DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	DATE FILED: September 6, 2022 11:14 AM CASE NUMBER: 2022CV32225
Petitioner: Tina Peters, an individual, v. **Respondents**: JENA GRISWOLD, in her capacity as the Colorado Secretary of State, *et al*.	**▲ COURT USE ONLY ▲** _____ Case Number: 2022-CV-32225 Courtroom: 466

ORDER DISMISSING PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

Petitioner filed a verified petition pursuant to C.R.S. § 1-10.5-109 and C.R.S. § 1-1-113(1) challenging the recount procedures used to certify the results in the primary election held on June 28, 2022.

Respondents claim that the Court lacks subject matter jurisdiction as the recount has been completed and the results certified. Respondents also argue that relief is not available under C.R.S. § 1-1-113 because this provision applies to election challenges before an election day.

After holding a status conference with counsel for the parties on August 24, 2022, the Court ordered that the parties file simultaneous briefing on the jurisdictional issues. The Court also set this matter for a preliminary injunction hearing to be held on September 7, 2022.

The Court has reviewed all of the briefing and exhibits filed by the parties on the jurisdictional issues, the entire file and the applicable authorities. The Court has also reviewed the order entered August 29, 2022 by another division of this Court in which Judge Myers concludes that the Court lacks jurisdiction in a case

involving a similar recount challenge. *See Weber v. Griswold*, case no. 2022CV32191 (Denver District Court). Consistent with Judge Myers's order in *Weber*, the Court determines that it does not have jurisdiction under C.R.S. § 1-10.5-109(1)(a) or C.R.S. § 1-1-113(4) to consider Petitioner's challenges to the recount. Therefore, the Court dismisses the petition for lack of subject matter jurisdiction.[1]

BACKGROUND

Petitioner was on the ballot in the June 28, 2022 primary election for the Republican Party nomination for Secretary of State. The Secretary of State certified the results for Petitioner's race on July 25, 2022. The results were as follows:

Tina Peters (Petitioner)	180,046	28.86%
Mike O'Donnell	175,147	28.08%
Pam Anderson	268,625	43.06%
Total Votes	**623,818**	

See Ex. A, at p. 27.

Petitioner lost by more than 88,000 votes. Petitioner timely sought and paid for a recount pursuant to C.R.S. § 1-10.5-106(2). The recount commenced on July 29, 2022. Pursuant to C.R.S. § 1-10.5-106(2) the deadline for completing the recount was August 4, 2022. *See id.* (requiring a recount to be completed 37 days after the primary election).

On July 31, 2022 Petitioner notified the clerks in each county of the state and the Secretary of State that the recounts violated the requirements set forth in C.R.S. § 1-10.5-102(3)(a) & (b). These provisions require a test of randomly

[1] All parties agree that Petitioner is not pursuing an election contest under C.R.S. § 1-11-203 or C.R.S. § 1-11-213 in this action. Therefore, the Court does not address jurisdiction under either of these provisions. Nothing in this order is intended to address jurisdiction or any other matters under the Election Code's provisions pertaining to an election contest.

selected voting devices by comparing the machine counted totals against a hand count of voter-verified paper records. *See* C.R.S. § 1-10.5-102(3)(a). This hand recount did not occur here because the Secretary of State provided regulatory guidance for this testing that Petitioner contends conflicts with the requirements of C.R.S. § 1-10.5-102(3)(a) & (b). *See* ex. A to Petitioner's response, summary of Colorado's recount procedures issued by the Secretary of State in July 2022. Therefore, Petitioner contends the recount was unlawful from the outset and that this violation of the law voids *ab initio* the Secretary of State's later certification of the recount.

The canvass boards in each county completed the recounts on or before the statutory deadline of August 4, 2022. The county clerks then certified the results of the recounts conducted in their counties to the Secretary to State. On August 4, 2022 at approximately 3:00 p.m. the Secretary of State certified the results of the recount. *See* ex. B to the Secretary of State's Op. Br., certification; and ex. D, affidavit of Cheryl Hammack.

The recount results did not materially change the results of this race. Petitioner and Ms. Anderson each gained 13 additional votes. Mr. O'Donnell received 11 more votes. The Secretary's August 4, 2022 certification completed the primary election process for the Secretary of State's race. *See* Ex. B; C.R.S. § 1-10-105(1) (describing the certification requirement following a recount).

Petitioner filed this matter on August 3, 2022. At that time Petitioner did not seek a temporary restraining order or any other emergency relief seeking to stop the recount. However, the next day, on August 4, 2022 at approximately 8:30 p.m., Petitioner filed a motion to stay the recount. Later, on August 8, 2022, Petitioner filed a motion for a preliminary injunction to enjoin the recount and turn it over to the Secretary of State pursuant to C.R.S. § 1-10.5-109.

On August 8, 2022, the Court ordered Petitioner to provide evidence of service of process on all Respondents and to set the matter for a status conference once service was completed. By August 18, 2022 it appeared that Petitioner had completed service.

On August 24, 2022 the Court held a status conference with counsel for the parties. At this status conference Respondents asserted that the Court lacks subject matter jurisdiction under C.R.S. § 1-10.5-109 and § 1-1-113 to consider this matter.

ANALYSIS

I. Jurisdiction under C.R.S. § 1-10.5-109

A candidate may challenge a recount under the following provision of the Election Code:

> (1)(a) 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.

C.R.S. § 1-10.5-109(1)(a) (hereinafter "subparagraph 109(1)(a)").

When interpreting the Election Code the Court's "goal is to ascertain and give effect to the General Assembly's intent." *Griswold v. Ferrigno Warren*, 462 P.3d 1081, 1084 (Colo. 2020). The Court looks "'. . . first to the language of the statute, giving its words and phrases their plain and ordinary meanings.'" *Id.* (quoting *McCoy v. People*, 442 P.3d 379, 389 (Colo. 2019)). The Court must read the entire statutory scheme as a whole and give "consistent, harmonious, and sensible effect to all its parts." *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, 395 P.3d 788, 792 (Colo. 2017).

The Court "read[s] these words and phrases in context, and 'we construe them according to the rules of grammar and common usage.'" *Griswold*, 462 P.3d

at 1084 (quoting *McCoy*, 442 P.3d at 389). If the language is clear and unambiguous, the Court must apply it as written—"'venturing no further.'" *Id.*, (quoting *Blooming Terrace No. 1, LLC v. KH Blake St., LLC*, 444 P.3d 749, 752 (Colo. 2019)). The Court must respect the legislature's choice of language and cannot "add words to the statute or subtract words from it." *Turbyne v. People*, 151 P.3d 563, 568 (Colo. 2007).

Subparagraph 109(1)(a) is written in a way that contemplates a challenge while the recount is in progress. It also sets forth procedures for the Court to order that the recount stop and be handled by the Secretary of State. This language and grammar reflect a clear limit on the Court's jurisdiction to consider a recount challenge. A challenge must be brought while the recount is in process. The Court, therefore, loses jurisdiction when the recount is completed.

This procedure reflects the intent and design of the Election Code. As recognized in *Frazier v. Williams*, the Election Code contains tight deadlines for conducting elections. 401 P.3d 541, 544 (Colo. 2017). The Election Code also provides for proceedings to quickly resolve candidate challenges. *See id.* A challenger must act quickly under these provisions. *See id.*

Petitioner filed the verified petition in this case on August 3, 2022. The next day, on August 4, 2022, the Secretary of State issued a certification order. However, Petitioner did not also file a separate motion for emergency preliminary injunctive relief, such as a request for a temporary restraining order or to stay the recount when she filed the verified petition. Indeed, Petitioner filed a motion to stay the recount on August 4, 2022. But it is undisputed that it was filed hours after the Secretary of State had already issued the order certifying the results of the recount.

The issue here is whether the verified petition filed the day before the Secretary of State's certification order is sufficient standing alone to stop a recount and require the Secretary of State to take over the recount in accordance with subparagraph 109(1)(a). The Court determines that a verified petition standing

alone is insufficient to stop the recount unless emergency relief is also sought by an appropriate separate motion.

If a verified petition alone is sufficient to stop a recount then it would be self-executing. When Petitioner filed the verified petition there was no evidence in the record that Respondents had been served. This is not the type of case where *ex parte* preliminary injunctive relief is appropriate. *See* C.R.C.P. 65(b). In a matter as important as an election recount, the county clerks and Secretary of State would be entitled to notice and a right to be heard before the recount is stopped.

In addition, Court review would be necessary before preliminary injunctive relief can be entered to stop the recount. Emergency relief stopping the recount could have been obtained upon the filing of a motion for a temporary restraining order and preliminary injunction. *See* C.R.C.P. 65(b). Under Rule 65(b) Petitioner would have to show that preliminary injunctive relief is appropriate under the standards set forth in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982). Even if subparagraph 109(1)(a) provides standards separate and apart from those set forth in *Rathke*, some evidence and Court review would be necessary before the recount could be stopped. A verified petition standing alone is insufficient.

However, Petitioner did not file a motion to stay until a few hours after the Secretary of State entered the certification order. Petitioner filed a motion for preliminary injunction four days later on August 8, 2022.

Furthermore, the county clerks and the Secretary of State cannot stop the recount upon the filing of a verified petition alone. These election officials are operating under a statutory deadline. Unless ordered otherwise by the Court they must meet these deadlines. Here the results of the recount had to be certified no later than thirty-seven days following the primary election. *See* C.R.S. § 1-10.5-106(2).

These deadlines have particular significance in an election context. *See Frazier v. Williams*, 401 P.3d at 544) (recognizing the need to meet the tight deadlines set forth under the Election Code and to promptly resolve election

challenges). As pointed out in Respondents' briefing there are a series of cascading election deadlines that follow from certification of the results of the primary election. The election officials were not free to suspend the recount and certification orders upon the filing of a verified petition under subparagraph 109(1)(a). A proper motion for emergency relief had to be filed and granted in order for the election officials to stop their work.

The Court concludes that Petitioner did not take the necessary action to stop the recount before it was final and the results certified. In accordance with subparagraph 109(1)(a) jurisdiction to consider this challenge was lost when the recount was completed and the Secretary of State entered the certification order on August 4, 2022 at 3:00 p.m.

Petitioner argues that the recount can still be challenged because the recount was conducted in an unlawful manner. According to Petitioner, the Secretary of State's certification order is void *ab initio* and has no legal significance because the recount was not performed in accordance with the testing procedures set forth in C.R.S. § 1-10.5-102(3)(a) & (b). Therefore, the recount is still open for challenge according to Petitioner.

This argument would allow a challenge to a recount long after the results are certified. By this logic there would be no time limit for challenges to certification orders involving a recount. This interpretation runs counter to the carefully designed deadlines and procedures set forth in the Election Code for certifying election results. *See Frazier*, 401 P.3d at 544 (the Election Code provides for summary proceedings to quickly resolve election challenges so that election deadlines can be met). Allowing these orders to be challenged later would destabilize elections and leave them open for challenge long after the Secretary of State certifies results.

As discussed above there is a process built into the Election Code for ensuring that challengers have an opportunity to raise their concerns. There are specific procedures set forth in subparagraph 109(1)(a) for challenging a recount. However, challengers must act quickly and before the recount is over. There are

provisions under the law for mobilizing the Court to take this quick action. *See, e.g.*, C.R.C.P. 65(b). But Petitioner did not do any of this until it was too late.

The question in this matter isn't whether the Court should allow this challenge to proceed just because Petitioner failed to file the proper motion by a matter of hours. The Court must have jurisdiction to consider a recount challenge. Subparagraph 109(1)(a) specifies when the Court has jurisdiction to consider these challenges. It's while the recount is proceeding. After the recount is over and the results certified, the Court loses jurisdiction to consider a recount challenge.

When faced with a specific limit on its jurisdiction the Court cannot exercise its equitable or constitutionally granted powers to expand its jurisdiction. Jurisdiction represents the power of the Court to act. Once it is lost, the Court loses the power to act. This is true even if the event ending jurisdiction happens mere hours before a party seeks the appropriate emergency relief.

Once the Secretary of State entered the certification order the recount was over. At that time the Court lost jurisdiction to act on a recount challenge. The plain language of subparagraph 109(1)(a) makes this clear. The Court's equitable powers cannot be invoked to override this clear limit on the Court's jurisdiction. Therefore, the Court does not have jurisdiction under subparagraph 109(1)(a) to now consider Petitioner's challenge to the recount.

II. Jurisdiction under C.R.S. § 1-1-113

A candidate may bring an action under C.R.S. § 1-1-113(1) to challenge an election official's breach of duty or wrongful conduct committed in connection with an election. Under subsection 113(4) of this statute ". . . 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." C.R.S. § 1-1-113(4). *See also Frazier*, 401 P.3d at 544 ("section 1-1-113 is a summary proceeding designed to quickly resolve challenges . . . against state election officials prior to election day.").

The plain language of this provision requires that a candidate bring an election challenge before election day. The election at issue in this action is the primary election conducted on June 28, 2022. This challenge was filed long after this election was over and the results certified on July 25, 2022.

Petitioner argues that the general election that is going to be held on November 8, 2022 is the relevant election for purposes of this statute. All of the proceedings currently ongoing are in advance of the general election according to Petitioner.

The Court declines to adopt this interpretation of C.R.S. § 1-1-113. As with Petitioner's previous argument this interpretation runs contrary to the Election Code's goal of ensuring finality in elections. It would also introduce the potential for chaos and confusion in the administration of the general election. Voter confusion and ballot uncertainty would be the result if a candidate who lost a primary election is allowed to maintain challenges after a primary election is concluded and the results certified.

Therefore, the Court determines that the June 28, 2022 primary election is the election at issue in this action. The Court lacks jurisdiction to consider this challenge under C.R.S. § 1-1-113(4) because Petitioner brought it long after conclusion and certification of the results in the primary election.

Accordingly, **IT IS ORDERD** that:

1. Petitioner's petition is dismissed for lack of subject matter jurisdiction; and
2. The preliminary injunction hearing set for September 7, 2022 is vacated.

SO ORDERED AND DATED this Tuesday, September 06, 2022.

BY THE COURT:

Andrew P. McCallin, District Court Judge