

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

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In Re: RAE ANN WEBER, et al. v.
JENA GRISWOLD, et al.

Petitioners:

RAE ANN WEBER, PETER LUPIA, and
LYNDA ZAMORA WILSON,

vs.

Proposed Respondents:

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.

▲ COURT USE ONLY ▲

Counsel for Petitioners:

Gary D. Fielder, Esq., #19757
1435 Stuart St.
Denver, CO 80204
(303) 650-1505
gary@fielderlaw.net

Case No. 2022SA _____

Related Case Below:

2022CV32191 (*Weber, et
al., v. Griswold, et al.*)
Denver District Court

**PETITION FOR A RULE TO SHOW CAUSE
PURSUANT TO C.A.R. 21**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21, and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that: The brief complies with C.A.R. 28(g):

- It contains **6,851** words in those portions subject to the Rule. The brief complies with C.A.R. 21(e):
- It contains the following: (A) The identity of the petitioner and of the proposed respondent, together with their party status in the proceeding below (e.g., plaintiff, defendant, etc.); (B) The identity of the court or other tribunal below, the case name and case number or other identification of the proceeding below, if any, and identification of any other related proceeding; (C) The identity of the persons or entities against whom relief is sought; (D) The ruling, action, or failure to act complained of and the relief being sought; (E) The reasons why no other adequate remedy is available; (F) The issues presented; (G) The facts necessary to understand the issues presented; (H) Argument and points of authority explaining why a rule to show cause should be issued and why relief requested should be granted; and (I) A list of supporting documents, or an explanation of why supporting documents are not available.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21, and C.A.R. 32.

By: /s/ Gary D. Fielder, Esq.
Gary D. Fielder, #19757

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INTRODUCTION

Petitioners request that this Honorable Supreme Court issue a Rule to Show Cause in the nature of Quo Warranto, Mandamus and Prohibition directed at Respondent, JENA GRISWOLD, in her official capacity as Secretary of State of Colorado (Secretary), contesting her authority to, and 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 the Secretary and Respondent, CHUCK BROERMAN, in his official capacity as Clerk and Recorder of the county of El Paso, requiring them to comply with the election law established by the General Assembly, pursuant to C.R.S. § 1-10.5-102(3)(a) &(b).

This Honorable Supreme Court may exercise its supervisory jurisdiction under C.A.R. 21 to review questions of law related to the separation of powers of the executive branch's rulemaking authority where it conflicts with the legislative intent of the General Assembly, and may decide issues of great public importance and first impression to the exclusion of all other courts. Petitioners are entitled to a legal remedy that may include prospective relief, even if they are not entitled to another recount, which may include an accounting and the refund of the costs of the recount not conducted in compliance with law, as hereinafter determined.

**A. IDENTITIES OF PARTIES AND THEIR PARTY STATUS
IN THE PROCEEDING BELOW**

Petitioners are Rae Ann Weber, Peter Lupia and Lynda Zamora Wilson, all of whom are citizens of the state of Colorado and the United States of America, and candidates that participated in the Republican (GOP) primary held on June 28, 2022, in the county of El Paso, concerning their respective races. The Petitioners were the Petitioners in the proceeding below.

Counsel for Petitioners:

Gary D. Fielder, Esq., No. 19757; gary@fielderlaw.net
1435 Stuart St.
Denver, CO 80204
Phone: (303) 650-1505

The Proposed Respondents are 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. The Proposed Respondents were the Respondents in the proceeding below.

Counsel for Proposed Respondents are:

Grant T. Sullivan, Esq., No. 40151; grant.Sullivan@coag.gov
LeeAnn Morrill, Esq., No. 38742; leeann.morrill@coag.gov
Colorado Attorney General's Office
1300 Broadway, 6th Floor
Denver, CO 80203
Phone: (720) 508-6000

Nathan Whitney, Esq., No. 39002; nathanwhitney@elpasoco.com
Steven Klaffky, Esq., No. 44836; stevenklaffky@elpasoco.com
Steven Martyn, Esq., No. 47429; stevenmartyn@elpasoco.com
Office of the County Attorney of El Paso County, Colorado
200 S. Cascade Avenue
Colorado Springs, CO 80903
Phone: (719) 520-6485

B. INDENTITY OF THE COURT BELOW

RAE ANN WEBER, et al., v. JENA GRISWOLD, et al., referenced under
2022CV32191, District Court for the Second Judicial District of Colorado, the
Honorable Judge Alex C. Meyers, presiding.

**C. INDENTITY OF THE PERSONS OR ENTITIES AGAINST WHOM
RELIEF IS SOUGHT, THE ACTION COMPLAINED OF AND THE
RELIEF BEING SOUGHT**

Petitioners request the Court issue an Order to Show Cause directed at the
Secretary in the nature of Quo Warranto, Mandamus and Prohibition. Petitioners
request the Court require the Secretary to show by what authority she changed the
law avoiding the pre-recount testing of voting devices through a comparison of
manually counted, voter-verified paper records, against the tabulation made by the
selected devices in the subject election, as required by the laws of the General
Assembly. Petitioners further request the Court issue an Order to Show Cause to the
Secretary and Clerk and Recorder mandating that they follow the law regarding the
required testing prior to conducting a recount, pursuant to C.R.S. § 1-10.5102(3).

D. NO OTHER ADEQUATE REMEDY IS AVAILABLE

Proceedings under C.A.R. 21 are authorized to consider whether an election official acted without or in excess of his or her jurisdiction, or has abused his or her discretion where an appellate remedy would not be adequate. *See Hanlen v. Gessler*, 333 P. 3d 41, 48 (Colo 2014). Here, Petitioners filed an expedited appeal pursuant to C.R.S. § 1-1-113, but this Court declined to accept jurisdiction. In the lower court, Respondents argued that the Petitioners were prohibited from proceeding under C.R.S. § 1-1-113, because the conduct complained of took place *after* the primary election. In the motion to dismiss filed by the Attorney General, the Secretary argued:

Here, the primary election was held on June 28, 2022. See § 1-4-101(1), C.R.S. (prescribing date for primary election as “the last Tuesday in June of even-numbered years”). One might argue that the “day of an election” should be stretched to include the last day any ballot is received by a clerk and recorder. See, e.g., § 1-8.3-113(2), C.R.S. (requiring clerk to count ballot mailed from a military or overseas voter if received by the “eighth day after an election”). Or even the last day a ballot is tabulated. But even at that outer limit, the deadline falls no more than ten days after the election, or July 8 in this case. See 8 C.C.R. §1505-1, Rule 25.2.2(e) (county must finish tabulating all in-person and accepted mail ballots no later than the tenth day after election day). Petitioners’ amended petition under section 1-1-113 was not filed in statutory authority to hear this section 1-1-113 action.

See Exhibit C, The Secretary of State’s Opening Brief Regarding Jurisdictional Issues, p. 11.

The district court agreed, stating in its order of dismissal:

Here, the election at issue was the 2022 primary election. It was held on June 28, 2022. This dispute and any alleged neglect of duty concerning the recount necessarily occurred after election day. Accordingly, the Court dismisses the Amended Petition to the extent it seeks relief under C.R.S. § 1-1-113 because this controversy arose well after the day of the election.

See Exhibit H, Order, p. 9.

The nature and scope of proceedings permitted by section 1-1-113(1) is a matter of statutory interpretation. *Carson v. Reiner*, 370 P. 3d 1137, 1140 (Colo 2016). As this Court stated in *Carson*:

Section 1-1-113 does not purport to impose any duty or function upon any election official, but rather provides a procedural vehicle or method — in fact, except as otherwise provided in part 1 of article 1 of title 1 of the revised statutes, *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*. [Emphasis added].

Id. at 1141.

Within the context of this case, the issue as to the meaning of “prior to the day of an election” is ambiguous and “susceptible of more than one reasonable interpretation.” *People v. Jones*, 346 P.3d 44, 48 (Colo. 2015). As is described below, the Petitioners reasonably believed that the recounts they requested were part of the primary process.

As stated by this Court in *Meyer v. Lamm*, 846 P. 2d 862, 870-871 (Colo 1993), in pertinent part:

It is reasonable to conclude, therefore, that proceedings involving recounts of election results which are inherently tentative and are not final or conclusive, and in which recounts are conducted pursuant to the election laws prior to the certification by the secretary of state that a person has been duly elected, are not 'election contests' for the purposes of either part 2, article 11, title 1 of the Revised Statutes, or article V, section 10, of the state constitution. Because the election is not final and the results are not complete pending the recount authorized by statute, a district court may exercise subject matter jurisdiction over such recount proceedings in order to ensure that they are conducted in accordance with constitutional and statutory provisions. A number of courts in other states have reached similar conclusions. *See State ex rel. Wahl v. Richards*, 44 Del. 566, 64 A.2d 400, 403 (1949) (supreme court had jurisdiction to issue mandamus compelling superior court to recanvass votes cast for office of representative in general assembly notwithstanding constitutional power given each house of legislature to determine election and qualifications of its own members; relator only sought order requiring board of canvass to properly perform duty imposed by law in order that relator could procure prima facie evidence that he had been duly elected to the office of state representative); *Blackburn v. Hall*, 115 Ga.App. 235, 154 S.E.2d 392, 397 (1967) (where as part of election proceedings, a recount is provided in proper instances, the election process is not over until recount is complete; for purpose of affording recount and of obtaining compliance with the election laws in the counting 871*871 and tabulation of ballots, the courts of the state have jurisdiction to entertain special statutory proceeding, even in election for Representative to United States House of Representatives, notwithstanding U.S. Const. art. I, § 5); *State ex rel. Wheeler v. Shelby Circuit Court*, 267 Ind. 265, 369 N.E.2d 933, 935 (1977) (a recount being merely an extension of the voting process in an effort to ensure the correctness of the vote count, circuit court had subject matter jurisdiction to order recount in elections involving state legislative offices).

As noted by the trial court, “C.R.S. § 1-1-113(4) was added in 1994 expressly limiting the statute to pre-election controversies. See H.B. 94-1286, 59th Gen. Assemb., 2d Sess. (Colo. 1994).” *See Exhibit H*, Order, p. 8, fn. 4. However, that did not resolve the issue as to whether a recount is part of the primary election, itself. This is a substantial legal issue, and one which will undoubtedly arise again, soon. By what other mechanism is a candidate supposed to proceed?

Generally, a statute finds meaning according to the legislative intent expressed in the language chosen for the statute by the legislature itself. *People v. Jones*, 346 P.3d at 48 (*citing Pham v. State Farm Auto. Ins. Co.*, 296 P.3d 1038, 1043 (Colo. 2013)). When the language of a statute is susceptible of more than one reasonable interpretation, and is therefore considered ambiguous, or when there is conflicting language in different provisions, intrinsic and extrinsic aids may be employed to determine which reasonable interpretation actually reflects the legislative intent. *Id.* (*citing Frank M. Hall & Co., Inc. v. Newsom*, 125 P.3d 444, 448 (Colo.2005)).

Considering the recount as part of the primary, as is further described below, once the district court failed to timely issue an order addressing the Petitioners’ request to stop the recount, pursuant to C.R.S. § 1-10.5-109, the Petitioners amended their petition to include C.R.S. §1-1-113. This statute “*requires* the

district court, upon a finding of good cause, to issue an order requiring substantial compliance with the provisions of the election code whenever any eligible elector files a verified petition alleging that a person charged with a duty under the code *has* committed a breach or neglect of that duty or other wrongful act.” *Carson*, 370 P. 3d at 1141. [Emphasis added]. Nonetheless, the district court ultimately dismissed the case as moot, and for lack of jurisdiction concerning § 1-1-113.

Petitioners understand that this Supreme Court declined to accept jurisdiction over the matter, after the Petitioners filed their petition for expedited appeal in 2022SA287. Nonetheless, the Petitioners cannot assume that their legal interpretation is right, and that relief was indeed available under § 1-1-113. However, if the Respondents and district court are right, i.e., no relief is available to a petitioner in the recount of a primary election under C.R.S. § 1-1-113, then the Petitioners pursued the wrong remedy to require that the Secretary and Clerk and Recorder follow the law. According to the logic of the Respondents, the Petitioners should have filed some other style of contest, request for administrative procedural review, show cause under Rule 106, civil rights action, or restraining order pursuant to Rule 65.

At this juncture in the history of Colorado jurisprudence, the issue as to the meaning of “prior to an election” is unclear regarding its application in a recount.

Most certainly, election officials have important duties concerning a recount, one of which is for the canvass board involved in a recount to test the devices that tabulated the vote in the election—and are going to be used in the recount. See C.R.S. 1-10.5-102(3)(a).

In light of the district court’s unwillingness to accept jurisdiction to grant relief in this matter, the Petitioners cannot now seek relief through some other mechanism, and await appellate review of any ultimate verdict after a full trial. *See Pearson v. Dist. Ct.*, 924 P.2d 512, 515 (Colo. 1996) (original jurisdiction under C.A.R. 21 appropriate where “the damage [petitioner] hopes to avoid would already be done before appellate review occurs”). *See also People v. C.V.*, 64 P.3d 272, 274 (Colo. 2003) (“[O]riginal jurisdiction may be necessary to review a serious abuse of discretion that could not adequately be remedied by appellate review.”).

Even if moot, the Petitioners, herein, have standing as candidates in the primary election, electors, and citizens of the state and United States. Relief in the nature of prohibition or mandamus is particularly appropriate “in matters of great public importance.” *See Smardo v. Huisenga*, 412 P.2d 431, 432 (Colo. 1966).

First, the issue concerning the Secretary’s conduct must be addressed. The law required the canvass board of El Paso to test the devices used in the recount.

As is outlined in the affidavits filed in the district court during and after the recount, the canvass board, chaired by the Clerk and Recorder, failed to properly test the voting devices, according to law. The Petitioners immediately objected and filed their petition in the proper court. The district court had a duty to review the Petition and rule upon it. However, the district court waited until after the recount to issue a standard delay prevention order. Essentially, the petition was not timely considered. Accordingly, the petition was amended and other motions were filed to stay or enjoin the recount and determine its validity. Needless to say, the Petitioners did not sit on their rights. After the matter was set for an expedited hearing, with notice to all parties, the district court dismissed the matter as moot, and determined relief under § 1-1-113 did not apply to conduct after a primary election, the definition of which does not include a recount. Where does this lead candidates in the future? What relief must be necessarily pled to get the Secretary to follow the law?

Review under C.A.R. 21 is appropriate, here, because the Order below failed to address these issues in any meaningful way. Even now, a candidate's right to appeal a district court's decision regarding relief available under § 1-10.5-109 to stop a recount is unclear, nor does the statute, itself state when and where an appeal may be filed. Conversely, § 1-1-113(3) outlines specific instructions regarding the

time limits to file a discretionary appeal with this Supreme Court. Naturally, a candidate is going to file a petition within the three days, if relief is available. However, this does not end the controversy if relief is denied under both §§ 1-10.5-109 and 1-1-113. This Court has original jurisdiction to order the Secretary and Clerk and Recorder to follow the law, and issue an order for the Secretary to establish the source of her power to modify a statute before an important recount.

Otherwise, similarly situated candidates in the upcoming elections will be unclear as to their rights if a recount is requested or required. Like the Petitioners, no candidate would likely file a petition for relief pursuant to § 1-1-113 requesting a district court to order the Secretary to follow C.R.S. § 1-10.5-102(3)(a)—before first losing the election which resulted in a required or requested recount.

If a recount is required or requested, the Secretary will unquestionably continue to violate the law, and thus deny a candidate in a recount the opportunity to create a presumption of a manual recount, pursuant to § 1-10.5-102(3)(b), by lawfully testing the tabulation devices prior to the recount pursuant to § 1-10.5-102(3)(a). Thus, the need for this Supreme Court to exercise its original jurisdiction to issue an Order to Show Cause to the Secretary as to the source of authority she is exercising by changing the law, and mandating the Respondents to follow the subject election law regarding the testing of devices prior to a recount.

E. 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 SECRETARY AND CLERK AND RECORDER MUST COMPLY WITH THEIR DUTIES AND RESPONSIBILITIES SET FORTH BY THE GENERAL ASSEMBLY UNDER C.R.S. § 1-10.5-102(3)(a) & (b).

F. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

On June 28, 2022, the GOP 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. Thereafter, 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.

Further, 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, 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. In it, the Secretary 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.

As this Court can see, the Secretary materially changed the wording of C.R.S. § 1-10.5-102 (3)(a). Most importantly, the requirement that the canvass board use “voter-verified paper records” was changed to “paper test ballots.”

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, which 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 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.

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 abused her authority by imposing her rule over the law.

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. Nonetheless, Petitioners’ recounts were conducted in the same manner as the ballots were

counted in the primary election, i.e., with the voting machine devices, but without compliance with C.R.S. § 1-10.5-102 (3)(a)&(b).

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 a Verified Petition for Order Pursuant to C.R.S. § 1-10.5-109. In the motion, the Petitioners advised the district court that the Clerk and Recorder had failed to adequately test the voting devices prior to the recount as required by C.R.S. § 1-10.5-102(3)(a).

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

On Thursday, August 4, 2022, the district court entered an untimely 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. Additionally, on August 8, 2022, Petitioners filed their Verified Motion for Preliminary Injunction with Notice to Respondents. 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.” 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.

After the parties filed briefs and responses regarding the district court's jurisdiction, on Monday, August 29, 2022, the district court found that the Petitioner's request to stop the recount was moot, and further determined that any claim under § 1-1-113 was limited to conduct performed before the primary. As such, the district court dismissed the case and vacated the hearing.

On Wednesday, September 7, 2022, pursuant to the expedited time limit of three days contained C.R.S. § 1-1-113, the Petitioners filed their application to have this Supreme Court review the district court's dismissal, referenced under 2022SA287. At that time, the Petitioners were under the mistaken belief that they could file their appeal, and include alternative relief pursuant to C.A.R 21.

However, the Petitioners were informed that the Court could not accept a request for two forms of relief, and the pleading was accepted as an appeal of the district court's dismissal under § 1-1-113(3). On Friday, September 2, 2022, this Court declined to accept the case for review. In the Order, this Court noted its decision not review the matter pursuant to § 1-1-113, with no mention of the Petitioners' request that the Court consider taking the case under its original jurisdiction.

Accordingly, the Petitioners respectfully file this petition for relief, pursuant to C.A.R. 21, for a specific order to show cause, as described herein.

**G . REASONS TO ISSUE A RULE TO SHOW CAUSE
AND GRANT RELIEF**

1. Section 1-1-113 is designed to accommodate the rapid resolution of disputes arising under the Election Code.

The appropriate scope of § 1-1-113 proceedings becomes more pressing with every election. § 1-1-113(1) empowers a district courts to “issue an order requiring substantial compliance with the provisions of [the Election Code].” Logically, it would seem that relief under the statute would be available for candidates in a recount, but the Secretary, Clerk and Recorder, Attorney General, County Attorney and district court all agree: There is no relief under § 1-1-113 concerning a recount. Although this Supreme Court, and other courts, have determined that a recount is part of an election, candidates that are required to participate in, or who request a recount are now uncertain as to their rights and remedies. The argument that candidates do not have a right to redress under § 1-1-113(1) in a recount seems preposterous and obviously false—but the respondents, here, adamantly adhere to their position, which avoids review of their authority.

Although election officials clearly have statutory duties regarding a recount, there is apparently a hole in the statutory framework that allows election officials

to disregard the law with no fear of recourse from § 1-1-113—even after a primary where the actual election is months away. Is a candidate who may wish to request a recount in the upcoming election to file a petition under § 1-1-113, now, before he or she has even lost, to request that a district court require the Respondents to follow the law? If a recount is required or requested after the upcoming election in November, are those candidates out of time to file a petition after the votes are originally counted? Thus, the resolution of this issue is necessary to maintain the separation of powers between the executive branch and the General Assembly, and provide guidance to candidates and other interested parties that participate in a recount under Colorado’s election code. Conversely, the lack of relief in this regard is obviously detrimental to the state of Colorado and her people—much less for candidates and others attempting to maneuver the maze of complex laws and rules, many of which are in present conflict.

This issue has been brought to this Court before. In *Hanlen v. Gessler*, 333 P.3d 41, 47 (Colo. 2014), the Secretary argued that “the district court lacked jurisdiction to grant relief under section 1-1-113” regarding his conduct in promulgating a temporary or emergency rule on the evening of an election. There, this Court found that it did not have appellate jurisdiction under § 1-1-113, but did

exercise original jurisdiction in holding that the Secretary acted in excess of his rulemaking authority. This creates a conflict in law that must be clarified.

Tangentially, while this Court's analysis in *Meyer* regarding a recount being a part of an election favored the Petitioners' interpretation, the General Assembly's inclusion of the language "prior to the day of an election," after *Meyer*, contributed to the present confusion over the applicability of § 1-1-113 in a recount. This issue must be resolved to avoid confusion and waste of judicial resources in the future. Normal appellate remedies have proven inadequate for resolving this issue, and with an election fast approaching, there is an urgent need to determine the appropriate scope of § 1-1-113 proceedings in a recount.

2. Without addressing § 1-1-113, this Supreme Court has the authority to issue a show cause order to the Respondents.

Constitutional 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).

The Secretary is vested with authority to promulgate rules that support the fairness of Colorado election laws established by the General Assembly. However, this authority is not limitless and does not allow the Secretary to create rules by imposing conflicting interpretation of laws that circumvent the general laws established to maintain the purity of these 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*, 333 P. 3d at 48. The decision to exercise original jurisdiction lies within the discretion of this Court. *Fognani v. Young*, 115 P.3d 1268, 1271 (Colo. 2005). Without addressing the above-referenced issues concerning § 1-1-113, this Supreme Court has the authority to exercise its original jurisdiction to issue a show cause order directed at the Proposed Respondents.

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). Here, the district court abused its discretion by not recognizing the importance of the petition and issuing an immediate ruling under the expedited scheme. The district court's conduct contributed to the issue becoming moot.

More importantly, this Supreme Court's power to act in its original jurisdiction is not bound by the prerequisite of establishing a district court's abuse of discretion. This Court has often been requested by state prisoners to order the Department of Corrections to follow a district court order. *See Meredith v. Zavaras*, 954 P. 2d 597 Colo. 1998). *See also People v. Ostuni*, 58 P. 3d 531 (Colo. 2002).

C. The Secretary and Clerk and Recorder did not follow the law with regard to the necessary testing of the devices in the Petitioners' recounts

The Petitioners are requesting that the Court issue an order to Secretary to establish by what authority to changed Colorado law. The test under the statute required the canvass board to make a *comparison* between its own tabulation of the actual ballots of voters in the primary against the devices' 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. El Paso has seven vote tabulators. The ballots those devices counted on election day, by known batch numbers, were to be manually counted by the canvass board. After which, the canvass board was required to compare their tabulation to the machine's count on primary election day. In this manner, no interaction is necessary with the voting machines. The devices have already made their 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. See C.R.S. § 1-10.5-102(3)(b). 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 § 1-10.5-102(3). However, the plain language of the statute is that the canvass 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."

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 under § 1-10.5-109 the next day, 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. This delay created the prohibitive mootness argument.

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

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.

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 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.

Nonetheless, this Supreme Court may consider the merits of a moot case 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 under the conflicting rules promulgated by the Secretary's interpretation.

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.

Here, the law concerning the testing of devices used in a recount has been rewritten by the Secretary, in a manner beyond her legal authority to do so. The Clerk and Recorder has followed the Secretary's guidance, both of whom must be mandated to follow the law as written by the General Assembly, and prohibited from violating the law, forthwith.

VIII. LIST OF SUPPORTING DOCUMENTS

Exhibit A: Petition for Order Pursuant to CRS 1-10.5-109, with attachments (Denver District Court, August 1, 2022).

Exhibit B: 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, with attachments (Denver District Court, August 5, 2022).

Exhibit C: The Secretary of States Opening Brief Regarding Jurisdictional Issues, with exhibits (Denver District Court, August 22, 2022).

Exhibit D: The Respondent Chuck Broerman’s Jurisdictional Opening Brief (Denver District Court, August 22, 2022).

Exhibit E: Petitioners’ Opening Brief Regarding Jurisdiction (Denver District Court, August 24, 2022).

Exhibit F: The Secretary of State and El Paso County Clerk and Recorder’s Joint Answer Brief Regarding Jurisdictional Issues (Denver District Court, August 26, 2022).

Exhibit G: Petitioners Combined Response to Respondents’ Briefs Regarding Jurisdiction with attachments (Denver District Court, August 26, 2022).

Exhibit H: Order (Denver District Court, August 29, 2022).

Exhibit I: Order of Court (Colorado Supreme Court, September 2, 2022).

CONCLUSION

Wherefore, the Petitioners hereby request that this Honorable Supreme Court issue an Order to Show Cause directed at the Secretary to show by what authority she changed the law requiring the testing of voting devices prior to a recount, and why she should not be prohibited from doing so, in the future.

Petitioners further request that the Court issue an Order to Show Cause to the Secretary and Clerk and Recorder mandating that they follow the law regarding the required testing necessary prior to conducting a recount, pursuant to C.R.S. § 1-10.5-102(3)(a) &(b).

Respectfully submitted this 13th of September, 2022.

By: /s/ Gary D. Fielder, Esq.
Gary D. Fielder, #19757

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of September, 2022, served via ICCES a correct copy of the foregoing **PETITION FOR A RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21**, sent a copy through electronic submission, and through email to the following:

Office of the County Attorney
of El Paso County, Colorado
Nathan Whitney, Esq. nathanwhitney@elpasoco.com
Steven Klaffky, Esq. stevenklaffky@elpasoco.com
Steven Martyn, Esq. stevenmartyn@elpasoco.com
200 S. Cascade Avenue
Colorado Springs, CO 80903

Colorado Attorney General's Office
Grant T. Sullivan, Esq. Grant.Sullivan@coag.gov
LeeAnn Morrill, Esq. leeann.morrill@coag.gov
1300 Broadway, 6th Floor
Denver, CO 80203

/s/ Gary Fielder, Esq.