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

2023 CO 63

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

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.

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.[1]

¶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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[1] 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

fide 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.[2]

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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[2] 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%2013,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 Intervenors' 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,

¶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.[12] 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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[12] 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.").

definition, this constituted an insurrection, and thus we will proceed to consider whether President Trump "engaged in" this insurrection.

3. "Engaged In"

¶190 Dictionaries, historical evidence, and case law all shed light on the meaning of "engaged in," as that phrase is used in Section Three.

¶191 Noah Webster's dictionary from 1860 defined "engage" as "to embark in an affair." Noah Webster, An American Dictionary of the English Language 696 (1860). Similarly, Webster's Third New International Dictionary defines "engage" as "to begin and carry on an enterprise" or "to take part" or "participate." *Engage*, Webster's Third New International Dictionary (2002). And Merriam-Webster defines "engage" as including both "to induce to participate" and "to do or take part in something." *Engage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/engage [https://perma.cc/7JDM-4XSB].

¶192 Attorney General Stanbery's opinions on the meaning of "engage," which he issued at the time the Fourteenth Amendment was being debated, are in accord with these historical and modern definitions. Attorney General Stanbery opined that a person may "engage" in insurrection or rebellion "without having actually levied war or taken arms." *Stanbery I*, 12 Op. Att'y Gen. at 161. Thus, in Attorney General Stanbery's view, when individuals acting in their official capacities act "in

the furtherance of the common unlawful purpose" or do "any overt act for the purpose of promoting the rebellion," they have "engaged" in insurrection or rebellion for Section Three disqualification purposes. *Id.* at 161–62; *see also Stanbery II*, 12 Op. Att'y. Gen. at 204 (defining "engaging in rebellion" to require "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose"). Accordingly, "[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Stanbery II*, 12 Op. Att'y. Gen. at 205; *accord Stanbery I*, 12 Op. Att'y Gen. at 164.

¶193 Turning to case law construing the meaning of "engaged in" for purposes of Section Three, although we have found little precedent directly on point, cases concerning treason that had been decided by the time the Fourteenth Amendment was ratified provide some insight into how the drafters of the Fourteenth Amendment would have understood the term "engaged in." For example, in *Ex parte Bollman*, 8 U.S. 75, 126 (1807), Chief Justice Marshall explained that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In other words, an individual need not directly

participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had:

> [I]t is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

In re Charge to Grand Jury-Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851).

¶194 We find the foregoing definitions and authorities to be generally consistent, and we believe that the definition adopted and applied by the district court is supported by the plain meaning of the term "engaged in," as well as by the historical authorities discussed above. Accordingly, like the district court, we conclude that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Anderson*, ¶ 254.

¶195 In so concluding, we hasten to add that we do not read "engaged in" so broadly as to subsume mere silence in the face of insurrection or mere acquiescence therein, at least absent an affirmative duty to act. Rather, as Attorney General Stanbery observed, "The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." *Stanbery I*, 12 Op. Att'y Gen. at 161; *see also* Baude & Paulsen, *supra* (manuscript at 67) (noting that "passive acquiescence, resigned acceptance,

for this claim. The majority recognizes the five-day requirement, Maj. op. ¶ 38, but it does not acknowledge the violation of section 1-4-1204's timeline or give consequence to that violation.

¶267 Nonetheless, the majority touts the fact that a hearing was held and lauds the district court's timely issuance of its decision as evidence that this matter was not too complex for a section 1-1-113 proceeding. Maj. op. ¶¶ 84–85. But was the order timely issued? Substantially, I think not. *Compare* Maj. op. ¶ 22 ("The trial began, as scheduled, on October 30 [a Monday]. The evidentiary portion lasted five days [through Friday, November 3], with closing arguments almost two weeks later, on November 15. . . . The court issued its written final order on November 17 . . . ."), *with* § 1-4-1204 ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Section 1-4-1204 only mandates two deadlines, and neither were honored. After all the evidence had been presented at a week-long hearing, the court suspended proceedings for two weeks. I find nothing in the record offering a reason grounded in the election code for the interval between the five consecutive days of the hearing and the solitary closing arguments. However, I understand the necessity to postpone the closing arguments for one reason: The complexity of the case required more time than "no later than forty-eight hours after the hearing" for the court to draft its 102-page order. Thus, while the district court formally

issued its order within forty-eight hours of the closing arguments, the interval between the evidentiary hearings and the closing arguments was not in compliance with section 1-4-1204.

¶268 The majority condoned the district court's failure to observe the statutory timeline by concluding that it "substantially compl[ied]." *See* Maj. op. ¶ 85. This renders the statute's five-day and forty-eight-hour requirements meaningless. *Contra Ferrigno Warren*, ¶ 20, 462 P.3d at 1085 (holding that, under Colorado's election code, a "specific statutory command could not be ignored in the name of substantial compliance"); *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 25, 398 P.3d 599, 608 ("Where the language is clear, we must apply the language as written."). If a court must contort a special proceeding's statutory timeline to process a claim, then that claim is not proper for the special proceeding.

¶269 From my perspective, just because a hearing was held and Intervenors participated, it doesn't mean that due process was observed. Nor should it be inferred that section 1-1-113's statutory procedures, which were not followed, were up to the task. I cannot agree with the majority that the district court's extra-statutory delays and select procedure augmentations indicate that the Electors' claim was fit for adjudication under sections 1-4-1204(4) and 1-1-113. *Contra*, Maj. op. ¶ 81 ("In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action."). Dragging

anticipation of the enforcement of state laws alleged to be unconstitutional. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Hence, *Ex parte Young* provides a means of vindicating Fourteenth Amendment rights without violating the grant of exclusive enforcement power to Congress. When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as section 1983.

¶306 Between affirmative relief provided by Congress and defensive *Ex parte Young* claims, constitutional rights are "protected in all instances." *Cale*, 586 F.2d at 316–17. Not surprisingly, after declining to find an implied cause of action permitting affirmative relief within the Fourteenth Amendment, the Fourth Circuit in *Cale* remanded to the district court with instructions to determine whether the plaintiff's wrongful discharge claim could be brought under section 1983, the proper enforcement mechanism. *Id.* at 312.

¶307 The majority devotes all of one sentence to *Cale* and disregards most of the Supreme Court jurisprudence to which that thoughtful opinion is moored. Maj. op. at ¶ 103. It is true that *Cale* was a Section One, not a Section Three, case. But *Cale* cited to *Griffin's Case* (a Section Three case) in determining that the Fourteenth Amendment cannot be used as a self-executing sword, thus tethering the distinction to both Sections. *Cale*, 586 F.2d at 316. Accordingly, while courts have

seldom had occasion to interpret Section Three, the case law on Section One is instructive on the issue of self-execution.

¶308 Critically, the Supreme Court has affirmed that the Fourteenth Amendment, while offering protection under certain circumstances, does not provide a self-executing cause of action. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, [n]ot affirmative, and it carries no mandate for particular measures of reform."). Moreover, as pertinent here, the Supreme Court has retreated from recognizing implied causes of action, instead holding that for a cause of action to exist, Congress must expressly authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (refusing to recognize a private right of action because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

¶309 The majority nevertheless protests that interpreting any section of the Fourteenth Amendment as requiring legislation yields absurd results because the rest of the Reconstruction Amendments are self-executing. Maj. op. ¶ 96. I do not dispute that the Thirteenth and Fifteenth Amendments are self-executing. But I disagree that Section Three must therefore be deemed self-executing as well. The Thirteenth and Fifteenth Amendments, on the one hand, and the Fourteenth Amendment, on the other, are different.

¶310 The Thirteenth and Fifteenth Amendments speak in affirmative, universal terms to abolish slavery, create the right to vote, and restrain not only government actors, but also private individuals. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008); *Guinn v. United States*, 238 U.S. 347, 363 (1915) (recognizing "the right of suffrage" created by the Fifteenth Amendment's "generic character"). The Fourteenth Amendment, however, was born out of a deep suspicion of the states and acts as a negative policing mechanism intended solely to curtail state power. *Adarand*, 515 U.S. at 255 (Stevens, J. dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."); *The Civil Rights Cases*, 109 U.S. at 11 (holding that the Fourteenth Amendment applies to state action, not private action). This curtailment applies both to state laws or actions abridging rights and to a state's selection of government officials. To give effect to this amendment while respecting our federalist system, courts have turned to the sword-shield paradigm of self-execution, thereby striking "a balance between delegated federal power and reserved state power" without forsaking the protection of constitutional rights "in all instances." *Michigan Corr. Org.*, 774 F.3d at 900; *Cale*, 586 F.2d at 317.

¶311 To draw a yet deeper line in the sand, unlike the Thirteenth and Fifteenth Amendments, Section Three does not indelibly ensure a right but instead allows

That's fifty-four days, which is nearly ten times the amount of time permitted by the Election Code. *See* § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held . . . .").

¶335 At the next status conference, on September 22, the court set more deadlines, this time related to exhibit lists, expert disclosures, and proposed findings of fact and conclusions of law. With respect to expert disclosures, the court ordered the Electors to provide expert reports by October 6, or twenty-four days before the hearing. *Cf.* C.R.C.P. 26(a)(2)(C)(I) (providing that in a civil case the claiming party's expert disclosures are typically due "at least 126 days (18 weeks) before the trial date"). It ordered President Trump to provide his expert reports no later than October 27, three days before the hearing was to begin. *Cf.* C.R.C.P. 26(a)(2)(C)(II) (stating that a defending party in a civil case is generally not required to provide expert reports "until 98 days (14 weeks) before the trial date"). And even though it was apparent from very early on in these proceedings that the Electors would rely heavily on expert testimony regarding both legal and factual matters to attempt to prove their challenge, the district court did not allow experts to be deposed. *Cf.* C.R.C.P. 26(b)(4)(A) (setting forth the default rule on the deposition of experts in civil cases: "A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial."). Instead, the court ordered that expert reports must

be "fulsome" and that experts would not be allowed to testify to anything outside their reports.

¶336 As planned, the hearing began on October 30 and concluded on November 3. The district court gave each side eighteen hours to present its case. The parties presented closing arguments on November 15, and the court issued its final order on November 17, two weeks after the hearing concluded and seventy-two days after the verified petition was filed.

¶337 This was a severe aberration from the deadlines set forth in the Election Code, *see* § 1-4-1204(4), which require a district court to issue its ruling no more than forty-eight hours after the hearing and roughly a week after the verified petition is filed. Despite this clear record, my colleagues in the majority curiously conclude that the district court "substantially compl[ied]" with all the statutory deadlines. Maj. op. ¶ 85. That's simply inaccurate (unless the majority views complete failure as substantial compliance). The majority's reading of the record, while creative, doesn't hold water.

¶338 Given the complexity of the legal and factual issues presented in this case, it's understandable why the district court may have felt that adhering to the deadlines in section 1-4-1204(4) wouldn't allow the parties to adequately litigate the issues. But the district court didn't have the discretion to ignore those statutory deadlines. Section 1-4-1204(4) states that "a hearing *must* be held" no later than

five days after a challenge is filed and that the district court "*shall* issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." *See Waddell v. People*, 2020 CO 39, ¶ 16, 462 P.3d 1100, 1106 ("[T]he 'use of the word "shall" in a statute generally indicates [the legislature's] intent for the term to be mandatory.'" (alteration in original) (quoting *People v. Hyde*, 2017 CO 24, ¶ 28, 393 P.3d 962, 969)); *Ryan Ranch Cmty. Ass'n v. Kelley*, 2016 CO 65, ¶ 42, 380 P.3d 137, 146 (noting that "shall" and "must" both "connote[] a mandatory requirement").

¶339 Rather than recognize that the Section Three challenge brought by the Electors was a square constitutional peg that could not be jammed into our Election Code's round hole, the district court forged ahead and improvised as it went along, changing the statutory deadlines on the fly as if they were mere suggestions. If, as the majority liberally proclaims, sections 1-1-113 and 1-4-1204(4) provide such a "robust vehicle" for handling the constitutional claim brought here, Maj. op. ¶ 86, why didn't the district court just drive it? Why, instead, did the district court feel compelled to rebuild such a "robust vehicle" by modifying the procedural provisions of the Election Code? I submit that, in reality, while sections 1-1-113 and 1-4-1204(4) are plenty adequate to handle ordinary challenges arising under the Election Code, they did not measure up to the task of addressing the Electors' Section Three claim. The result was a proceeding that was neither the

constitutional eligibility, including eligibility under Section Three. *Id.* at ¶¶ 60–62, 65–66. In the majority's view, a reading of the Election Code that constrains courts from considering a candidate's constitutional qualifications would produce a result "contrary to the purpose of the Election Code." *Id.* at ¶ 64.

III. The Electors Failed to State a Cognizable Claim for Relief

¶366 Sections 1-4-1204(4) and 1-1-113 frame the threshold question this court must address before turning to the merits of the parties' appeal: Did the General Assembly intend to grant Colorado courts the authority to decide Section Three challenges? Based on my reading of sections 1-4-1204(4), 1-4-1201, and 1-4-1203(2)(a), I conclude that the answer to this question is no. As a result, I conclude that the Electors have not stated a cognizable claim for relief and their complaint should have been dismissed.

A. Section 1-4-1204(4) Allows for a Broad, but Not Unlimited, Range of Claims for Relief

¶367 As an initial matter, I acknowledge that the language in section 1-4-1204(4) is fairly broad insofar as it allows expedited challenges to the listing of any candidate on the presidential primary election ballot based on "alleged improprieties." And I agree with the majority that "section 1-1-113 'clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,'" Maj. op. ¶ 61 (quoting *Carson*, ¶ 17, 370 P.3d at 1141), "including any act that is 'inconsistent with the Election Code,'" *id.*

(quoting *Frazier v. Williams*, 2017 CO 85, ¶ 16, 401 P.3d 541, 545). I also agree with the majority that a "wrongful act" is "more expansive than a 'breach' or 'neglect of duty.'" *Id.* (quoting *Frazier*, ¶ 16, 401 P.3d at 545).

¶368 But this language can only do so much. As we also held in *Frazier*, "other wrongful act" is limited to acts that are wrongful under the Election Code. ¶ 16, 401 P.3d at 545. We have also emphasized that section 1-1-113 is a *summary* proceeding designed to quickly resolve challenges brought by designated plaintiffs against state election officials prior to election day. *Id.* Indeed, past cases decided by this court reflect the generally straightforward nature of the cases filed under section 1-1-113, the lion's share of which involved disputes over state or local election residency or signature requirements. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 15, 462 P.3d 1081, 1084 (deciding whether the Election Code's minimum signature requirement mandates substantial compliance and whether a U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 1–6, 418 P.3d at 480–81 (deciding whether a non-resident signature circulator could legally collect signatures for a candidate's petition); *Frazier*, ¶ 1, 401 P.3d at 542 (considering whether the Secretary improperly invalidated signatures included on a U.S. Senate candidate's petition to appear on the primary election ballot); *Carson*, ¶ 21, 370 P.3d at 1142 (considering whether a challenge to a candidate's qualifications

based on their residency was permitted after the Secretary certified the candidate to the ballot).

¶369 Don't get me wrong, the almost 450 entries in the district court register of actions in the two months and eleven days between September 6, 2023, the date on which the petition was filed, and November 17, 2023, the date on which the district court issued its 102-page final order, illustrate the extraordinary effort that the attorneys and the district court dedicated to this case. But that effort also proves too much. The deadlines under the statute were not met, nor could they have been. Setting aside the factual questions, an insurrection challenge is necessarily going to involve complex legal questions of the type that no district court—no matter how hard working—could resolve in a summary proceeding.

¶370 And that's to say nothing of the appellate deadline. Three days to appeal a district court's order regarding a challenge to a candidate's age? Sure. But a challenge to whether a former President engaged in insurrection by inciting a mob to breach the Capitol and prevent the peaceful transfer of power? I am not convinced this is what the General Assembly had in mind.

¶371 The various provisions of the Election Code on which the district court and the majority rely to suggest otherwise do not persuade me either.

B. The Term "Federal Law" Does Not Support a Broad Grant of Authority to Colorado Courts to Enforce Section Three

¶372 The district court relied on the declaration of intent in part 12. *Anderson*, ¶ 222. It explains the intent of the People of the State of Colorado in the context of presidential primary elections. It provides: "In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).[3] In adopting a broad view of section 1-4-1204(4)'s reach, the court assumed that the term "federal law," as used in this section, refers to the entire U.S. Constitution, including Section Three. *Anderson*, ¶¶ 222–24.

¶373 The majority also leans on this reference to "federal law" in section 1-4-1201, though more obliquely, suggesting it means the General Assembly intended for part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. I am not persuaded.

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[3] As Professor Muller notes in his amicus brief, "A postpositive modifier like ['governing presidential primary elections'] attaches to both 'federal law' and 'national political party rules.'" Brief for Professor Derek T. Muller as Amicus Curiae Supporting Neither Party. Hence, the term "federal law" is properly understood not as a standalone term but as only relating to presidential primary elections.

¶374 In my view, the term "federal law" is ambiguous at best. A brief dive into the history of part 12 explains why. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389 ("If, however, the statute is ambiguous, then we may consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history.").

¶375 Part 12 was enacted as part of the return to a primary system in Colorado. *See* § 1-4-1102, C.R.S. (1990) (governing Colorado's presidential primary system in the 1990s). From 2002 to 2016, presidential candidates were selected through a closed party caucus system. But in 2016, after "Colorado voters experienced disenfranchisement and profound disappointment with the state's [caucus] system," voters considered Proposition 107, which promised to restore presidential primary elections in Colorado, with one significant change—unlike prior iterations of its primary system, beginning in 2020, Colorado would host open presidential primaries, allowing unaffiliated voters to participate in these primary elections. *See* Proposition 107, § 1, https:// www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/2GA9-ZY7U] (noting that "restor[ing] [Colorado's] presidential primary" to an open primary system would enable the "35% of Colorado voters who are independent of a party" to "participat[e] in the presidential nomination

process," and "encourage candidates who are responsive to the viewpoints of more Coloradans").

¶376 When Proposition 107 passed, the General Assembly amended the Election Code and adopted part 12 to formally re-introduce the presidential primary process. Nothing in this history indicates that one of the concerns animating either the proponents of Proposition 107 or the General Assembly was a need to challenge, through the courts, issues concerning candidates' constitutional disqualifications. In fact, the language in the current version of section 1-4-1201 mostly mirrors the 1990 version of part 12 (then, part 11): "It is the intent of the general assembly that the provisions of this part 11 *conform to the requirements of federal law and national political parties for presidential primary elections*." § 1-4-1104(3), C.R.S. (1990) (emphasis added).

¶377 There is some history surrounding Proposition 107 and part 12 which suggests that proponents of this new open presidential primary system were concerned about one specific constitutional issue: a potential First Amendment challenge to the new law based on political parties' private right of association. *See Independent Voters*, Denver Metro Chamber of Com., https://denverchamber.org/policy/policy-independent-voters-white-paper/ [https://perma.cc/T2TT-A2UD] (The Denver Chamber of Commerce, which launched Proposition 107, noted that a semi-open primary system, because it would permit

unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary, could face legal challenges based on parties' First Amendment rights of association.); *see also* Christopher Jackson, *Colorado Election Law Update*, 46-SEP Colo. Law. 52, 53 (2017) (noting that the law was likely crafted in a manner designed to "stave off a First Amendment challenge" given the U.S. Supreme Court's 2000 decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which struck down California's "blanket primary" law).

¶378 Curiously, the earlier version of the statute required the Secretary to provide a "written report" to the General Assembly "concerning whether the provisions of this part 11 conform to the requirements of federal law and national political party rules for presidential primary elections[,]" and provided that "the general assembly shall make such reasonable changes to this part 11 as are necessary to conform to federal law and national political parties' rules." § 1-4-1104(3), C.R.S. (1990). It is unclear if those reports were intended to speak to potential First Amendment concerns or some other issue, as any reports that may have been submitted to the General Assembly appear to have been lost to the sands of time (or, according to the State Archivist's Office, possibly a flood).

¶379 At bottom, this legislative history does little to illuminate what the 2016 General Assembly meant by this language in section 1-4-1201. What this history does show, however, is that the term "federal law" is most certainly not an

affirmative grant of authority to state courts to enforce Section Three in expedited proceedings under the Election Code.

C. The Term "Qualified Candidate" Does Not Support a Broad Grant of Authority to Colorado Courts

¶380 The other principal support for the district court's broad interpretation of section 1-4-1204(4) rests on the term "qualified candidate." The majority relies heavily on this language as well. Maj. op. ¶¶ 37, 62–64.

¶381 To understand the meaning of this term, it is critical to consider it in its full context. Recall, it states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

§ 1-4-1203(2)(a) (emphases added).

¶382 The district court construed this section expansively. It looked to the term "qualified candidate" as evidence of the General Assembly's intent to grant the court authority to determine if President Trump was disqualified under Section Three. The district court, like the Electors, appears to have read section 1-4-1203(2)(a) like a syllogism, such that if (1) participation in the presidential primary is limited to *qualified candidates*, and if (2) Section Three disqualifies insurrectionists, then (3) a court may appropriately consider a

Section Three challenge. But that is not what the statute says. Rather, it provides: "[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." *Id.* (emphases added).

¶383 Section 1-4-1203(2)(a) addresses when and how presidential primary elections are conducted. It does not prescribe additional qualifications through its use of the term "qualified candidate." *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute."). Nor can it be read, given the fact that the term is explicitly tethered to subsection 1203, as expanding the criteria outlined in section 1-4-1204(1)(b) and (c): A candidate is eligible to be certified to the ballot by (1) being a bona fide candidate for president; (2) submitting a notarized candidate's statement of intent, and (3) paying the $500 filing fee or submitting a valid write-in petition. *See* § 1-4-1204(1)(b), (c).

¶384 It is significant, as well, that this part of the statute describes when a *political party* can participate in a presidential primary election. The consequence for a party that does not have a qualified candidate—that is, a candidate who does not meet the three-part criteria laid out in section 1-4-1204(1)(b) and (c)—is that the party cannot participate in the primary. Considered in context, then, the term

"qualified candidate" does not offer support for an expansive reading of the court's authority to determine a challenge under Section Three.

¶385 The majority takes a slightly different approach. It points to section 1-4-1201's "federal law" declaration and suggests it means that the General Assembly intended part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. Then, like the district court, it gives great weight to the language in section 1-4-1203(2)(a), which it construes to mean that participation in the presidential primary is limited to "qualified candidates." *Id.* at ¶¶ 37, 62–64. It effectively reads "pursuant to this section" out of the statute by concluding that the phrase "sheds no light on the meaning of 'qualified candidate.'" *Id.* at ¶ 37 n.3 (quoting § 1-4-1203(2)(a)). The majority then asserts that, "[a]s 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." *Id.* at ¶ 37 (quoting § 1-4-1204(1)(c)).

¶386 And, it explains, the Secretary's statement of intent for a major party presidential candidate requires the candidate to affirm via checkboxes that the candidate meets the qualifications set forth in Article II of the U.S. Constitution for the Office of President, i.e., 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. *Id.* at ¶ 38; U.S. Const. art. II, § 1, cl. 5; *Major Party Candidate*

Statement of Intent for Presidential Primary, Colo. Sec'y of State, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/RY72-ASSD]. As well, the form 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*." *Major Party Candidate Statement of Intent for Presidential Primary*, *supra.*

¶387 The majority stitches these various parts of the Election Code together to conclude the General Assembly intended to grant state courts the authority to decide Section Three challenges. Maj. op. ¶¶ 36–38, 62. This approach falls short for five reasons.

¶388 First, there is nothing in section 1-4-1201's "federal law" declaration that indicates the General Assembly meant to refer to Section Three. Perhaps the declaration refers to the General Assembly's concern regarding a potential First Amendment right of association challenge to the open primary system created by part 12, perhaps not. The declaration's history is muddy at best.

¶389 Second, the term "qualified candidate" cannot be fairly read to grant Colorado courts authority to adjudicate Section Three disqualification claims. The term is best understood as describing when a political party can participate in the

presidential primary process, not as the foundation for a wrongful act claim under section 1-4-1204(4) and section 1-1-113.

¶390 Third, even assuming the General Assembly intended to grant some authority to the courts through its reference to the candidate's statement of intent in the exceptionally roundabout manner suggested by the majority, there is no basis for concluding that authority extends beyond the fairly basic types of Article II challenges that have come before this court in the past, such as those involving a candidate's age, or other challenges like those alleging that petition circulators did not reside in Colorado.

¶391 Fourth, I am not persuaded by the majority's reliance on sections 1-4-1205 and 1-4-1101, which govern the requirements write-in candidates must satisfy before being certified to the ballot. *See* Maj. op. ¶¶ 37, 62. Like major party presidential primary candidates, write-in candidates for the presidential primary must file a "notarized . . . statement of intent" and submit to the Secretary "a nonrefundable fee of five hundred dollars . . . no later than the close of business on the sixty-seventh day before the presidential primary election." § 1-4-1205. Section 1-4-1101(1), which applies to all write-in candidates regardless of office, requires that the write-in candidate confirm "that he or she desires the office and *is qualified to assume its duties if elected.*" (Emphasis added.) According to the majority, "[t]he 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." Maj. op. ¶ 62.

¶392 It is true that both major party candidates and write-in candidates must fill out statement of intent forms, and that the forms are similar in some respects. But, if anything, the General Assembly's decision to include a specific qualification provision for write-in candidates shows that when it wants to include an explicit qualifications requirement, like the one in section 1-4-1101(1), it knows how to do so. *See People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625 ("But, in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009))).

¶393 Fifth and finally, there is the problem that Section Three is a disqualification for office, not a qualification to serve. As the majority acknowledges, the U.S. Supreme Court has twice declined to address whether Section Three—which is described in the text as a "disability" and is referred to as the Disqualification Clause—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (observing that an academic suggested in a law review article in 1968 that the three grounds for disqualification (impeachment, Section Three, and the Congressional incompatibility clause) and two other similar provisions were

each no less of a "qualification" than the Article II, Section 5 qualifications); *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); Maj. op. ¶ 65.

¶394 Given the fact that the U.S. Supreme Court has not weighed in on whether Section Three is a qualification for office, it seems all the more important to look for some affirmative expression by the General Assembly of its intent to grant state courts the authority to consider Section Three challenges through Colorado's summary hearing and appeal process under the Election Code. I see no such expression.

IV. Conclusion

¶395 The Electors' arguments below and before this court are, to my mind, unavailing. Too much of their position rests on text like "federal law" and "qualified candidate" that—on closer examination—does not appear to mean what they say it means because it is taken out of context. In short, these sections do not show an affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process.

¶396 Because it too relied on the provisions of part 12 regarding "federal law" and "qualified candidate," the district court's reasoning suffers from the same shortcomings.

¶397 And, at the end of the day, while the majority's approach charts a new course—one not entirely presented by the parties—its approach has many of the same problems. It stitches together support from the Secretary's general authority to supervise the conduct of primary and other elections, § 1-1-107(1), C.R.S. (2023); the inference that section 1-4-1201's "federal law" declaration means something pertinent to Section Three; part, but not all, of the "qualified candidate" statute, § 1-4-1203(2)(a); inferences from the write-in candidate process statute, § 1-4-1101(1); and the novel suggestion that the General Assembly granted authority to state courts to adjudicate a Section Three challenge by virtue of its reference to the Secretary's statement of intent form in section 1-4-1204(1)(c). *See* Maj. op. ¶¶ 35–37, 62–63.

¶398 I agree with the majority that, if the General Assembly wants to grant state courts the authority to adjudicate Section Three challenges through the Election Code, it can do so. *See* U.S. Const. art. II, § 1, cl. 2 (authorizing states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (recognizing that 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"). I just think it needs to say so.