COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
Application for Review Under Colo. Rev. Stat. § 1-1-113(3) Denver District Court No. 2020CV31415 Hon. Michael Anthony Martinez	
Intervenor-Appellant: Colorado Republican Committee v. **Petitioner-Appellee:** Karl Schneider **Respondents-Appellees:** Jena Griswold, in her capacity as the Colorado Secretary of State, and Eli Bremer, in his capacity as presiding officer of the Republican Party State Senate District 10 Assembly and **Intervenors-Appellees:** Larry Liston and David Stiver	▲ **COURT USE ONLY** ▲
Attorneys for Intervenor-Appellant: Christopher O. Murray, #39340 Julian R. Ellis, Jr., #47571 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Phone: 303.223.1100 Email: cmurray@bhfs.com jellis@bhfs.com	Case No.: 2020SC____
Application for Review Under Colo. Rev. Stat. § 1-1-113(3) and Opening Brief	

CERTIFICATE OF COMPLIANCE

This brief serves as the application for review under Colo. Rev. Stat. § 1-1-113(3) and the opening brief of Petitioner. I hereby certify that this brief complies with all Colorado Appellate Rules 28, 32, and 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the content requirements set forth in Colorado Appellate Rule 53. The brief does not comply with the word limits of Colorado Appellate Rule 53, because this brief acts as the application for review and the opening brief of Petitioner. The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **7,992** words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A) and 28(b).

For each issue raised by Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellant review with citation to authority, and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ Christopher O. Murray
Christopher O. Murray

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ISSUE PRESENTED FOR REVIEW

Colorado statute grants the state central committee of a political party "full power to pass upon and determine all controversies concerning the regularity of the organization of that party." After contestants challenged the regularity of the Republican State Senate District 10's assembly and designation election, the Colorado Republican Committee's executive and state central committees each heard the controversy. In total, 200 party members decided the party controversy and issued a reasoned decision (i) finding the designation election to be infirm and the results unreliable, and (ii) ordering the Republican State Senate District 10 leadership to designate both declared Republican candidates to the June 2020 Republican primary ballot. The issue presented is: Whether the district court erred by not yielding to the Committee's exclusive jurisdiction to decide party controversies, thereby returning Colorado to a system in which state courts are the necessary forum to resolve intra-party disputes.

DECISION BELOW

The Colorado Republican Committee (Committee) seeks review of the district court's order in *Schneider v. Griswold*, No. 2020CV31415 (Colo. Dist. Ct., Denver Cty., May 4, 2020). (*See* App. 180.)

JURISDICTION

This Court has jurisdiction under Colo. Rev. Stat. § 1-1-113(3), which grants parties the right to seek review of a district court's decision under subsection 1-1-113(1) "within three days after the district court proceedings are terminated." The district court issued its decision on May 4, 2020; this application is timely filed within three days after the district court proceedings terminated.

EXISTENCE OF OTHER CASES

The Committee is unaware of any other pending cases in which the Court has granted review on the same legal issue raised in this case. That said, there is an additional case under Colo. Rev. Stat. § 1-1-113(1) pending in district court that presents a similar issue. *See Underwood v. Griswold*, No. 2020CV31482 (Colo. Dist. Ct, Denver Cty.). In that case, the petitioner, a candidate for the Democratic Party's nomination for U.S. Senate, has sued both the secretary of state and the Colorado Democratic Party's state chair alleging that irregularities in the conduct of the Democratic Party's state assembly and convention necessitate his designation to the Democratic primary ballot for U.S. Senate. Like the Committee, the Democratic Party in *Underwood* has argued that the petitioner's grievances are subject to his party's controversy process under Colo. Rev. Stat. § 1-3-106.

STATEMENT OF THE CASE

I. Colo. Rev. Stat. § 1-3-106 and Summary of Its History.

This matter centers on a statute granting state political parties the exclusive authority to finally resolve party controversies. The statute has existed in some form for nearly 120 years, and states:

> The state central committee of any political party in this state has *full power* to pass upon and determine *all controversies concerning the regularity of the organization* of that party within any congressional, judicial, senatorial, representative, or county commissioner district or within any county and also concerning the right to the use of the party name. The state central committee may make rules governing the method of passing upon and determining controversies as it deems best, unless the rules have been provided by the state convention of the party as provided in subsection (2) of this section. *All determinations upon the part of the state central committee shall be final.*

Colo. Rev. Stat. § 1-3-106 (emphasis added).

The history of how Colo. Rev. Stat. § 1-3-106(1) came to be is particularly relevant to this dispute—and it foretells the Colorado judicial system's future if the district court's decision stands. The general assembly adopted section 1-3-106's precursor in 1901. *See Lowry v. Dist. Ct. of Second Judicial Dist.*, 74 P. 896, 897 (Colo. 1903). Prior to the statute's adoption, however, cases percolated through the state judicial system requiring courts to choose between candidates of various factions within a single political party. *See Spencer v. Maloney*, 62 P. 850, 852 (Colo. 1900) (collecting cases). For example, in *Spencer*,

two factions of the Democratic Party nominated candidates, and a lower court ordered both candidates on the ballot. *Id.* The Colorado Supreme Court reversed, concluding that one of the two factions' tickets was the true winner. *Id.* at 856. In resolving the party controversy, the court lamented that it had become common for courts to resolve these matters, and the court was explicit in admonishing that such a practice "should never have been adopted." *Id.*

Heeding the court's reticence in *Spencer*, the general assembly responded with the party-controversy statute now codified in subsection 1-3-106(1). In particular, that statute designates "the state central committee of a political party" as "the sole tribunal to determine [party] controversies" and divestes the courts of concurrent jurisdiction. *Lowry*, 74 P. at 897, 898. And, in this Court's view, such a shift in review authority made good sense:

> We close the discussion by saying that the General Assembly exhibited wisdom and a regard for the interests of the judiciary in passing [the 1901] statute, by which members of the same political body are required to submit their controversies to the highest constituted authority of the party in the state. It relieves the courts of a class of litigation w[hich] should never be imposed on them, and confers the power and places the responsibility for its exercise upon the political parties, where it properly belongs.

Id. at 899; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 666 (Colo. 1924) (Campbell, J., dissenting) ("My observation and

experience in these matters have convinced me not only of the unwisdom of an attempt to confer such power, but likewise of the lack of legislative authority under the Constitution to confer it. This court . . . should unhesitatingly now, as it summarily did two years ago, refuse to permit any judicial tribunal in this state to interfere with, or pass upon, purely political controversies of a political party.").

While state political parties' right to decide party controversies is codified in state statute, it is notable that the right is of constitutional significance. The U.S. Supreme Court has reminded that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party" even if the court believes a particular expression protected by the First Amendment (association or speech) is "unwise or irrational." *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981); *see also Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986).

This textual and historical backdrop supports the Committee's view that the district court failed to afford the Committee's final resolution of the underlying party controversy the deference required under Colorado statute and the Constitution.

II. Factual Background.

In mid-March 2020, Governor Polis declared a disaster emergency in Colorado related to the COVID-19 disease. (*See* App. 16.) Recognizing

the likely impact on political parties' assemblies and conventions, the general assembly adopted, and the governor signed into law, H.B. 20-1359, 72d Gen. Assemb., 2d Sess. (Colo. 2020) (H.B. 1359), which made temporary changes to the assembly and convention process for designating candidates to the June 2020 primary ballot.[1] (*Id.* at 17.)

On March 14, 2020, Respondent Eli Bremer, as chairman of the Republican State Senate District 10 Committee (SD-10 committee), scheduled the SD-10 assembly for an in-person meeting at the Colorado Springs Country Club on March 25. (*Id.*) Days later, on March 17, Respondent Bremer restructured the SD-10 assembly as an online assembly in response to concerns raised by SD-10 delegates. (*Id.* at 17-18.) Respondent Bremer further rescheduled the SD-10 assembly on March 19, by moving the assembly up three days to March 22. (*Id.* at 18.) At the same time, Respondent Bremer placed two individuals who had declared their intention to run for state senator, Intervenor Larry Liston and Intervenor David Stiver, into nomination for designation to the Republican primary ballot for SD-10. (*Id.*)

The next day Respondent Bremer emailed instructions to the SD-

[1] The Committee adopted 17 emergency bylaws in response to H.B. 1359 to govern Republican district, county, and state assemblies and conventions in Colorado. (*Id.*)

10 delegates on credentialing and voting in the designation election. (*Id.*) Specifically, delegates would send an email to a dedicated email address overseen by someone from outside SD-10 and El Paso County to preserve the integrity and secrecy of the balloting. (*Id.*) Respondent Bremer clarified that credentialing and balloting would be open upon circulation of the designated email and would remain open until the time of the assembly on March 22. (*Id.*) Intervenor Stiver and others objected to the process and claimed it impermissibly allowed voting before the SD-10 assembly opened. (*Id.*) The Committee also advised Respondent Bremer against permitting voting before gaveling the assembly open, but he declined the Committee's advice. (*Id.* at 18 n.3.)

On March 21, Respondent Bremer circulated a Yahoo email address (sd10assembly@yahoo.com) to the SD-10 delegates and announced that voting in the designation election was open immediately. (*Id.* at 18.) Some delegates claimed they never received Respondent Bremer's email, but Respondent Bremer disputed that allegation and stated he sent the email to all delegates for whom leadership had an email address. (*Id.* at 19.)

Nonetheless, while voting was open, it is undisputed Intervenor Stiver accused Respondent Bremer of gamesmanship in a Facebook post. (*Id.*) In response to Intervenor Stiver's accusations, and while

voting for the SD-10 designation election was open, Respondent Bremer emailed the SD-10 delegates the evening before the assembly:

> Dear Senate 10 Delegates,
>
> It was just brought to my attention that one of the candidates for this office, Mr. Dave Stiver, is making false and defamatory statements on Facebook about the volunteer officers of Senate District 10. Among his false accusations are that he was not notified that balloting had opened despite the fact that he himself successfully voted. We have checked and double checked our system to confirm that he was sent notification. We suggested he check his junk mail since we have been sending numerous emails in an effort to be fully transparent. Despite this, Mr. Stiver has decided to slander the officers of SD10 publicly rather than attempt to work through this process.
>
> I want to assure you that Mr. Stiver's allegations are 100% false and demonstrably so. Despite his public slander, we are fully committed to running a fair and transparent election. If you have any questions or concerns, please feel free to reach out to any of the district officers. Thank you for your time and participation in this admittedly deeply flawed system that the State Government has forced on our Party.
>
> Eli Bremer
> SD10 Chair

(*Id.*) On the morning of the SD-10 assembly, a delegate responded to Respondent Bremer with a motion to postpone the designation election until an agreed-upon balloting system could be put in place. (*Id.* at 20.) Respondent Bremer refused to hear the delegate's motion on the ground that the SD-10 assembly was not yet technically open. (*Id.*)

At the same time Respondent Bremer declined to hear the motion

to postpone the SD-10 designation election he emailed the delegates announcing that SD-10 leadership had identified an apparent hack on the designated Yahoo email account used for voting. (*Id.*) Respondent Bremer stated the email account was impaired and directed delegates who had not voted to use a second email address to vote (sd10assembly2@yahoo.com). (*Id.*)

Apparently because of the claimed hack on SD-10's designated voting email account, additional SD-10 delegates renewed the request to postpone the designation election to allow leadership to implement a new voting process. (*See id.*) Respondent Bremer again refused the motion, this time when the SD-10 assembly was gaveled open. (*Id.*)

After the assembly convened on March 22, leadership determined that 10 alternates were eligible for elevation to voting delegates. The SD-10 committee held open voting from 3 p.m. to 6 p.m. to allow the alternates to vote, five of whom did so. (*Id.*) When the SD-10 assembly reconvened shortly after 6 p.m., the teller reported the results of the designation election: 169 votes cast (of a possible 179 delegate slots) with 127 votes (or 75.14%) for Intervenor Liston, 41 votes (or 24.26%) for Intervenor Stiver, and 1 vote (or 0.59%) for "no one." (*Id.*) The election results were emailed to the delegates the next day. (*Id.*)

III. Procedural Background.

Party Controversy Before the Committee. Two days after the designation election, Intervenor Stiver and eight other contestants lodged a party controversy with the Committee's executive committee. (*Id.* at 16, 21.) The contestants alleged irregularities with the SD-10 assembly and designation election, including that Respondent Bremer unnecessarily advanced the date of the assembly; Respondent Bremer improperly opened voting in the designation election before the assembly had been convened; Respondent Bremer exposed the delegates to voter intimidation by using email voting that was not secret; Respondent Bremer violated rules on neutrality and improperly sent an email to the delegates while voting was open accusing Intervenor Stiver of dishonesty; Respondent Bremer failed to entertain a motion to postpone the designation election after the voting process had been compromised; and Respondent Bremer impermissibly elevated five alternates to voting delegates during the election. (*Id.* at 21-22.)

The executive committee determined it had jurisdiction to hear the party controversy under Colo. Rev. Stat. § 1-3-106(1) and the Committee's bylaws and emergency bylaws, and no party to the controversy contested the Committee's jurisdiction to finally decide the matter. (*See id.* at 16.) Due to the governor's prohibition on in-person

gatherings, the executive committee held a special meeting on April 14 via Zoom to hear the controversy. The executive committee invited all parties to submit written submissions, and all did so. (*Id.* at 21.) Additionally, the contestants, Respondent Bremer, and Intervenor Liston were invited to present evidence and argument to the executive committee at the special meeting, which they did. (*Id.*)

The Committee's executive committee issued its written findings on April 15. (*See generally id.* at 15.) The executive committee found that the SD-10 assembly was irregular to the point of undermining the confidence in the reported results of the election. (*Id.* at 24.) First, Respondent Bremer impermissibly opened voting for the designation election prior to the assembly, which was permitted by neither the Committee's bylaws nor H.B. 1359. (*Id.* at 24-25.) Second, Respondent Bremer impermissibly used his office as chairman of the SD-10 committee to send an email during the election attacking one of the two candidates for the SD-10 nomination. (*Id.* at 25-26.) And third, because the deadline for the completion of single-county district assemblies under H.B. 1359 had expired, the designation election could not be re-conducted to redress the irregularities with the assembly. (*Id.* at 26-27.)

Due to the irregularities and the expired deadline, the executive committee ordered "that the equitable remedy for the irregularity of the

assembly is that the voters in the Republican primary election in Senate District 10 be permitted to choose between Representative Liston and Mr. Stiver." (*Id.* at 27.) To effectuate this remedy, the executive committee ordered Respondent Bremer to file a certificate of designation with the secretary of state naming Intervenor Stiver to the Republican primary ballot for SD-10. (*Id.*)

Respondent Bremer appealed the executive committee's decision to the Committee's state central committee. All of the parties' written submissions were forwarded to the members of the state central committee, and each party was invited to make an oral presentation at the state central committee meeting on April 17.

After considering the parties' submissions and arguments, the state central committee adopted the executive committee's report by a margin of 98 to 88. (*See* App. 7, ¶ 49; *id.* at 50, ¶ 49.)

Petitioner Schneider's Petition. On April 20, Petitioner Schneider (the vice-chairman of the SD-10 committee) filed a petition against Respondent Bremer and Respondent Secretary of State under Colo. Rev. Stat. § 1-1-113(1). He asked the district court to enjoin Respondent Bremer, as chairman of the SD-10 committee, from complying with the Committee's order that he designate Intervenor Stiver as a candidate to the Republican primary ballot, and to enjoin

Respondent Secretary of State from certifying the Republican primary ballot with Intervenor Stiver's name. (*Id.* at 9-10, ¶¶ 66-73, 74-80.)

Both Intervenor Liston and the Committee intervened in the case.[2] The district court held a hearing via WebEx virtual courtroom on April 27, and issued its order granting in part and denying in part Petitioner Schneider's petition on May 4. (*Id.* at 180, 190.)

Specifically, the district court granted Petitioner Schneider's petition against Respondent Bremer and enjoined him from submitting a certificate of designation to the secretary of state that designates Intervenor Stiver as a candidate to the Republican primary ballot. (*Id.* at 189.) In so ordering, the district court acknowledged the tipping point issue to be whether the Committee or the court had jurisdiction over this matter. (*Id.* at 187.) The district court analyzed section 1-3-106 (the party controversy statute) and concluded that "[t]he plain text and title of Article 3 suggests that the legislature intended to limit the scope of C.R.S. § 1-3-106 to determining controversies concerning the organization of the party and the right to use the party name." (*Id.* at 188.) That is, the district determined state political parties' exclusive jurisdiction to hear and finally decide party controversies is limited to

[2] Intervenor Stiver later intervened in the case. (*Id.* at 178.)

two narrow classes of disputes: (i) "disputes over a party's structure," and (ii) disputes over "the right to use the party name." (*Id.*) The district court went so far as to say that interpreting section 1-3-106 any broader "would lead to an absurd result," because, in the court's view, it would interfere with the scope of subsection 1-1-113(1). (*Id.*)

After the district court decided the Committee did not have jurisdiction, it then broadly interpreted subsection 1-1-113(1) and its reference to "official" to find it had jurisdiction over the claims. (*Id.*) For the first time since subsection 1-1-113(1)'s adoption, the district court concluded that subsection 1-1-113(1) must include claims against public election officials and *non*-public officials, including the chairman of a political party's state senate district committee as here. (*Id.*)

On the merits, the district court found that the results of the SD-10 designation election "[we]re not disputed by the parties." (*Id.* at 189.) Strikingly, the district court made specific reference to the Committee's report but did not acknowledge the Committee's explicit finding to the contrary.[3] Having concluded that the designation election results were not in dispute, the district held that Intervenor Stiver could not be

[3] (*See id.* at 24 (the Committee Report) ("The Executive Committee finds that the Senate District 10 assembly was irregular to the point that the Executive Committee cannot have confidence in the outcome of the designation election.").)

placed on the Republican primary ballot for SD-10 because he had not received the statutorily minimum vote at the SD-10 assembly. (*Id.*) To this point, the district court denied Intervenor Stiver's request to present evidence on the regularity of the SD-10 assembly because of his purported delay in intervening in the case. (*Id.* at 187.)

Because the district court enjoined Respondent Bremer from submitting a certificate of designation, designating Intervenor Stiver to the June 2020 Republican primary ballot, it denied Petitioner Schneider's claim against Respondent Secretary of State, as the Secretary would not be in receipt of such a designation. (*Id.*)

The Committee now files this application for review and opening brief, seeking review of the district court's jurisdictional decision, which invades the Committee's exclusive jurisdiction.

ARGUMENT

The core of this dispute is who decides whether a political party's district assembly and designation election were irregular to the point of undermining confidence in the election results. For the last 118 years in Colorado, state political parties have served as the exclusive forum to hear and decide challenges by candidates and delegates to the regularity of party assemblies and designation elections. In fact, neither the district court nor any party to this case was able to produce a single

reported decision from a Colorado court after Colo. Rev. Stat. § 1-3-106's adoption examining the efficacy of a state party assembly or designation election. Despite this, the district court held *the courts* are the necessary forum to litigate party controversies over designation elections and, in doing so, contravened the Committee's express findings.

To be certain, this is a watershed moment for Colorado courts. If uncorrected, the district court's decision will secure the judiciary's place at the center of most every intra-party dispute in the years to come. No longer will "members of the same political body [be] required to submit their controversies to the highest constituted authority of the party in the state," and no longer will the courts be "relieve[d] . . . of a class of litigation w[hich] should never be imposed on them." *See People ex rel. Lowry v. Dist. Ct. of Second Judicial Dist.*, 74 P. 896, 899 (Colo. 1903). Rather, going forward, party controversies such as this one will be played out in the courts, further burdening the judiciary.

This Court should restore the balance. When section 1-3-106 was first adopted, the Court praised the general assembly's "wisdom and a regard for the interests of the judiciary" in delegating exclusive authority to finally resolve political controversies where it belongs: the state political parties. *See Lowry*, 74 P. at 899. But, through judicial fiat, the district court abrogated the wisdom reflected in section 1-3-106

and abridged the Committee's rights under the First Amendment.

I. Standard of Review and Preservation.

In an appeal under Colo. Rev. Stat. § 1-1-113(3), this Court defers to a district court's findings of fact only if they are supported by the record and reviews the district court's legal determinations de novo. *Kuhn v. Williams*, 418 P.3d 478, 483 (Colo. 2018). Questions of "[c]onstitutional interpretation and statutory interpretation present questions of law that [that the Court] review[s] de novo." *Gessler v. Colo. Common Cause*, 327 P.3d 232, 235 (Colo. 2014).

The issue presented in this appeal was preserved below in the Committee's answer and hearing brief. (App. 59-60, 116-21.)

II. The District Court Erred By Not Yielding to the Committee's Exclusive Jurisdiction under Section 1-3-106.

A. Petitioner Schneider's claims turn on the regularity and validity of the SD-10 assembly.

Petitioner Schneider's claims—one seeking to enjoin Respondent Bremer from submitting a certificate of designation that designates Intervenor Stiver as a candidate for the SD-10 Republican primary, and another to enjoin Respondent Secretary of State from certifying the same (App. 9-10)—necessarily assume the validity and regularity of the SD-10 assembly and designation election. Stated differently, the claims only work if one assumes the outcome of the election was correct and

Intervenor Stiver did not receive 30% of the vote. But that premise is wrong, or at least undetermined because of the many irregularities at the SD-10 assembly, and the district court erred by predicating its affirmative relief on the validity of the election.

More fundamentally to the issue here, such an assumption runs contrary to the express findings of the Committee, which heard this controversy under Colo. Rev. Stat. § 1-3-106 and made findings on the matter. (*See id.* at 24 ("The Executive Committee finds that the Senate District 10 assembly was irregular to the point that the Executive Committee cannot have confidence in the outcome of the designation election.").) Specifically, when this matter was first initiated at the party level, the Committee invited the interested parties to submit written materials; it heard evidence and argument of counsel; and it conducted internal deliberations. After which, the Committee's executive committee issued a 13-page report (later adopted by the state central committee) that outlined the irregularities with the SD-10 assembly and decided that, because of the irreparable designation election and expired deadline for single-county assemblies, the proper remedy was ballot access rather than excluding one (of two) candidates in the race. That is, presented with an irregular assembly and no opportunity to re-hold the assembly designation election, the executive

committee and state central committee settled on a limited remedy by which electors choosing a Republican primary ballot in SD-10 would select between the two declared candidates in the June 2020 primary for the Republican nomination for SD-10.

Petitioner Schneider's claims under subsection 1-1-113(1), while framed as something different, necessarily seek collateral review of the Committee's finding by attempting to rehabilitate a flawed SD-10 designation election. And the only way Petitioner Schneider could have met his burden under subsection 1-1-113(1) was to first validate the results of the SD-10 designation election in disregard of a final determination by the Committee. The district court ignored that finding, and, by so doing, invaded the Committee's exclusive authority—which it exercised—to pass upon the regularity of the Republican Party's designation elections.

To that, it cannot be reasonably disputed that the Committee afforded the interested parties process and issued a reasoned decision detailing its findings of fact and conclusions. The Committee canvassed the evidence and determined the outcome of the SD-10 designation election could not be trusted because (i) Respondent Bremer impermissibly opened voting for the designation election prior to the assembly, which was permitted by neither the Committee's bylaws nor

H.B. 1359 (App. 24-25); and (ii) Respondent Bremer impermissibly used his office as chairman of SD-10 to send an email attacking one of the two candidates for the SD-10 nomination during the designation election in violation of political party bylaws applicable to him (*id.* at 25-26). And these findings were not just that of a few—this party controversy was finally resolved by nearly ***200 party members*** (between the executive committee and state central committee). In the end, the district court erred by not crediting the Committee's findings on the regularity and validity of the designation election in granting relief under subsection 1-1-113(1).[4]

B. The Committee's determination is beyond the jurisdiction of the courts.

Not only should the Committee's finding that the SD-10 designation election was irreparably irregular be afforded deference, but, more fundamentally, the correctness of the Committee's final resolution of this intra-party dispute is not for the courts. It has long

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[4] In its order, the district court found "[n]o party to this case is challenging [the results of the SD-10 designation election]." (App. 184; *see also id.* at 189 ("As noted above, these results are not disputes by the parties here.").) Respectfully, the district court is mistaken. No party disputed that the results were *reported*, but the validity of the election results were very much in dispute, as explained in the Committee's report. (*Id.* at 24 ("The Executive Committee finds that the Senate District 10 assembly was irregular to the point that the Executive Committee cannot have confidence in the outcome . . . .").)

been the law in Colorado that state central committees of political parties are the final arbiters of internal party affairs and controversies. *See* Colo. Rev. Stat. § 1-3-106(1). That statute provides the Committee with the "full power to pass upon and determine all controversies concerning the regularity of the organization of that party," including within any senatorial district, which "shall be final." *Id.*

The plain language of subsection 1-3-106(1) is at odds with the district court's order. The phrase "regularity of the organization of th[e] party" must include controversies over the regularity of assembly designation elections that determine who will be the Colorado Republican nominees for Republican primary elections. Designation elections—as opposed to public primary and general elections—are without questions matters of party organization, the regularity of which is determined exclusively by state political parties. To be sure, these elections are the mechanisms by which political parties choose (and reject) the standard bearers of the party. And a plain reading of subsection 1-3-106(1) supports this truth. But, if there is hesitation as to the plain meaning of subsection 1-3-106(1) and its scope, study of the history of the subsection allays all doubt.

As previously discussed (*supra* pp. 3-5), subsection 1-3-106(1) has

existed since 1901.[5] *Lowry*, 74 P. at 897 (quoting Act of Apr. 16, 1901, ch. 71, § 1, 1901 Colo. Sess. Laws. 169) ("The state central committee of any political party in this state shall have full power to pass upon and determine all controversies concerning the regularity of the organization of that party within and for any congressional, judicial,

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[5] It bears noting that the district court found the "placement of C.R.S. § 1-3-106 in Article 3 which is titled 'Political Party Organization'" material to its analysis of the applicability of the statute to the Committee's authority (or lack thereof) to resolve this controversy. (App. 188.) But this statute was adopted in 1901 and has thus been on the books long before the state's positive law was codified in 1953. An examination of its placement in the Election Code after its adoption suggests the opposite of the conclusion drawn by the district court. Indeed, just seven years after its adoption, the statute was included in the portion of the Election Code titled "Miscellaneous Provisions." § 2325, Colo. Rev. Stat. (1908). This portion of the Election Code included only provisions plainly applicable to the entirety of Colorado's elections process such as a provision requiring employers to provide employees two hours to vote on election day (section 2321), the inclusion of Sundays in the computation of time under the Election Code (section 2322), and the requirement that political party chairmen file a list of the membership of their state central committees with the secretary of state (section 2326). The district court's reliance on the results of a later recodification was therefore mistaken, because, as this Court has made plain, recodifications do not effect substantive changes to the law. *See In re Interrogs. from House of Reps. Concerning Sen. Bill No. 24, Thirty-Ninth Gen. Assemb.*, 254 P.2d 853, 855 (Colo. 1953) ("[T]he usual constitutional limitation on the enactment of new laws, and the repeal or amendment of existing laws, strictly speaking, is not applicable, and does not generally prevail in the matter of legislation enacting an official code or compilation or revision of existing laws. A peculiarly distinct field is entered by the introduction and passage of legislation enacting a codification and revision of the general law. The presumption exists that the laws here involved were originally enacted with due constitutional precaution.").

senatorial or representative district, or county, or city, in this state . . . ."). In the decade leading up to 1901, however, Colorado tinkered with review authority of candidate nominations, specifically in what was section 13 of the Election Code (section 2161), *see* § 2161, Colo. Rev. Stat. (1908), which subsequently informed the 1901 act. Prior to 1897, Colorado law provided all objections to certificates of nominations must be lodged and summarily determined by the secretary of state. But the secretary's authority was limited to the determination to ministerial objections to the form of the nomination, and all certificates valid on their face were required to be honored. *See People ex rel. Eaton v. Dist. Ct. of Arapahoe Cty.*, 31 P. 339, 343 (Colo. 1892). This limitation on adjudicable objections to those presenting questions of form produced absurd results. For example, in 1892, this Court found that, despite two competing factions of the Democratic Party each submitted facially valid certificates of nomination for their preferred set of statewide candidates, the Court could not choose between the factions, but rather could only compel the secretary to recognize both certificates. *Id.*; *see also People ex rel. Hodges v. McGaffey*, 46 P. 930, 932 (Colo. 1896) (identical result for two competing Republican Party tickets in 1896).

Given the calamity of multiple ticket on the same general election ballot befell both major political parties in successive presidential

election years, it is perhaps not surprising the general assembly granted review power over substantive objections to nominations to the secretary of state and the courts. Colorado operated under this review scheme for four years (from 1897 to 1901), by which "the courts assumed jurisdiction to settle, and did settle, party disputes" over nominations. *See Lowry*, 74 P. at 897. In particular, the law in effect during these four years provided the following review scheme:

- "All certificates of nomination" that "are in apparent conformity with the provisions of this Act, shall be deemed to be valid, unless objection thereto." And any objection "shall decide[d] . . . within at least forty eight hours after the same are filed."
- Objections "shall be duly made, in writing, within three (3) days after the filing" and "notice thereof shall be forthwith mailed to all candidates who may be affected."
- "The officer with whom the original certificate is filed shall pass upon the validity of all objections, whether of form or substance, and his decision upon matters of form shall be final."
- "Decisions [as to] substance shall be open to review, if prompt application be made," in court. "[T]he remedy, in all cases shall be summary, and the decision of any Court having jurisdiction shall be final, and not subject to review by any other Court, except that the Supreme Court may, in the exercise of its discretion, review any such judicial proceeding in a summary way."

Act of Apr. 16, 1897, ch. 49, § 13, 1897 Colo. Sess. Laws. 154. As such, between 1897 and 1901, Colorado adhered to a tiered-review scheme for form and substance objections to nominees for public office, and the law conveyed power to the courts to review substantive objections.

But that changed with regard to party nominations in 1901. Reflecting on its decision in *Spencer v. Maloney*, 62 P. 850 (Colo. 1900), this Court observed that in *Spencer* it "intimat[ed] that the judiciary ought not to be clothed with or exercise power of th[e] kind [granted by the 1897 act], but that the Legislature should provide some special tribunal for the settlement of the internal disputes of a political party," including objections to party nominations and factional disputes. *See Lowry*, 74 P. at 897. The general assembly listened and adopted the 1901 act, which reassigned the duties and jurisdiction outlined in the 1897 act with respect to substantive challenges to party nominations to state political parties. *See id.* at 898 ("It is upon [the 1901] act that petitioners in this proceeding base their claim that the courts are thereby, by necessary implication, deprived of the jurisdiction which theretofore they exercised under the amended act of 1897. That the state central committee of a political party, or the state convention, as the case may be, is now the sole tribunal to determine such controversies as is here presented is, to our mind, clear beyond all doubt; and, as a necessary sequence, the courts do not have concurrent jurisdiction in the premises."). But ministerial objections, or objections to the form of a certificate of nomination, whether the certificate was submitted by parties or by petitioners, remained with the secretary and

the courts. *See O'Connor v. Smithers*, 99 P. 46, 51-52 (Colo. 1908).

What this history teaches is that subsection 1-3-106(1) is not limited to the narrow class of controversies the district court claims. (*See* App. 188.) Rather, since 1901, political parties' statutory authority to decide party controversies has included disputes over party nominations, which must encompass party assemblies and designation elections. Indeed, this division of responsibility for adjudication of challenges to nomination or designation papers—with challenges arising out of the political party process left to the parties and challenges based on compliance with some ministerial or other non-party process left to the secretary of state and the judiciary—has continued to this day.

It is also notable that after the 1901 act the tide of litigation over party nominations stopped. The last reported decision of such a challenge is in 1903. *See Lowry*, 74 P. at 899. That there are not scores of decisions over the last century in the Pacific Reporters resolving disputes like the one at issue here is telling. Indeed, only two reported cases have examined the contours of section 1-3-106 during its nearly 120-year existence: *Lowry* and *Nichol v. Bair*, 626 P.2d 761 (Colo. App. 1981). *Nichol* involved a challenge to the removal of two plaintiffs "from their positions of Captain and Co-captain of a captaincy district within

the Democratic Party of Adams County." 626 P.2d at 762. The court of appeals in *Nichol* summarily found that subject matter jurisdiction was lacking, citing to subsection 1-3-106(1) (then section 1-14-109) and *Lowry* for support. *Id.*

In truth, state political parties regularly hear and decide many types of party controversies, including controversies over the regularity of party assemblies. The general acceptance of the Committee's review power is perhaps best exhibited by the fact that neither Petitioner Schneider, Respondent Bremer, nor Intervenor Liston (nor Intervenor Stiver) questioned the Committee's jurisdiction to hear this matter until *after* the Committee issued its report.

C. Failing to recognize section 1-3-106's scope will inundate the courts with political disputes.

Since its adoption, section 1-3-106 has operated as a shield for the courts, relieving them "of a class of litigation w[hich] should never be imposed on them." *See Lowry*, 74 P. at 899. It bears repeating that section 1-3-106 exists today because, in part, this Court asked for it in *Spencer*. After adjudicating political controversies from 1897 to 1901, the Court (rightly) acknowledged the lose-lose situation in which it found itself. Political disputes, particularly controversies between rival factions or political candidates, are unique and are not well-suited for

adjudication by nonpartisan bodies. In *Spencer*, after finding it had jurisdiction under the 1897 review scheme, the Court begrudgingly plotted out its chore: "Fully aware of the bitterness which disputes of this sort engender, and conscious of the futility of the attempt to satisfy contestants, or allay the partisan strife out of which their differences spring, we shall dispose of this case just as we do other questions." 62 P. at 852. But the Court made clear that the practice of courts resolving political disputes "should never have been adopted." *Id.*

Yet, the district court's decision thrusts courts back into the political fray and places judges in the precise position the Court in *Lowry* praised the general assembly for avoiding. While only two cases have been filed *this* election cycle, both of which raise novel jurisdictional questions, *see Underwood v. Griswold*, No. 2020CV31482 (Colo. Dist. Ct., Denver Cty.), the district court's finding will inundate the Colorado state courts with party controversies in the election cycles to come. For example, in a given election year, hundreds of assemblies and designation elections are held by state political parties and their various adjuncts. At those assemblies, tens or hundreds (depending on the size) of decisions are made that may adversely affect a party member or a candidate for office. Under the district court's logic, each of those hypothetical grievances may now be redressed in court under

subsection 1-1-113(1) through its expedited procedures, so long as it is grounded in a duty owed under the Election Code.

It is neither hyperbole nor an overstatement to predict that litigants will use the district court's jurisdictional finding as a sword in cases to come. If the district court's decision stands, Colorado state courts should prepare for election cycles like none they have seen in the last century. And, not only will cases initially be filed in district court (*see Underwood*), but, like the adverse parties here, litigants are bound to use courts as quasi-appellate forums to seek collateral review of decisions by state political parties when they disagree with the party's findings and conclusions. This class of cases presents an additional layer of complication. And, as discussed next, second guessing political parties' resolution of internal-party affairs will unconstitutionally erode political parties' associational rights under the First Amendment.

III. The District Court's Jurisdictional Finding Implicates the Committee's First Amendment Rights.

A. The First Amendment should inform the Court's interpretation of sections 1-3-106 and 1-1-113.

Beyond being demonstrably inconsistent with plain language and unmistakable historical context of Colo. Rev. Stat. § 1-3-106, the district court's interpretation of Colo. Rev. Stat. §§ 1-3-106 and 1-1-113 violates the constitutional-doubt cannon of statutory construction because its

interpretation would infringe the Committee's associational rights under the First Amendment. The underlying dispute that the Committee finally resolved through its internal-party procedures—i.e., determining the regularity of the SD-10 designation election, along with the candidates designated to the Republican primary ballot for SD-10—implicates two First Amendment guarantees. *First*, "[t]he First Amendment protects the freedom to join together to further common political beliefs, which presupposes the freedom to identify those who constitute the association." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 568 (2000). In no area is the political association's right "more important than in the process of selecting its nominee," because "it is the nominee who becomes the party's ambassador to the general electorate." *Id.* at 575. The U.S. Supreme Court's cases therefore "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Id.* (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

Second, political parties' resolution of party controversies is itself constitutionally protected activity. *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) ("[A] State, or a court, may

not constitutionally substitute its own judgment for that of the Party."). It is for this reason that the Supreme Court has rejected judicial intervention in internal-party affairs and controversies. *See, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) ("[T]his is a case where 'the convention itself (was) the proper forum for determining intraparty disputes as to which delegates (should) be seated.'"); *O'Brien v. Brown*, 409 U.S. 1, 4 (1972) ("[N]o holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature."); *Buckley v. Valeo*, 424 U.S. 1, 250 (1976) (Burger, C.J., concurring) ("[T]his Court has scrupulously refrained, absent claims of invidious discrimination, from entering the arena of intraparty disputes concerning the seating of convention delegates." (footnote omitted)). *Cf. Morse v. Republican Party of Va.*, 517 U.S. 186, 241 (1996) (Scalia, J., dissenting) ("[W]e have always treated government assertion of control over the internal affairs of political parties—which, after all, are simply groups of like-minded individual voters—as a matter of the utmost constitutional consequence.").

To the extent the district court was unpersuaded by the plain language and history of these statutes, the Committee's First Amendment rights should thus have informed the district court's

interpretation of sections 1-3-106 and 1-1-113 and confirmed state political parties' exclusive jurisdiction under subsection 1-3-106(1) to hear and finally decide party controversies like the one here. The constitutional-doubt canon provides that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)); *see also People v. Iannicelli*, 449 P.3d 387, 392 (Colo. 2019). By choosing the interpretation of section 1-3-106 that it did—and by allowing section 1-1-113 to supersede the Committee's authority over matters exclusively within party jurisdiction—the district court cast serious doubt on the constitutionality of these statutes. This Court should therefore reject the district court's interpretation and avoid the view that these statutory sections condone a review process in which courts review or supplant internal-party deliberations in violation of the Committee's associational rights under the First Amendment.

B. The First Amendment provides an independent ground for deferring to the Committee's decision.

The district court's failure to yield to the Committee's resolution of

the regularity of the SD-10 designation election impermissibly undermines the Committee's First Amendment rights. Not only should state political parties' associational rights inform how the Court interprets Colo. Rev. Stat. §§ 1-3-106 and 1-1-113, but the First Amendment also provides an independent ground justifying deference to the Committee's process for resolving party controversies.

That process is included in the Committee's bylaws and specifically addresses contests of designations by district or county assemblies. (*See* App. 46, ¶ 28 (linking to the Committee's Emergency Bylaws, *available at* https://bit.ly/2zvfeZm).) The Committee's emergency bylaws, which were adopted in response to the declared emergency and H.B. 1359, include emergency bylaw #10, which states,

> Any delegate or candidate who wishes to contest the designation of any candidate to the primary ballot by district or county assembly and convention must within two days of the adjournment of the district or county assembly and convention at which the designation was made, present such contest to the state Executive Committee with simultaneous notice to all candidates for designation at the assembly and convention in the race subject to contest and to the district or county chair. The state Executive Committee will make a recommended determination of all such contests to the Colorado Republican State Central Committee which will make the final determination of all such contests at its pre-assembly meeting.

The interested parties invoked, and actively participated in, this contest procedure to challenge (and defend) the SD-10 assembly and

designation election before the Committee. The Committee conducted a thorough examination of the facts and allowed for the presentation of evidence and argument, and no party here questioned the adequacy of the process or the neutrality of the adjudication.

The district court's review of Petitioner Schneider's claims under subsection 1-1-113(1) required the court to reexamine an issue the Committee had finally resolved—the adequacy and regularity of the SD-10 assembly and designation election. It is uncontested that the Committee deemed the assembly and designation election irregular, to the point of having no confidence in the results of the election. In granting the requested relief, the Court did not deem the Committee's findings wrong or overrule them; rather, the district court simply ignored the findings as if they did not exist. (*See* App. 189 (stating the election "results are not disputed by the parties").) The district court's decision is wrong, but to disregard the Committee's findings on a matter that strikes at the heart of its associational guarantees to select the Colorado Republican Party's nominees for primary elections runs roughshod over the First Amendment. Without question the district court's chosen path undermines the Committee's constitutional rights, particularly when the parties first participated in the designation-election contest before the Committee. The district court should have

avoided these issues by applying section 1-3-106 and deferring to the Committee's resolution of this matter.

And, contrary to Petitioner Schneider's argument before the district court, the Committee's invocation of the First Amendment as an independent ground for respecting the Committee's internal deliberations, does not run afoul of the Court's decisions in *Kuhn v. Williams*, 418 P.3d 478, 489 (Colo. 2018) and *Frazier v. Williams*, 401 P.3d 541, 542 (Colo. 2017). Unlike in *Kuhn* and *Frazier*, where the litigants affirmatively argued that Colorado statute was unconstitutional, it is not the Committee's position that the section 1-3-106 (or section 1-1-113) is unconstitutional. Rather, the Committee has maintained that section 1-3-106 is consistent with the First Amendment in that it requires courts and other branches of government to accede jurisdiction to state political parties to resolve party controversies. In that way, the First Amendment and section 1-3-106 do the same work and the remedy is the same: for the court to decline jurisdiction and defer to state political parties to resolve internal-party affairs. And, refusal to recognize the Committee's First Amendment guarantees in this limited context would compel the Committee to seek relief under 42 U.S.C. § 1983 in federal district court. *See Goodall v. Williams*, 324 F. Supp. 3d 1184 (D. Colo. 2018).

CONCLUSION

The Court should grant the Committee's application for review under Colo. Rev. Stat. § 1-1-113(3) and reverse the district court's first-of-its-kind view of state political parties' jurisdiction over party affairs. Doing so will restore the balance of Colorado's party controversy statute and avoid abridging state political parties' First Amendment rights.

Dated: May 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 4, 2020, I filed a true and correct copy of this **Application for Review Under Colo. Rev. Stat. § 1-1-113(3)** with the Clerk of Court via the Colorado Courts E-Filing System, which will send notification of such filing upon counsel of record:

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