

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED November 8, 2024 11:58 PM FILING ID: A496048D12D72 CASE NUMBER: 2024SA295</p>
<p>Appeal from the 2nd Judicial District The Honorable Judge Kandace C. Gerdes District Court Case No. 2024CV33363</p>	
<p>In Re: LIBERTARIAN PARTY OF COLORADO, a Colorado minor political party, by and through, HANNAH GOODMAN, as Party Chair; and, JAMES WILEY, Congressional Candidate for Colorado’s 3rd District, Petitioners, v. JENA GRISWOLD, in her official capacity as Secretary of State of Colorado; and, CHRISTOPHER P. BEALL, in his official capacity as Deputy Secretary of State of Colorado, Respondents.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners Gary D. Fielder, Esq. #19757 1435 Stuart St., Denver, CO 80204 Phone: (303) 650-1505 Email: criminaldefense@fielderlaw.net</p>	<p>Case No.</p>
<p style="text-align: center;">PETITION FOR REVIEW PURSUANT TO C.R.S. § 1-1-113</p>	

Petitioners, LIBERATARIAN PARTY OF COLORADO (LPCO) and James Wiley, Congressional Candidate for Colorado's 3rd District, asks this Court to review the Denver District Court's decision, pursuant to C.R.S. § 1-1-113.

I. INTRODUCTION

Petitioners respectfully request that this Honorable Supreme Court accept jurisdiction over this appeal and reverse, at least in part, the district court's decision regarding the failure of Respondent, JENA GRISWOLD, in her official capacity as Colorado Secretary of State (Secretary), to discharge her duty regarding Colorado's 2024 General Election.

Respondents filed a Section 113 action in the Denver District Court requesting relief from the Secretary's wrongful act and neglect of duty regarding her publication of certain Basic Input/Output System (BIOS) active passwords to approximately 255 of the state's electronic voting systems components currently in use in 34 of Colorado's 64 counties. The passwords were contained in an EXCEL workbook posted on the Secretary of State's website for over four months, to a time before Colorado's primary elections in June 2024. The passwords were not encrypted or otherwise protected and were contained on an easily accessible hidden sheet.

These BIOS passwords allow access to a county's election system network, through the corresponding component, which includes a county's Election Management System (EMS), its ImageCast® Central device, the Microsoft server, EMS Client, Adjudication Client, and other voting system components. Access to the voting system would allow a person to manipulate the data, change the totals, modify procedures, and otherwise make significant changes to how the system operates—which includes disabling restrictions against internet access. Further, access to a voting systems BIOS firmware would allow that person to remove any trace of use by overwriting the system logs necessary for a subsequent audit. By allowing these passwords to be available to the public, through her own admissions, the Secretary breached her duty to adequately supervise and conduct Colorado's 2024 general election, and to secure the purity of Colorado's elections, pursuant to section 11 of article VII of the state constitution.

II. ISSUE PRESENTED

Whether the Secretary committed a wrongful act and/or otherwise breached her duty to adequately supervise and conduct Colorado's 2024 general election, and to secure the purity of Colorado's 2024 general election, by publishing the BIOS passwords of 255 active voting system components on the Secretary of State's website for over four months before said election.

III. DECISION BELOW

Petitioners seeks review of the district court’s November 5, 2024, decision in *LPCO, et al., v. Griswold*, Denver District Court No. 2024CV33363. *App. H.*

IV. JURISDICTION

This Court has jurisdiction under Section 113(3), which permits a party to seek review of a district court’s decision under Section 113(1) “within three days after the district court proceedings are terminated[.]” C.R.S. § 1-1-113(3). If this Court declines to accept jurisdiction, “the decision of the district court shall be final and not subject to further appellate review.” *Id.* The district court issued its decision on November 5, 2024. Thus, this application is timely filed within three days after the district court proceedings terminated.

V. EXISTENCE OF OTHER CASES

There are no other pending cases in which this Court has granted certiorari review on the same legal issue.

VI. STATEMENT OF THE CASE

Petitioner, LPCO, has standing as a recognized minor party in the state of Colorado, as does Petitioner, James Wiley, as a certified 2024 LPCO candidate for Colorado’s 3rd Congressional District.

On Wednesday, October 23, 2024, Colorado citizen, Retired Colonel Shawn Smith (Mr. Smith), accessed the Colorado Secretary of State's website (www.coloradosos.gov) and Voting Systems webpage and downloaded a 562 KB Microsoft Excel file named "VotingSystemInventory.xlsx." App. 2, Ex. 2, ¶ 2.

As explained by Mr. Smith in his affidavit dated October 27, 2024, and his testimony, that file "upon downloading and opening with the Microsoft Excel application, contain[ed] one visible worksheet named 'Inventory,' listing voting system components by county, showing one row for each component and columns titled 'Serial #,' 'County,' 'Model,' 'Vendor,' 'Remarks,' 'Inactive,' and 'Firmware/Software Version.'" *Id.* at ¶ 3.

Upon "right-clicking the Worksheet Tab section of the main screen and selecting 'Unhide,'" a dialog box opened "where the application user can select from one, several, or all four listed hidden worksheets contained in the file." *Id.* at ¶ 4. Three of the four worksheets appeared to contain the "Basic Input Output System (BIOS) passwords for some listed components." *Id.* at ¶ 5.

In fact, one of the worksheets contained BIOS passwords for over 700 individual voting system components in 63 Colorado counties' voting systems. *Id.* at ¶ 6.

As stated by Mr. Smith in his affidavit:

Comparison of values in the ‘Serial #’ columns of the ‘Inventory’ and ‘Clean_Formulas’ worksheets indicates that the ‘Clean_Formulas’ worksheet lists BIOS passwords for voting system components that are currently in use in at least ten of Colorado’s twelve largest counties, by population.

Id. at ¶ 7

On Thursday, October 24, 2024, the Secretary removed the spreadsheets that were contained on website. Five days later, on Tuesday, October 29, 2024, following the publication of Mr. Smith’s affidavit, anonymously, the Secretary sent an email at 3:53pm notifying the 64 Colorado County Clerks of an upcoming 5:00pm teleconference on which Deputy Secretary Christopher Beall notified the clerks, including the 34 affected counties with voting system components, which hadn’t been upgraded or replaced during that period, of the BIOS password publication.

During that time-period between the Secretary learning of the security breach and her notifying the county clerks, the voting systems in those affected counties were being used to scan ballots for the 2024 General Election that had been mailed or delivered to the different counties, respectively.

On Thursday, October 31, 2024, the Office of the Secretary of State issued a notice of temporary adoption of Colorado's Department of State Elections Rules, under 8 CCR 1505-1. App. 1, Petitioner's Exhibit 1, attached to the petition.

Said "New Emergency Rule 20.5(c)(12) concerning the updating of BIOS passwords" states:

IF THE SECRETARY OF STATE DETERMINES THAT ANY BIOS PASSWORD NEEDS TO BE CHANGED, THEN AN EMPLOYEE OR DESIGNEE OF THE SECRETARY OF STATE MAY BE TASKED WITH ACCESSING THE VOTING SYSTEM COMPONENT TO FORTHWITH CHANGE THE PASSWORD(S). THE EMPLOYEE OR DESIGNEE OF THE SECRETARY OF STATE MAY ALSO TAKE ACTIONS TO INVESTIGATE THE VOTING SYSTEM. ANY EMPLOYEE OR DESIGNEE OF THE SECRETARY OF STATE WHO PERFORMS A TASK IN ACCORDANCE WITH THIS RULE MUST FIRST PASS A BACKGROUND CHECK IN ACCORDANCE WITH RULE 20.2.1.

This so-called "New Emergency Rule" was "Temporarily adopted on 31st of October 2024, by Deputy Secretary of State, Christopher P. Beall, For Jena Griswold, Colorado Secretary of State."

This new election rule allowed for over 20 IT department employees from the Secretary of State's office and the Governor's office to possess the old and new BIOS passwords which, up until this breach, were highly confidential. The Secretary of State's high standard of security was downgraded with a hastily made emergency rule by distributing the BIOS passwords for 34 counties to this large team of employees.

The next day, on Friday, November 1, 2024, Petitioners filed their verified petition in the district court. App. 1. Later that afternoon the matter was set for hearing to proceed on Monday, November 4, 2025. Before the hearing, Respondents filed their response to the verified petition. App. 2.

At the hearing, it was established that the BIOS passwords had been on the Secretary's website since at least June 21st 2024, which is before Colorado's Primary Elections that were held on June 25, 2024. Respondents identified 34 Colorado counties that had affected components in voting systems where a BIOS password would be needed. *Id.* at p. 28, fn. 15. Respondent, Deputy Secretary of State, Christopher Beall, acknowledged that the release of the BIOS password was a breach of security. In response, Respondents' witnesses testified that remediation efforts were taken between October 24, 2024, and October 31, 2024, that included changing the BIOS passwords on the identified components and a review of the components' configurations.

Petitioners argued that: 1) the subject BIOS passwords would allow any user to access a county's voting systems and database; 2) the BIOS passwords are a critical part of the security system for the voting systems' scanners, tabulators and servers; 3) the subject BIOS passwords allow access to a county's Election Management System (EMS), its ImageCast® Central device, the Microsoft server,

EMS client, adjudication client, and other voting devices; and, 4) access to the voting system would allow the user to manipulate the data, change the totals, modify procedures, and otherwise make significant changes to how the system operates, which includes disabling restrictions against certain devices that can be plugged in, such as networking devices.

The following day, on Tuesday, November 5, 2024, the day of the election, the district court issued its ruling. App. 3. In it, the district court erred by failing to find that the Secretary committed a wrongful act and had, accordingly, breached her duty to adequately supervise and conduct Colorado’s 2024 general election, and to otherwise protect the purity of Colorado’s 2024 general election.

Instead, the district court adopted the Respondents’ position that the Petitioners failed to exhaust their administrative remedies under C.R.S. § 1-5-621, prior to instituting a Section 113 action in district court. App. 3, *Order Re: Verified Petition Pursuant to C.R.S. § 1-1-113*, p. 6. Nonetheless, the district court considered the petition should “the appellate courts conclude that Petitioners have standing to bring this action outside of the APA (e.g. C.R.S. § 1-5-621 does not provide adequate remedy),” the district court addressed “the merits of the relief sought pursuant to C.R.S. § 1-1-113. *Id.* at p. 8.

The district court noted the Petitioners' burden to "establish that an officer has committed a breach, neglect of duty, or wrongful act and after notice, including the opportunity to be heard, if the court finds good cause, the trial court shall issue an order requiring substantial compliance with the Colorado Revised Statutes." *Id.* at p. 8. However, the district court focused on Petitioners' position that the Secretary conduct violated C.R.S. § 1-13-708. *Id.* That statute provides:

Any person who knowingly publishes or causes to be published passwords or other confidential information relating to a voting system shall immediately have their authorized access revoked and is guilty of a class 5 felony.

The district court determined that the "record before the Court lacks any evidence that the conduct related to the BIOS passwords on the Secretary of State's website was done "knowingly." *Id.* at p. 9. Further, the district court found:

Even if Petitioners could meet their burden to show that C.R.S. § 1-13-708(2) was violated, the Colorado Secretary of State independently acted to correct the wrongful act before the instant litigation was filed. The presumption of regularity is granted to Respondents in this case, given the efforts undertaken to resolve the public disclosure of BIOS passwords. The Colorado Secretary of State removed public access to the BIOS passwords and immediately commenced remediation protocol which included new BIOS passwords, verification of affected voting system equipment, and checking voting system equipment against the affected counties' operating systems.

Id.

Ultimately, the district court ruled:

(1) this disclosure is an isolated example of oversight, contrasted with a systematic disregard for requirements, (2) the purpose of C.R.S. § 1-13-708(2) is substantially achieved by issuing new BIOS passwords, and (3) it is reasonable to infer that Respondent made a good faith effort to comply with the two-step password verification protocol by changing the BIOS passwords which are the only passwords Respondent Secretary is authorized to control. Therefore, any relief required by section 113 has been accomplished independent of and prior to the filing of the instant case. Stated differently, the Secretary of State substantially complied with correcting the BIOS password breach and has verified that no affected voting systems were compromised. Thus, any order requiring the Secretary of State to substantially comply with correcting the public disclosure of BIOS passwords is unnecessary.

Id. at 9-10.

Thereafter, this appeal was timely filed within three day, pursuant C.R.S. § 1-1-113(3).

V. THE SUPREME COURT MUST RULE ON THIS MATTER OF GREAT PUBLIC IMPORTANCE

A. Standard of Review

In reviewing a district court's order, this Court defers to a district court's findings of fact, if they are supported by the record. *Jones v. Samora*, 318 P.3d 462, 467 (Colo. 2014). However, the Court reviews the district court's legal determinations de novo. *See Hanlen v. Gessler*, 333 P.3d 41, 48 (Colo. 2014.)

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.

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).

Pursuant to C.R.S § 1-1-107, the Secretary has the duty to:

- a. Supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state;
- b. Serve as the chief state election official within the meaning of the federal “Help America Vote Act of 2002”, 52 U.S.C. 20901 et seq., and, in that capacity, to coordinate the responsibilities of the state of Colorado under the federal act in accordance with the requirements of this code; and,
- c. Secure the purity of Colorado’s elections and to guard against the abuses of the elective franchise, pursuant to section 11 of article VII of the state constitution.

The Secretary breached those duties by publishing the subject BIOS passwords on the Secretary of State’s website. That conduct was admitted to by the Respondents. Additionally, while the district court found that the Secretary’s actions were not performed knowingly, as defined in C.R.S. § 1-13-708(2), Section 113 simply requires the establishment of good cause to conclude that the Secretary “has committed or is about to commit a breach or neglect of duty or other wrongful act.” If such an act or breach is established, the district court “shall issue an order requiring substantial compliance with the provisions of [the Election Code.]”

Here, the Secretary spent the first 5 days, after being made aware of the security breach, consulting with CISA and the vendors of Colorado’s electronic voting systems. The Secretary chose to spend those 5 days “painstakingly scouring” the spreadsheet to determine which of the counties’ components were affected, instead of informing the 34 affected counties and ordering them to discontinue processing ballots until cyber teams could take corrective action on the counties’ election system. It was not until Tuesday, October 29, 2024, one week before the election, that the public was made aware of the situation, and Thursday, October 31, 2024, until the Secretary issued a notice of temporary adoption of Colorado’s Department of State Elections Rules, under 8 CCR 1505-1. Petitioners filed their verified petition the next day.

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. [*Emphasis added*].

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.

“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).

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)).

Petitioners filed their original Petition on Friday, November 1, 2024, and served the Secretary and Attorney General, 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. 1-1-113(1), and the Respondents were given an opportunity to be heard.

With that, the Petitioners requests that this Supreme Court, pursuant to C.R.S. § 1-1-113(3), review and finally adjudicate this matter. In light of the time constraints, Petitioners have not been able to secure a transcript of the hearing. Additionally, the election is over and much of the relief requested by the Petitioners cannot be effectuated. Nonetheless, this conduct greatly affects the public’s perception of the purity of Colorado’s elections. Beyond question, the Secretary violated her duty under Colorado statutes and the constitution, as outlined above. Accordingly, Petitioners request that this Honorable Court accept this application and review the record and an expedited transcript of the hearing to adjudicate the matter pursuant to Section 113(3).

Of course, Petitioners understand that, if the Court accepts the case, Respondents will have an opportunity to respond. Nonetheless, this matter should be able to be before the Court before Friday, November 15, 2024, or shortly thereafter.

IX. CONCLUSION

WHEREFORE, Petitioners hereby request that this Honorable Court issue an order accepting the case, and requiring Respondents to file a response brief with the Court no later than Wednesday, November 13, 2024, and the Petitioners to reply no later than Friday, November 15, 2024.

Petitioners request that this Court find that the Secretary performed a wrongful act and that, accordingly, the Secretary breached her duty to adequately supervise Colorado's 2024 general election, and to secure the purity of Colorado's elections, pursuant to C.R.S § 1-1-107 and section 11 of article VII of the state constitution

Petitioners further request that this Court require the Secretary to show cause why she neglected her duty and failed to secure the critical election infrastructure by publishing, for four months, 664 Basic Input Output System (BIOS) passwords, 255 of which were still actively being used to access voting system components in 34 Colorado counties, including 10 of the 12 largest counties in the state, while

those compromised election system components were being used by count election staff members and election officials for the tabulation of those counties' 2024 General Election ballots.

Petitioners further request that this Court issue an order requiring the Secretary to substantially compliance with the referenced provisions of Colorado's Election Code, require the Secretary to perform her duties and desist from the wrongful act, or to forthwith show cause why the order should not be obeyed.

Respectfully submitted this 8th day of November, 2024,

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