ineligible to serve because she did not satisfy statutory residency requirements. Despite the candidate's ineligibility to hold office (and inability to

take office) the court concluded that the candidate was "legally elected" because she received the highest number of votes in the election. *Id.* ¶ 13. The court in *Figueroa* described the fallout of the situation as follows:

> Speers would be entitled to take office were she properly qualified to do so. Since it is undisputed that she is not qualified to do so, she cannot take office. Since the district court properly voided Speers's election because she cannot take office, and since no other person was legally elected, *we must set aside the election* and declare a vacancy in the [school board] office.

Id. (internal citations omitted) (emphasis added).

This result is an irritation or inconvenience in the context of a local school board election. In the context of a statewide presidential primary election, it would be an absolute disaster. The best-case scenario would be a mad scramble by the Secretary of State to administer a second primary election on a compressed timetable; barring that possibility, there would be a risk of complete disenfranchisement of Republican voters, including petitioners, in the general presidential election itself. Alternatively, any delay to the certification of the Colorado primary ballot would provide Trump with an undue benefit to the detriment of his opponents who are not disqualified, as well as the voters, like petitioners, who support non-Trump Republican candidates. Were the question to be answered at an even later stage – for instance, after Mr. Trump became the President-Elect – there would be a substantial likelihood of public unrest, as it would fall to

Congress to disqualify the ineligible President-Elect during its January 6, 2024 Joint Session to certify the election. This country survived one constitutional crisis on January 6, 2021; it cannot risk another constitutional crisis on January 6, 2024.

In *Figueroa v. Speers*, "neither Figueroa nor any other qualified elector mounted a legal challenge to [Speers's] qualifications prior to the election." *Id.* ¶ 13. In this case, the legal challenge has been properly mounted by eligible Colorado electors, and it has been mounted at the earliest possible opportunity in hope that the chaos of a post-primary adjudication of Mr. Trump's qualification may be avoided. Again: there is a high likelihood that the critical questions in this case will have to be answered by the Supreme Court of the United States. As challenges to Mr. Trump's qualification for the ballot multiply across the country, time is of the essence in ensuring that the critical questions of his qualification or disqualification from the office of the Presidency are placed before the Supreme Court of the United States for decision on their merits as soon as possible.

C. Appeals to "Democracy"

At trial, Mr. Trump's counsel argued that "this Court should not interfere with that fundamental value, [the] rule of democracy," and that "this lawsuit is antidemocratic." 10/30/23 Tr. 35:25 – 36:4 (Mr. Gessler). The irony of Mr. Trump invoking the principles of "democracy" against his constitutional disqualification

cannot possibly be overstated. Lest it be lost in the shuffle, the entire purpose of the January 6th attack on the Capitol was to interrupt and ultimately prevent the transition of power in a democratic election that Mr. Trump lost by over seven million votes. Mr. Trump is under criminal indictment for seeking to subvert the democratic will in the State of Georgia. The idea that Mr. Trump cares one whit for "democracy" is facially preposterous.

In contrast, *amici* care deeply about democracy. For over fifty years, in the courts and legislatures of all fifty states, Common Cause has fought for the expansion and protection of democratic ideals. Ms. Buchanan served nearly a decade as Secretary of State of Colorado and prioritized ensuring that elections were administered efficiently and effectively so that only eligible candidates were placed on ballots and that eligible voters could exercise their right to the franchise. No matter how passionately *amici* may advocate for the expansion and protection of democratic ideals, it is a fundamental precept of American governance that effective democracy exists through and is preserved first and foremost by the rule of law. "[A] judge's fidelity must be to the enforcement of the rule of law regardless of perceived popular will." *Republican Party of Minnesota v. White*, 536 U.S. 765, 803, 122 S. Ct. 2528, 2549, 153 L. Ed. 2d 694 (2002) (White, J., dissenting). The rule of law stands in contrast to "the rule of the strong," and its "limitations upon popular

democracy… are as much a part of the Constitution as the institutions of democracy itself." *Tiwari v. Friedlander*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772, at *7 (W.D. Ky. Aug. 14, 2020).

In the United States, the rule of law extends from our written Constitution and has been described as "a constitutional ideal." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 378, 130 S. Ct. 876, 921, 175 L. Ed. 2d 753 (2010) (Roberts, J., concurring). The United States Constitution is "the supreme law of the land." U.S. Const. art. VI. As the "supreme law of the land," the United States Constitution is binding upon government officials at every level, state or federal. *See, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-341 (1816) (stating that the Constitution imposes obligations on state court judges in every state, in exercising their ordinary jurisdiction are "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.'"); *Quern v. Jordan*, 440 U.S. 332, 362 (1979) (Brennan, J., concurring) ("[A]ll State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution.").

The Fourteenth Amendment's Disqualification Clause is a load-bearing component of the Constitution. Its mandate is a constitutional one. The Disqualification Clause cannot be subverted to an amorphous and disingenuous ethic

of unfettered populism merely because its invocation has been infrequently necessary in our nation's history. As the United States Supreme Court held in the case of *Jarrolt v. Moberly*,

> [a] constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed.

103 U.S. 580, 586 (1880).

Some of our Constitution's brightest lines and plainest prohibitions have been given little to no occasion for judicial examination. This does nothing to change their fundamental constitutional character. As but one example, the Third Amendment's prohibition against the quartering of soldiers has rarely been the subject of federal case law, but that does not change the fundamental constitutional character of that amendment – nor the fervent prayer that it would be immediately adjudicated and enforced were ever the need to arise. *See Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir. 2001) (reviewing the merits of a challenge under the Third Amendment despite an acknowledgment that "[j]udicial interpretation of the Third Amendment is nearly nonexistent."); *Engblom v. Carey*, 677 F.2d 957, 961-962 (2nd Cir. 1982) (addressing a challenge under the Third Amendment which is a "provision rarely invoked in the federal courts."). No court of general jurisdiction could justifiably decline to decide a Third Amendment challenge on its merits

merely because the Third Amendment is "rarely invoked." Similarly, the Disqualification Clause (though rarely invoked) must now be decided on its own merits.

III. Conclusion

This country and its institutions are at a crossroads. Either the plain mandates of our Constitution will be honored and enforced in the face of partisan outcry (thus preserving the rule of law in America) or they will be subverted to avoid that same partisan outcry (eroding the rule of law accordingly). There is no third future. It would be an error of historical scale to pretend otherwise. The Court must embrace its role as an active defender of our Constitution's mandates, or those mandates will begin to crumble under the intense heat and force that they will inevitably face in years and elections to come. "**Government by law is imperiled, and that issue is paramount."** *In re Charge to Grand Jury*, 62 F. 828, 829 (D.C.N.D. Ill. 1894).

Amici submit that the findings of the District Court as to Mr. Trump's engagement in insurrection against the Constitution are logically sound and fully supported by the applicable law and the well-developed factual record in this case. *Amici* also submit that the District Court's holding that the Presidency is not an "office … under the United States" and the President is not "an officer of the United States" are reversible errors, and that affirming this holding would essentially affirm

the ability of outgoing Presidents to deploy mobilized partisans against the peaceful transfer of their own executive power without fear of meaningful constitutional repercussion. As to these questions, *amici* echo and support the meticulously researched arguments of fellow *amici curiae* Professor Mark Graber and the Constitutional Accountability Center regarding the historical meaning of the phrase "an officer of the United States" and its encompassment of the Presidency. The understanding that the President is "an officer of the United States" extends not only to the time of the drafting of the Fourteenth Amendment; it extends to the drafting and ratification of the Constitution itself. *See, e.g.* The Federalist No. 69, p. 450 (B. Wright ed. 1961) (A. Hamilton) ("The President of the United States would be an officer elected by the people for four years"); The Federalist No. 70, p. 458 (B. Wright ed. 1961) (A. Hamilton) (titled "The Presidential Term of Office," and discussing those temptations that face a president when "he must lay down his office"); The Federalist No. 73, p. 471 (B. Wright ed. 1961) (A. Hamilton) (referring to the President's "immediate interest in the power of his office").

The fact that the Disqualification Clause has so rarely been implicated in our nation's law and history is a great credit to prior generations of American political leaders, who played their respective parts, time and time again, in the peaceful transition of power. The fact that the Disqualification Clause is so clearly implicated

at this hour, then, is a proportionally great discredit to Mr. Trump himself, who allowed a lust for power to supersede his own Oath of Office and over two centuries of American political precedent. Mr. Trump has sought at every turn to inject chaos into our country's electoral system in the upcoming 2024 presidential election. He should be given no opportunity to do so in the state of Colorado.

Amici respectfully request that the Court AFFIRM the findings of the District Court that Mr. Trump engaged in insurrection against the Constitution of the United States, and that the Court REVERSE the finding of the District Court that the office of the Presidency is not an "office…under the United States" and the President is not "an officer of the United States" for purposes of the Disqualification Clause.

Dated: November 29, 2023

Respectfully submitted,

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Certificate Of Service

I hereby certify that on November 29, 2023, a true and correct copy of the foregoing **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF FOR COLORADO COMMON CAUSE AND MARY ESTILL BUCHANAN IN SUPPORT OF PETITIONERS-APPELLANTS NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, AND CHRISTOPHER CASTILIAN** was electronically filed and served via Colorado Courts E-Filing on the following counsel of record:

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