

<p>Colorado Supreme Court 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p>DATE FILED August 31, 2022 6:28 PM FILING ID: 9FD9926BFBC78 CASE NUMBER: 2022SA287</p>
<p>Appeal from the 2nd Judicial District - Denver The Honorable Judge Alex C. Meyers District Court Case No. 2022CV032191</p>	
<p>In Re: RAE ANN WEBER, PETER LUPIA, LYNDA ZAMORA WILSON, LINDSAY MOORE, DAVID WINNEY, and SUMMER GROUBERT,  Petitioners,  v.  JENA GRISWOLD, in her official capacity as Secretary of State of Colorado, and CHUCK BROERMAN, in his official capacity as Clerk and Recorder of the county of El Paso,  Respondents.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Attorneys for Petitioners</b> Gary D. Fielder, Esq. #19757 1435 Stuart St. Denver, CO 80204 Phone: (303) 650-1505 Email: gary@fielderlaw.net</p>	<p>Case No.</p>
<p style="text-align: center;"><b>VERIFIED PETITION FOR A RULE TO SHOW CAUSE PURSUANT TO C.A.R. § 21(a)(2) and FOR EXPEDITED REVIEW PURSUANT TO C.R.S. § 1-1-113 and C.R.S. § 1-10.5-109</b></p>	

## **I. INTRODUCTION**

The Petitioners request that this Honorable Supreme Court issue a Rule to Show Cause in the nature of Quo Warranto and Prohibition directed at Respondent JENA GRISWOLD, in her official capacity as Secretary of State of Colorado, prohibiting her from issuing rules that circumvent the law established by the General Assembly, in protection of the purity and integrity of elections under Colo. Const. Art. 7, § 11; and, in the nature of Mandamus directed at CHUCK BROERMAN, in his official capacity as Clerk and Recorder of the county of El Paso, why he should not be required to comply with the election law established by the General Assembly, pursuant to C.R.S. § 1-10.5-102(3)(a) & (b). Additionally, Petitioners' request this Honorable Supreme Court exercise its supervisory and appellate jurisdiction under C.A.R. 21 to review the district court's determination of questions of law related to C.R.S. §§ 1-1-113 and 1-10.5-109 in deciding these issues of great public importance and first impression.

## **II. ISSUES PRESENTED**

1. WHETHER THE SECRETARY ACTED IN EXCESS OF HER RULE MAKING AUTHORITY WHICH CIRCUMVENTED ELECTION LAW ESTABLISHED BY THE GENERAL ASSEMBLY IN RELATION TO C.R.S. 1-10.5-102(3)(a) & (b).

2. WHETHER THE CLERK AND RECORDER MUST COMPLY WITH HIS DUTIES AND RESPONSIBILITIES SET FORTH BY THE GENERAL ASSEMBLY UNDER C.R.S. § 1-10.5-102(3)(a) & (b).
3. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE PETITIONERS' REQUEST TO STOP THEIR RECOUNT AND REQUIRE THE RESPONDENTS TO FOLLOW THE LAW REQUIRING THE TESTING OF DEVICES IS MOOT.
4. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT §1-1-113 COULD NOT BE INVOKED AFTER THE PRIMARY ELECTION.
5. WHETHER THE FAILURE OF THE CANVASS BOARD TO FOLLOW THE TESTING PROCEDURES REQUIRED UNDER C.R.S. § 1-10.5-102(3)(a) INVALIDATES THE RECOUNT.

### **III. PARTIES**

Petitioners, Rae Ann Weber, Peter Lupia, Lynda Zamora Wilson, Lindsay Moore, David Winney, and Summer Groubert, are natural persons, citizens of the state of Colorado and of the United States of America, all of whom ran as Republican Party (GOP) primary candidates for several offices within the county of El Paso, state of Colorado.

Respondents are Jena Griswold, who is named in her official capacity as Secretary of the State of Colorado (Secretary); and, Chuck Broerman, also named in his official capacity as Clerk and Recorder of the county of El Paso (Clerk and Recorder).

### **III. COURT BELOW**

The court below is the district court for the city and county of Denver, the Honorable Judge Alex C. Meyers, presiding.

### **IV. NATURE OF THE CASE**

To date, this case has been litigated on an accelerated timeline. However, the district court dismissed the case for mootness, and upon a finding that relief under C.R.S. § 1-1-113 is limited to conduct before the subject primary election.

On June 28, 2022, the Republican primary election was held in El Paso to determine the party's candidates for offices in the county. Petitioners allegedly lost their respective primary elections. As "interested parties," pursuant to C.R.S. § 1-10.5-106, the Petitioners all formally requested a recount by submitting notarized letters to either the Secretary or Clerk and Recorder within the statutory time period of 28 days.

Pursuant to C.R.S. § 1-10.5-107, the Clerk and Recorder arranged to have the recounts made by the county's canvass board that officiated in certifying the official abstract of the votes casts in the primary election.

On Friday, July 29, 2022, the recounts started in the offices of the Clerk and Recorder. However, C.R.S. § 1-10.5-102 (3)(a) states:

Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question

that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.

C.R.S. § 1-10.5-102 (3)(b) states:

If the results of the comparison of the machine count and the manual count in accordance with the requirements of subsection (3)(a) of this section are identical, or if any discrepancy is able to be accounted for by voter error, then the recount may be conducted in the same manner as the original ballot count. If the results of the comparison of the machine count and the manual count in accordance with the requirements of subsection (3)(a) of this section are not identical, or if any discrepancy is not able to be accounted for by voter error, a presumption is created that the voter-verified paper records will be used for a final determination unless evidence exists that the integrity of the voter-verified paper records has been irrevocably compromised. The secretary of state shall decide which method of recount is used in each case, based on the secretary's determination of which method will ensure the most accurate count, subject to judicial review for abuse of discretion. Nothing in this subsection (3) limits any person from pursuing any applicable legal remedy otherwise provided by law.

Instead, unbeknownst to the Petitioners, the Secretary directed the Clerk and Recorder and canvass board to test its voting machines through the use of test ballots. In that regard, the Secretary sent a **Summary of Colorado Recount Procedures July 2022** to the Clerk and Recorder.<sup>1</sup> In it, the Secretary

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<sup>1</sup> Jena M. Griswold Secretary of State Judd Choate Director, Elections Division, *Summary of Colorado Recount Procedures July 2022*, Appendix IV, pp. 156-163.

misrepresented Colorado law to the canvass board. With regard to the testing of the devices required, the Secretary stated the following:

## **7. Testing Prior to Recount**

### *a. Generally*

1-10.5-102 (3) (a) and (b), C.R.S. and Rules 10.12.2, 10.13.1 The canvass board must, prior to any recount in which scanners will be used, randomly choose and test voting devices used in the original race. The canvass board must compare a manual count of the paper test ballots against the machine count of the randomly selected scanners or voting devices. If the results of the comparison are identical, or if any discrepancy can be attributed to voter or ballot marking error, the county must conduct the recount in the same manner as the original count.<sup>2</sup>

In that regard, 8 Colo. Code Regs. § 1501-1-10.12.2, states:

If the county re-scans ballots during the recount, the county clerk must test all ballot scanners that will be used. The purpose of the test is to ensure that the voting system accurately tabulates votes in the recounted contest.

(a) The county must prepare and tabulate the following test decks:

(1) The county recount test deck must include every ballot style and, where applicable, precinct style containing the recounted contest. It must consist of enough ballots to mark every vote position and every possible combination of vote positions, and include overvotes, undervotes, and blank votes in the recounted contest.

(2) In a requested recount, the person requesting the recount may mark up to 10 ballots. Any other candidate in the

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<sup>2</sup> *Id.* at p. 158, ¶ 7.

contest, or person or organization who could have requested the recount, may also mark up to 10 ballots.

(3) In a mandatory recount, at least two canvass board members of different party affiliations must each mark an additional 10 ballots containing the recounted contest.

(b) A bipartisan team, of election judges and/or staff, must hand tally the recounted contest on the test ballots and verify that the hand tally matches the voting system's tabulation.

(c) The test is limited to the race or measure that is recounted.

The issue concerning a “rescan” is a bit of a red herring. The Election Rules promulgated by the Secretary state that “an interested may request that the county re-scan ballots.” 8 Colo. Code Regs. § 1501-10.9.3. The request must be made no later than “the day after the deadline to request a recount...” *Id.* However, none of the Petitioners requested a re-scan.

Nonetheless, the guidance provided by the Secretary led the canvass board, here, to test the scanners and voting devices as outlined by 8 Colo. Code Regs. § 1501-10.12.2. While that test may have been conducted in addition to the requirements of § 1-10.5-102(3)(a), the performance of the test under the Election Rules did not alleviate the canvass board’s duty to follow the law.

Pursuant to C.R.S. § 1-10.5-102 (3)(a), prior to the recount, the canvass board is required to manually count the ballots that were tabulated by the chosen devices in the primary election on June 28, 2022.

After the manual count of the ballots that were previously tabulated by the chosen devices used in the primary, the canvass board must then compare the manual count of those ballots with the results of the machine count that was tabulated on June 28, 2022.

Accordingly, the canvass board did not comply with C.R.S. § 1-10.5-102 (3)(a). By directing the canvassing board not to comply with C.R.S. § 1-10.5-102 (3)(a), the Secretary and Clerk and Recorder breached their duties to conduct fair, impartial, and uniform recounts. C.R.S. § 1-10.5-102 (3)(b) allows the recount to be conducted in the same manner as the original ballot count, i.e., through the voting machines, only if “the results of the *comparison* of the machine count and the manual count in accordance with the requirements of subsection (3)(a) of are identical, or if any discrepancy is able to be accounted for by *voter* error.” [Emphasis added]. Pursuant to C.R.S. § 1-10.5-102 (3)(b), if “the results of the *comparison* of the machine count and the manual count in accordance with the requirements of subsection (3)(a) of are *not* identical, or if any discrepancy is not able to be accounted for by voter error, a presumption is created that the voter-verified paper records will be used for a final determination unless evidence exists that the integrity of the voter-verified paper records has been irrevocably compromised.” [Emphasis added].

Since the canvass board failed to comply with C.R.S. § 1-10.5-102 (3)(a), the requirements of C.R.S. § 1-10.5-102 (3)(b) were also not met. Petitioners' recounts were conducted in the same manner as the ballots were counted in the primary election, i.e., with the voting machines, but without compliance with C.R.S. § 1-10.5-102 (3)(a)&(b). Thus, the recounts are void.

Petitioners were not aware that the canvass board was not going to perform the necessary testing until Sunday, July 30, 2022. In response, during the recount on Monday, August 1, 2022, the Petitioners filed their Petition for Order Pursuant to C.R.S. § 1-10.5-109.<sup>3</sup> C.R.S. § 1-10.5-109(1)(a), states:

Any interested party that requested a recount of a county, state, national, or district office of state concern or any party to such recount that has reasonable grounds to believe that the recount is not being conducted in a fair, impartial, and uniform manner may apply to the district court of the city and county of Denver for an order requiring the county clerk and recorder to stop the recount and to give the secretary of state access to all pertinent election records used in conducting the recount, and requiring the secretary of state to conduct the recount. The county clerk and recorder shall be an official observer during any recount conducted by the secretary of state.

The Secretary and the Clerk and Recorder were served with copies of the Petition on the next day, Tuesday, August 2, 2022.<sup>4</sup> Nonetheless, the canvass board continued the recount and finished on Wednesday, August 3, 2022.

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<sup>3</sup> Appendix I, pp. 7-33.

<sup>4</sup> See Appendix V, pp. 381-382, and pp. 395-396.

On Thursday, August 4, 2022, the district court entered a standard pretrial order and delay prevention order. After the recount was over, on Friday, August 5, 2022, the Petitioners filed their Amended Verified Petition Under C.R.S. §§ 1-1-113 and 1-10.5-109 and for Injunctive Relief Pursuant to C.R.C.P. 65.<sup>5</sup> Additionally, on August 8, 2022, Petitioners filed their Verified Motion for Preliminary Injunction with Notice to Respondents.<sup>6</sup> On that same day, the Attorney General entered his appearance.<sup>7</sup>

On August 10, 2022, Petitioners filed their Motion to Stay Recount Deadline.<sup>8</sup> The county attorney for the Clerk and Recorder entered his appearance.<sup>9</sup> Also, on August 10, 2022, the district court entered an order for “counsel for all the parties shall jointly set this matter for an expedited status and scheduling conference.”<sup>10</sup> The next day, August 11, 2022, Petitioners filed their waivers of service from the Secretary and Clerk and Recorder, dated August 8, 2022, and August 3, 2022, respectively.<sup>11</sup>

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<sup>5</sup> Appendix III, pp. 92-122.

<sup>6</sup> Appendix IV, pp. 170-188.

<sup>7</sup> Appendix IV, pp. 164-166.

<sup>8</sup> Appendix IV, pp. 211-216.

<sup>9</sup> Appendix IV, pp. 218-220.

<sup>10</sup> Appendix IV, pp. 189-190.

<sup>11</sup> Appendix V, pp. 254-255 & 256-257.

A status conference was held on Wednesday, August 17, 2022, at which time the district court outlined a briefing schedule and set the matter for hearing on Thursday, September 1, 2022.<sup>12</sup> After the parties filed their briefs, the district court dismissed the matter as moot, and found that any claim under § 1-1-113 was limited to conduct performed before the primary.<sup>13</sup> As such, the district court dismissed the case and vacated the hearing.

## **V. THE SUPREME COURT MUST RULE ON THIS MATTER OF GREAT PUBLIC IMPORTANCE AND FIRST IMPRESSION**

### **A. Standard of Review**

Constitutional interpretation and statutory interpretation present questions of law that this Supreme Court reviews de novo. *See Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo.2006). As part of the Court's de novo review, it may consider the Secretary's interpretation and regulations that it has promulgated. *Bd. of Cnty. Comm'rs v. Colo. Pub. Utils. Comm'n*, 157 P.3d 1083, 1088 (Colo.2007). However, such deference is not warranted where, as here, the Secretary's interpretation is contrary to constitutional and statutory law established by the intent of the General Assembly. *See Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 172 (Colo. 1988).

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<sup>12</sup> Appendix V, pp. 259-263.

<sup>13</sup> Appendix V, pp. 383-394.

## **B. Analysis**

The Secretary is vested with authority to promulgate rules in the administration of Colorado elections that support the statutory laws established by the General Assembly. However, this authority is not limitless and does not allow the Secretary to create new laws that circumvent the general laws established to maintain the purity of elections. *See* Colo. Const. Art 7, Section 11. Accordingly, Election Rules may not conflict with other provisions of law. *See* C.R.S. § 24-4-103(4)(b)(IV)(providing that an agency rule can be adopted only if it “does not conflict with other provisions of law.”); § 24-4-103(8)(a)(providing that “any rule ...which conflicts with a statute shall be void.”); and, § 24-4-106(7)(requiring courts to set aside agency actions that are “contrary to law”).

Thus, resolution of this case turns on: (1) whether the use of 8 C.C.R. § 1501-1.10.12.2 conflicts with the prerequisites of C.R.S. § 1-10.5-102(3)(a) & (b); and, (2) whether the Secretary exceeded her authority by instructing the canvass board to use test ballots—rather than “voter verified paper records,” as expressly required by the General Assembly.

This Supreme Court has original jurisdiction to review the district court’s order pursuant to C.A.R 21. *Hanlen v. Gessler*, 333 P. 3d 41, 48 (Colo 2014). The decision to exercise original jurisdiction lies entirely within the discretion of this

Court. *Fognani v. Young*, 115 P.3d 1268, 1271 (Colo. 2005). However, this Court may exercise this extraordinary jurisdiction “to review whether the trial court abused its discretion in situations where the petition raises an issue of first impression that is of significant public importance, and where the normal appellate process would prove inadequate.” *People v. Voth*, 312 P.3d 144, 148 (Colo. 2013).

Additionally, this appeal is timely filed under C.R.S. § 1-1-113(3). The lower court rendered its decision on Monday, August 29, 2022. This Petition is filed within two days of the dismissal and, despite the accelerated timeline in this case, this Court has adequate time to review and rule upon the matter before the certification of the ballots—the deadline of which is September 12, 2022. Although these deadlines are meaningful, the election itself is not until November 8, 2022. Noting that a recount must be requested within 28 days of the primary, and completed within 37, a week to ten days to conduct a recount is the anticipated time needed to perform the task. Here, however, the necessary recounts have not been conducted.

In order for the canvass board to conduct a legal recount, it must comply with the law that requires testing of the devices used in the primary. The test under the statute requires the canvass board to make a comparison between its own

tabulation of the actual ballots of voters in the primary against the machine's count already tabulated and certified by the same canvass board after the primary.

Not all the machines need be tested. The canvass board randomly selects the devices for testing. For example, El Paso has seven voting machines. The canvass board would select, out of a hat, the number of devices that the board wished to test. The ballots those devices counted on election day, by known batch numbers, would be manually counted by the canvass board. After which, the canvass board would compare their tabulation to the machine's count on primary election day. In this manner, no interaction is necessary with the voting machines. It's already made its calculations on election day. If the comparison has no discrepancies, the recount may be done in the same manner as the primary election. However, if there are discrepancies, then a legal presumption is created that a hand count should be done. Through the actions of the Secretary and Clerk and Recorder, the Petitioners' right to the creation of that legal presumption was denied.

The facts are not in dispute. The Secretary can argue that it has the authority to promulgate rules, or that the use of test ballots substantially complies with § 1-10.5-102(3)(a), but those argument bely the fact that the devices were not tested according to statute. As such, the will of the people, as expressed through the General Assembly, has been thwarted.

The obvious policy behind the statute is to allow for the comparison of actual voter verified paper against a voting machine's tabulation. However, because recounts are rare, there is little to no body of law concerning this topic. Petitioners are not aware of any petition ever being filed pursuant to § 1-10.5-109. However, the plain language of the statute is that the Petitioners can petition the district court of the city and county of Denver for an order to stop the recount based upon their reasonable belief that the recount was not being conducted in a fair, unbiased and uniform manner. The petition was verified. Accordingly, the district court should have granted or denied the motion, immediately. There are no notice requirements in § 1-10.5-109.

However, in its Order dismissing the case, the district court blames the Petitioners. As stated in the district court's order:

It is simply unreasonable and illogical to expect under these circumstances that Respondents would take the reins and rush into Court on an emergency basis—and do so in the absence of any pending motion or request for emergency relief. [C]ontrary to their argument, the record shows that it was Petitioners who dragged their feet, not the Respondents. Petitioners took no other action to seek immediate relief on their original petition. In addition, Petitioners took no action to seek immediate relief on their Amended Petition, such as moving for a temporary restraining order or contacting the Court to request an immediate hearing before this judge or the assigned duty judge. Instead, after having filed their first lawsuit in El Paso County on July 29, Petitioners waited until August 8 to file their Injunction Motion in this case, until August 10 to file a motion to stay the already lapsed recount certification deadline, and until August 12 set a status conference—

which only occurred after the Court issued an Order on August 10 highlighting the delay.<sup>14</sup>

The record reflects that the parties and attorneys were served the day after the original Petition was filed. Accordingly, the Petition was the request for immediate relief. The Respondents had an opportunity to be heard and to this day have chosen to remain silent on the factual issues. The district court was the entity required to act. In that regard, the district court's attempt to blame the Petitioners for its obfuscation of duty is in error, and must be review and overturned by this Supreme Court.

The Petitioners were not aware that the canvass board wasn't going to follow the law until, after taking two days to perform the testing with test ballots, it failed to follow the procedures required prior to the start of the actual recount on Sunday, July 1, 2022. The Petitioners filed their motion the next day on Monday, August 1, 2022. Obviously, the district court didn't review the Petition with any particularity, as it simply issued its standard pretrial order and delay prevention order.<sup>15</sup> Granted, at that time, the district court was not aware that service had been made, but the petition *was* served upon the parties. The Respondents had an

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<sup>14</sup> Appendix V, p. 388.

<sup>15</sup> Appendix II, pp. 73-75 & 76-94.

opportunity to be heard. Accordingly, the Petitioners were not required to file an additional pleading requesting the same relief.

When it became apparent that the case was not being expedited by the district court, and the recount was completed, the Petitioners amended their petition, and motions for a preliminary injunction and stay were filed, shortly thereafter. Whatever the case maybe, the Petitioners did not sit on their rights, and were making every good faith effort to get an order from the district court.

Realistically, this matter may not be able to be resolved before September 12, 2022. If this Supreme Court rules in favor of the Petitioners, that deadline may have to be stayed temporarily, as well. Issues concerning elections are important. This issue, particularly, is one of great public importance. There are also issues of first impression, and clear error regarding the availability of relief under § 1-1-113.

## **VI. THE CASE IS NOT MOOT**

Generally, a case is moot when a judgment would have no practical legal effect on the existing controversy. *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990). Here, Petitioners filed their verified petition to stop the recount, pursuant to C.R.S. § 1-10.5-109, while the recount was taking place. Respondents were placed on immediate notice regarding the Petitioners' claims under § 1-10.5-109, but continued to conduct the recount, despite those objections.

After the recount, the Petitioners filed their amended petition on Friday, August 5, 2022, which included an additional claim for violations under C.R.S. § 1-1-113. The Secretary waived service that following Monday, August 8, 2022. Additionally, the Petitioners filed a motion for preliminary injunction on Monday, August 8, 2022, and a motion to stay on Wednesday, August 10, 2022.

To date, instead of admitting or denying any of the averments contained in the petitions, Respondents have requested dismissal based, in part, because the case is allegedly moot. However, it was the Respondents that did not engage in the process to resolve the issue, but rather pushed forward to finish the recount—apparently believing that would be the end of the controversy.

Yet, the same district court has previously issued orders staying the statutory election deadlines where there was an ongoing legal challenge pursuant to C.R.S. § 1-1-113. In *Blaha v. Williams*, Case No. 2016CV31574 (Dist. Ct. Denver Cty., May 4, 2016), a Republican primary candidate for the United States Senate challenged the Secretary of State, Wayne Williams (SOS), concerning his determination that he had garnered insufficient signatures to appear on the ballot, alleging that hundreds of signatures had been improperly invalidated. *See also Frazier v. Williams*, Case No. 2016CV31575 (Dist. Ct. Denver, May 5, 2016) and Case No. 2016SA159 (Colo. 2016).

In those cases, C.R.S. § 1-5-203(1)(a) required that the SOS certify the ballot by April 29, 2016. This deadline was of great importance, since the SOS needed to begin printing and shipping ballots immediately. However, the district court stayed the deadline and ordered the SOS to reexamine the signatures and certify the petitioner if he met the signature requirements. The stay orders were reconsidered on other grounds. However, the district court’s jurisdiction to enter such an order was unquestionable.

Further, as stated, this Supreme Court may consider the merits when, “as do so many election cases,” the matter involves a question of great public importance, or is capable of repetition yet evading review. *Urevich v. Woodard*, 667 P. 2d 760, 762 (Colo. 1983). *See Gresh v. Balink*, 148 P. 3d 419, 421- 422 (Colo. App. 2006). *See also Simpson v. Bijou Irrigation Co.*, 69 P. 3d 50, 71 (Colo. 2003).

Here, the issue as to whether a canvass board must follow the statutory prerequisite of C.R.S. § 1-10.5-102(3)(a)-(b), prior to a recount, is of great public importance. Additionally, without resolution of this issue, this violation of law will be repeated by canvass boards across the state concerning the recount of an election. Respondents admit that there exists limited caselaw relating to recounts and mootness. However, there have been matters that have proceeded in Colorado courts under C.R.S. § 1-1-113, which reviewed conduct and behavior subject to

repetition. *See Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987). Thus, Colorado courts have determined that mootness cannot forever deprive plaintiffs of the opportunity of review. *Rocky Mountain Ass'n of Credit Management v. District Court*, 565 P.2d 1345, 1346 (Colo. 1977).

## **VII. CLAIMS PURSUANT TO § 1-1-113 ARE ACTIONABLE AFTER A PRIMARY ELECTON**

The district court ruled that a controversy related to an election official's conduct cannot be initiated under C.R.S. § 1-1-113 unless it involves conduct that occurred prior to the election. C.R.S. § 1-1-113(1) states:

When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

Additionally, C.R.S. § 1-1-113(4) states:

Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

Subsection (4) requires that § 1-1-113 be the exclusive method for adjudication of controversies that occur prior to the day of an election. However, this does not preclude the use of § 1-1-113 for conduct after a primary election—it’s just no longer the “exclusive method for adjudication.” For example, the Petitioners were able to proceed under § 1-10.5-109 regarding their request to stop the recount, in addition to any claims they may have under § 1-1-113. As such, the latter is not the exclusive remedy after a primary election.

Otherwise, how would a candidate in a recount know that an election official was going to violate the code ahead of time. The Clerk and canvass board were under a duty to test the devices used in the primary and recount, pursuant to C.R.S § 1-10.5-102(3)(a)-(b). Thus, in many parts of the election code, the duties of election officials are often ongoing.

“Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day.” *Frazier v. Williams*, 401 P. 3d 541, 544 (2017). Despite the design of the statute, not all duties required by an election official are required to be completed by a primary election.

In fact, concerning the primary election held on June 28, 2022, the ultimate issue is the presence of the Petitioners on the ballot for Colorado’s general election on November 8, 2022. This case was filed immediately after the Respondents breached their duty, and there was no way the Petitioners would have been able to predetermine their conduct. Thus, the requirement that an action be filed pursuant to § 1-1-113, in this context, only makes sense if the referenced “election” is the one upcoming—not the primary that passed.

In its Order of dismissal, the district court suggested that Petitioners’ argument in this regard “ignores the numerous types of elections that are defined in the Election Code, including primary elections, and the necessity of timely challenges to election conduct.”<sup>16</sup> “Adopting Petitioners’ interpretation,” insisted the district court, “would invite challenges long after they could be effectively addressed by election officials or the Courts, undermining the election process and potentially the results.”<sup>17</sup> However, other than blaming the Petitioners for not filing the magic bullet to get the Court to act, the district court failed to provide a procedure that allows an interested party to file an action in a recount—the latter of which is naturally after an election.

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<sup>16</sup> Appendix V p. 391, fn. 5.

<sup>17</sup> *Id.*

C.R.S. § 1-1-103 requires the Election Code to be liberally construed. Further, courts must always “avoid interpreting a statute in a way that creates absurd results ‘if alternative interpretations consistent with the legislative purpose are available.’” *Burton v. Colorado Access*, 428 P. 3d 208, 212 (2018)(quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, (1982)).

Petitioner filed their original Petition on Monday, August 1, 2022, and served the Secretary and Clerk and Recorder, immediately. The Petitioners have followed the rules and procedures as set out by the General Assembly. Therefore, this controversy was properly before the district court, pursuant to the authority set forth in C.R.S. §§ 1-10.5-109 and 1-1-113(1).

### **VIII. REMAND IS UNNECESSARY**

A remand to the district court for further findings of fact is unnecessary. The canvass board failed to conduct the proper testing of the devices under Colorado law and its recount is void. The Colorado Constitution authorizes the General Assembly “to pass laws to secure the purity of election, and guard against abuses of the elective franchise.” Colo. Const., Art. 7, § 11. The General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto. Colo. Const., Art 7, § 12.

If the language of a statute is clear and unambiguous, the Court's analysis is at an end. *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010). Only if the Court finds the language ambiguous does it then look beyond the express statutory language for other evidence of legislative intent and purpose. *Id.* Here, this Court's jurisdiction to hear election cases and controversies is absolute and established by the plain language of C.R.S. §§ 1-1-113(1) and 1-10.5-109, as a part of maintaining the purity of elections from abuses of the elective franchise from systemic flaws as to its administration.

In *Hanlen v. Gessler*, 333 P. 3d 41 (Colo. 2014), this Court exercised original jurisdiction to affirm a district court's order, albeit on different grounds, that an Election Rule promulgated by the Secretary of State was in conflict with an existing state statute. There, this Court held that the Secretary of State acted in excess of his rulemaking authority under the Administrative Procedures Act. Specifically, this Court ruled that "the Secretary lacks authority to promulgate rules that conflict with statutory provisions." *Id.* at 49. As stated by this Court, "A rule that conflicts with a statute is void." *Id.*

Similarly, the Secretary exceeded her authority in this matter. As a result, the Clerk and Recorder and canvass board failed to adequately test the devices used in the recount. As such, the recounts are void, as a matter of law.

## IX. PRAYER FOR RELIEF

Wherefore, the Petitioners hereby request that this Honorable Court issue an order accepting the case and requiring the parties to file briefs with the Court no later than Tuesday, September 6, 2022, at 5 p.m. The Petitioners further request that the Court issue a rule to show cause directed at the Secretary as to why she should not be prohibited from promulgating a rule that conflicts with C.R.S. § 1-10.5-102(3)(a)&(b), and by what authority she relied upon to make such a rule; and to the Clerk and Recorder as to why he should not be mandated to follow the law pursuant to said statute. Petitioners further request that this Court: (1) declare the subject recounts void; (2) require the Clerk and Recorder to give the Secretary access to all election records used in the recounts; (3) require the Secretary to conduct the recounts; (4) require that all expenses incurred by the Secretary in conducting the recounts be paid from the state general fund; (5) require the expenses incurred prior to this Court's order be paid by El Paso; (6) return all monies paid by Petitioners to the Clerk and Recorder and Secretary; (7) issue an order, pursuant to C.R.S. § 1-1-113, requiring the Secretary to comply with C.R.S. § 1-10.5-102(3)(a)&(b); and, (9) for such other relief as is just and proper.

Respectfully submitted this 31<sup>st</sup> day of August, 2022.

By: /s/ Gary D. Fielder, Esq.  
Gary D. Fielder, #1975

## Verification

Rae Ann Weber  
4360 Hidden Rock Rd.  
Colorado Springs, CO 80908

I, Rae Ann Weber, declare under penalty of perjury under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

---

Dr. Rae Ann Weber

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Rae Ann Weber.

Witness my hand and official seal:

My Commission Expires:

Peter Lupia  
2627 Flintridge Dr.  
Colorado Springs, CO 80918

I, Peter Lupia, declare under penalty of perjury, under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

---

Peter Lupia

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Peter Lupia.

Witness my hand and official seal:

My Commission Expires:

Lynda Zamora Wilson  
4207 E. Muledeer Dr., #C  
USAF Academy, CO 80840

I, Lynda Zamora Wilson, declare under penalty of perjury, under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

---

Lynda Zamora Wilson

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Lynda Zamora Wilson.

Witness my hand and official seal:

My Commission Expires:

Lindsay Moore  
3270 Birnamwood Dr.  
Colorado Springs, CO 80920

I, Lindsay Moore, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

---

Lindsay Moore

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Lindsay Moore.

Witness my hand and official seal:

My Commission Expires:

David Winney  
6205 Whirlwind Dr.  
Colorado Springs, CO 80922

I, David Winney, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

---

David Winney

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by David Winney.

Witness my hand and official seal:

My Commission Expires:

Summer Groubert  
3246 Centennial Blvd., #214  
Colorado Springs, CO 80907

I, Summer Groubert, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

---

Summer Groubert

SUBSCRIBED AND SWORN TO ME this 5<sup>th</sup> day of August, 2022, by Summer Groubert.

Witness my hand and official seal:

My Commission Expires:

**Verification**

Rae Ann Weber  
4360 Hidden Rock Rd.  
Colorado Springs, CO 80908

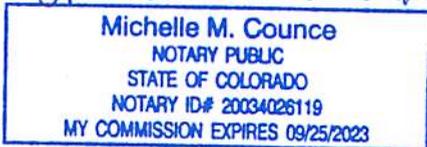
I, Rae Ann Weber, declare under penalty of perjury under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

  
\_\_\_\_\_  
Dr. Rae Ann Weber

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Rae Ann Weber.

Witness my hand and official seal:

My Commission Expires:  
*09/25/2023*

*Michelle M. Counce*  


Peter Lupia  
2627 Flintridge Dr.  
Colorado Springs, CO 80918

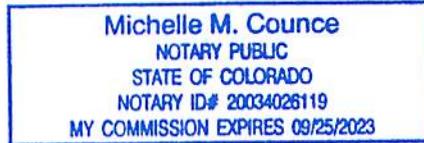
I, Peter Lupia, declare under penalty of perjury, under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

  
Peter Lupia

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Peter Lupia.

Witness my hand and official seal:





My Commission Expires:

09/25/2023

Lynda Zamora Wilson  
4207 E. Muledeer Dr., #C  
USAF Academy, CO 80840

I, Lynda Zamora Wilson, declare under penalty of perjury, under the laws of the United States and Colorado that the foregoing is true and correct to the best of my knowledge.

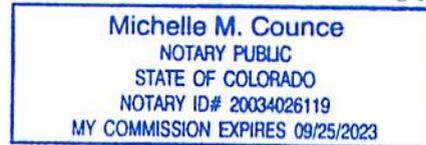
  
Lynda Zamora Wilson

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Lynda Zamora Wilson.

Witness my hand and official seal:

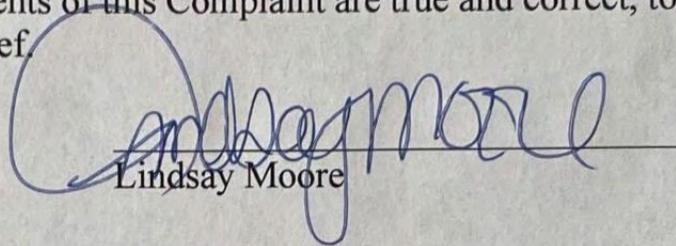
My Commission Expires:

09/25/2023



Lindsay Moore  
3270 Birnamwood Dr.  
Colorado Springs, CO 80920

I, Lindsay Moore, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

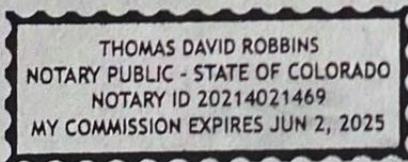
  
Lindsay Moore

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Lindsay Moore.

Witness my hand and official seal:

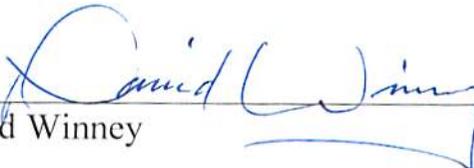
*Thomas David Robbins*

My Commission Expires: *2 June 2025*

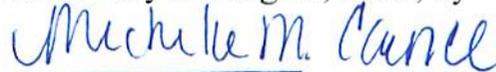


David Winney  
6205 Whirlwind Dr.  
Colorado Springs, CO 80922

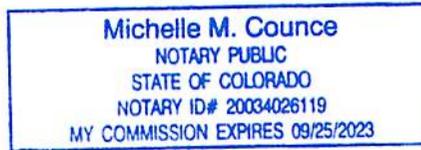
I, David Winney, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

  
\_\_\_\_\_  
David Winney

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
David Winney.



Witness my hand and official seal:

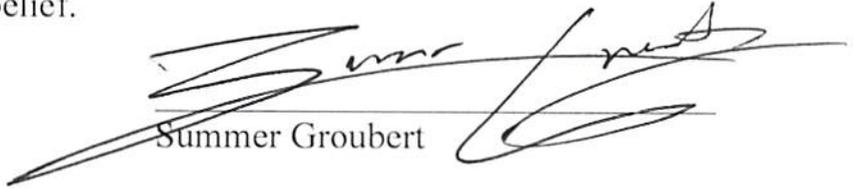


My Commission Expires:



Summer Groubert  
3246 Centennial Blvd., #214  
Colorado Springs, CO 80907

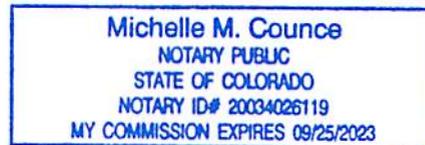
I, Summer Groubert, hereby declare, swear, and affirm, under penalty of perjury, that the facts and contents of this Complaint are true and correct, to the best of my knowledge and belief.

  
Summer Groubert

SUBSCRIBED AND SWORN TO ME this 31<sup>st</sup> day of August, 2022, by  
Summer Groubert.



Witness my hand and official seal:



My Commission Expires:

09/25/2023