

No. 23-696

In the
Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

**BRIEF IN SUPPORT OF PARTIAL GRANT OF
CERTIORARI BY JENA GRISWOLD, SECRETARY OF
STATE OF COLORADO, RESPONDENT**

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INTRODUCTION

Respondent Jena Griswold, in her official capacity as the Colorado Secretary of State, supports granting certiorari for this important case of first impression on two of the issues raised in the petition. The Secretary further urges the Court to expedite its consideration of the matter given the significance of the issues presented and Colorado's impending election deadlines.

STATEMENT

The Secretary is Colorado's chief state election official. *See* Colo. Rev. Stat. § 1-1-107(1)(e). For presidential primaries, the Secretary's duties include "certify[ing] the names and party affiliations of the candidates to be placed on any presidential primary election ballots." *Id.* § 1-4-1204(1). Based on that responsibility, the Secretary was named as a respondent in the action below, brought by six Colorado electors who argued that certifying Donald J. Trump to the Republican primary ballot would be a "wrongful act" within the meaning of Colorado law.

Throughout the state court proceedings, the Secretary took no position on the question of whether Trump should be excluded from the presidential primary ballot. The Secretary instead argued that Colorado's Uniform Election Code of 1992, Colo. Rev. Stat. § 1-1-101 *et seq.* (the "Election Code"), (i) bars a candidate from being listed on a ballot if the candidate is ineligible to hold the office they seek, and (ii) in the circumstances here, requires the state's courts to adjudicate qualification disputes over eligibility, with the power to order election officials to exclude from the primary ballot any candidate who does not meet the

qualifications to serve as president. The Colorado Supreme Court agreed with this interpretation of Colorado law. See *Anderson v. Griswold*, --- P.3d ---, 2023 CO 63, ¶ 62.

The Colorado Supreme Court also concluded that Trump is disqualified from holding the office of President based on Section 3 of the Fourteenth Amendment, and so ordered that “the Secretary may not list President Trump’s name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him.” *Id.* at ¶ 257. However, the Court stayed its order until January 4, 2024—the day before the Secretary’s deadline to certify candidates to the presidential primary ballot—with the stay to remain in place if review was sought in this Court before January 4, until this Court issues its order or mandate.

The Colorado Republican State Central Committee (the “Republican Party”), an intervenor-appellee below, has now petitioned for certiorari.

REASONS FOR GRANTING, IN PART, AND DENYING, IN PART, THE WRIT

I. The Court should grant certiorari on the first two questions presented by the Republican Party’s petition to ensure that Colorado voters cast their ballots only for candidates qualified to hold office.

The Secretary supports granting the writ of certiorari on the first two issues raised in the Republican Party’s petition. This Court’s resolution of the matter is important to ensure that all Coloradans’ votes are cast only for candidates who are qualified to hold the office of president.

Additionally, the Secretary asks the Court to resolve the question of Trump's eligibility as expeditiously as possible in light of the upcoming election calendar. This will ensure that, to the greatest extent possible, all Coloradans know whether Trump is eligible to be elected president at the time they cast their ballots.

A number of important deadlines are approaching on Colorado's election calendar:

- January 5, 2024: deadline for the Secretary to certify candidates to the primary ballot. *See* Colo. Rev. Stat. § 1-4-1204(1).
- January 20: deadline for Colorado's county clerks to mail ballots to military and overseas voters, as required by the Uniformed and Overseas Citizens Absentee Voting Act. *See* 52 U.S.C. § 20302(a)(8).
- February 12-16: period in which county clerks must mail presidential primary ballots to other active registered voters. *See* Colo. Rev. Stat. § 1-7.5-107(3)(a)(I).
- February 26: first required day for in-person voting. *See id.* § 1-7.5-107(4.5)(a)(III), (c).
- March 5: election day. *See id.* § 1-4-1203(1).
- March 14: last day for counties to finish tabulating votes. *See* 8 Code Colo. Reg. 1505-1, Rule 25.2.2(e).
- March 28: deadline to complete canvass of primary election. *See id.* at Rule 11.9.6.

As the above calendar demonstrates, expedited resolution of this case will ensure that Colorado voters cast ballots in the presidential primary election knowing whether Trump is qualified to serve as president. Providing this certainty is important both for the candidates in Colorado's Republican primary and, most importantly, for the millions of Republican and unaffiliated voters in Colorado who will be casting ballots in that election.

II. The Court should deny certiorari on the Republican Party's third question presented because that issue is resolved by precedent and is not squarely raised here.

While the Secretary agrees the Court should grant certiorari on the Fourteenth Amendment issues that are at the heart of this case, the Court should deny certiorari on the third question presented in the Republican Party's petition. The Republican Party contends that the Colorado Supreme Court violated its First Amendment right to place Trump on the presidential primary ballot. This argument is squarely contrary to this Court's precedent. And to the extent the Court is inclined to revisit any of that precedent, this case presents a poor vehicle for doing so.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court held that parties do not have an unfettered First Amendment right to name anyone they wish as their candidate on the state's ballot. Although a party "has a right to select its own candidate[. . .] [i]t does not follow . . . that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359. For instance, a "particular candidate might be ineligible for

office,” in which case the party does not have a First Amendment right to force the state to place that candidate on the state’s ballot. *Id.* That is because “[b]allots serve primarily to elect candidates, not as forums for political expression.” *Id.* at 363.

In *Timmons*, the Court held that “antifusion laws” prohibiting candidates from appearing on the ballot as a candidate for more than one party do not violate parties’ First Amendment rights. So, too, here, as Colorado’s system of allowing state courts to exclude ineligible candidates from the ballots does not meaningfully interfere with the party’s associational rights. The Republican Party’s insistence that it has a right to force the state to place even an ineligible candidate on the ballot undermines the electoral purpose served by ballots and is directly contrary to *Timmons*.

Even if the Court wished to reconsider *Timmons*, this case should not be the case in which it does so. The Colorado Supreme Court did not issue a direct ruling on the merits of this issue. The district court concluded that it lacked jurisdiction under section 1-1-113 of the Election Code to resolve this constitutional claim. *See Anderson*, 2023 CO 63, ¶ 74. The Supreme Court agreed that the constitutional challenge was not properly presented. *See id.* (“We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113.”). The Court nevertheless proceeded to consider and dispel the Republican Party’s arguments—largely based on *Timmons*—but that language was dicta because it was not essential to the Court’s holding.

In short, this case presents several novel and weighty questions of constitutional interpretation that

merit this Court's attention. Whether the Republican Party has a constitutional right to place an ineligible candidate on Colorado's ballot is not one of them.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first two questions and denied as to the third.

Respectfully submitted,

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