

<p>7th DISTRICT COURT, GUNNISON COUNTY, STATE OF COLORADO Court Address: 200 E. Virginia Avenue Gunnison, CO 81230</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>DAVID JUSTICE, Petitioner, v. JENA GRISWOLD, in her official capacity as Secretary of State, KATHY SIMILLION in her official capacity as Clerk and Recorder of the County of Gunnison MANDY ROBERTS in her official capacity as Canvas Board Member and VIKKI ARCHULETA in her official capacity as Canvas Board Member. Respondents.</p>	
<p>VERIFIED PETITION PURSUANT TO C.R.S. § 1-10.5-113 and for INJUNCTIVE RELIEF PURSUANT TO C.R.C.P 65</p>	

COMES NOW Petitioner, David Justice, pursuant to C.R.S. § 1-1-113 and C.R.S. § 24-4-106 hereby submits the following verified petition for relief in the form of an Injunctive Relief and Judicial Review against Jena Griswold, in her official capacity as Secretary of State, Kathy Simillion in her official capacity as Clerk and Recorder of the County of Gunnison, Mandy Roberts in her official capacity as Canvas Board Member and Vikki Archuleta in her official capacity as Canvas Board Member.

I. INTRODUCTION

This Honorable Court may exercise its supervisory jurisdiction 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. The Petitioner is entitled to a legal remedy and

prospective relief including a recount of voter verified paper records or ballots cast in the 2022 general election for the Office of Representative from Colorado's 3rd (third) Congressional District of the United States Congress, pursuant to C.R.S. § 1-10.5-102(3)(a) &(b), as hereinafter determined.

Petitioner requests that this Honorable Court issue an Order of Injunctive Relief and Judicial Review directed at Respondent, Jena Griswold, in her official capacity as Secretary of State of Colorado (Secretary), contesting her authority to issue rules that circumvent the law established by the General Assembly, in protection of the purity and integrity of elections under Colorado Constitution Article 7, § 11; and, an Order directed at all Respondents 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).

II. PARTIES

1. Petitioner, David Justice, is a natural person, and citizen of the state of Colorado and the United States of America. David Justice is an eligible elector of CD3 who resides in the County of Gunnison in the State of Colorado.

2. Respondent, Jena Griswold, is named in her official capacity as Secretary of State of Colorado.

3. Respondent, Kathy Simillion, is named in her official capacity as Clerk and Recorder of the County of Gunnison.

4. Respondent, Mandy Roberts, is named in her official capacity as Canvas Board Member for the County of Gunnison.

5. Respondent, Vikki Archuleta, is named in her official capacity as Canvas Board Member for the County of Gunnison.

III. JURISDICTION AND VENUE

1. Jurisdiction of the District Court is invoked pursuant to C.R.S. § 1-1-113.

IV. STATEMENT OF FACTS

1. Respondent, Jena Griswold, The Colorado Secretary of State, *has committed or is about to commit a breach or neglect of duty or other wrongful act* by issuing the Summary of Colorado's Recount Procedures November 2022, as she also did in the Primary Recount in July of 2022, by ordering the Clerks to conduct an election recount in a manner which does not comply with CRS 1-10.5-102 (3)a.

2. C.R.S. § 1-1-113 - Neglect of duty and wrongful acts - procedures for adjudication of controversies states:

(1) 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.

3. 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.

4. Part 4 of C.R.S. § 1-1-113 indicates that a petition pursuant to C.R.S. § 1-1-113 is the *only* method for the adjudication of controversies *before* an election. Part 4

does not exclude filing a petition pursuant to C.R.S. § 1-1-113 after an election. “Except as otherwise provided in this Part 1” is referencing the statement “*has committed or is about to commit*”. Part 4 does, however, indicate that there may be multiple methods of adjudication available after an election.

5. The General Election was held on November 8, 2022. Adam Frisch and Lauren Boebert were the two certified major party (or “named”) candidates in Colorado Congressional District 3 (“CD 3”) for a seat in the 118th United States Congress.

6. At the conclusion of tabulation of all 27 counties that make up CD 3, Adam Frisch received 49.92% of the overall vote total (163,292 votes) while Lauren Boebert received 50.08% (163,842 votes).

7. Pursuant to Colorado law, the percentage difference of vote totals between the two candidates requires the Secretary of State to order a recount as state in C.R.S.1-10.5-101:

A recount of any election contest shall be held if the difference between the highest number of votes cast in that election contest and the next highest number of votes cast in that election contest is less than or equal to one-half of one percent of the highest vote cast in that election contest.

8. On Wednesday, November 30th, 2022, the Secretary published a press release which included a link to her Election Order 2022-14 (<https://www.coloradosos.gov/pubs/newsRoom/pressReleases/2022/PR20221130OrderOfRecount.html><https://www.coloradosos.gov/pubs/newsRoom/pressReleases/2022/PR20221130OrderOfRecount.html>). The Secretary states in the Order (See Exhibit A)

The recount shall be conducted in accordance with statute as stated in the *applicable* sections of 1-10.5-102, C.R.S. and Election Rule 10, as well as any further instruction provided by the Election Division of the Office of the Secretary of State.

9. The applicable sections of C.R.S. § 1-10.5-102, include C.R.S. § 1-10.5-102(1), C.R.S. § 1-10.5-102(2), and C.R.S. § 1-10.5-102(3), including C.R.S. § 1-10.5-102(3)(a), C.R.S. § 1-10.5-102(3)(b), and finally C.R.S. § 1-10.5-102(3)(c). These same applicable sections, in fact, make up the entirety of C.R.S. § 1-10.5-102. The Secretary's statement that "The recount shall be conducted in accordance with statute as stated in the applicable sections of 1-10.5-102, C.R.S.", suggests that sections of C.R.S. § 1-10.5-102 might be designated as either applicable or non-applicable, when instead, the entirety of the statute is applicable, and the inclusion of the adjective modifier "applicable" is unwarranted and unsupported by the specific nature and intent of Colorado Law in C.R.S. § 1-10.5-102.

10. As referenced by the Secretary, C.R.S. § 1-10.5-102(1) states:

If the secretary of state determines that a recount is required for the office of United States senator, representative in congress, any state office or district office of state concern...the secretary of state shall order a complete recount of all the votes cast for that office...no later than the thirtieth day after the election.

11. C.R.S. § 1-10.5-102(2), states:

The secretary of state shall notify the county clerk and recorder of each county involved of a public recount to be conducted in the county at a place prescribed by the secretary of state. The recount shall be completed no later than the thirty-fifth day after any election. The secretary of state shall promulgate and provide each county clerk and recorder with the necessary rules to conduct the recount in a fair, impartial, and uniform manner, including provisions for watchers during the recount. Any rule concerning the conduct of a recount must take into account the type of voting system and equipment used by the county in which the recount is to be conducted.

12. Importantly, C.R.S. § 1-10.5-102(3) states:

(a) 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*. [Emphasis added].

(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 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.

(c) The secretary of state shall promulgate such rules, in accordance with article 4 of title 24, C.R.S., as may be necessary to administer and enforce any requirement of this section, including any rules necessary to provide guidance to the counties in conducting the test of voting devices for the recount required by paragraph (a) of this subsection (3). The rules shall account for:

(I) The number of ballots cast in the candidate race, ballot issue, or ballot question that is the subject of the recount;

(II) An audit of each type of voting device utilized by the county in the candidate race, ballot issue, or ballot question that is the subject of the recount; and

(III) The confidentiality of the ballots cast by the electors in the candidate race, ballot issue, or ballot question that is the subject of the recount.

13. These laws were passed by the Colorado General Assembly who, being familiar with the rapid pace of technology, fulfilled the will of the People in 2005 by providing timeless laws to apply to election recounts for however long into the future voting devices and voter verified paper records are used.

14. C.R.S. § 1-10.5-102(3)(a) speaks for itself; 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 Secretary appears to be justifying her circumvention of the law by relying on a definition of “voting devices” found in C.R.S. § 1-104(50) as:

any apparatus that the elector uses to record votes by marking a ballot card and that subsequently counts the votes by electronic tabulating equipment or records the votes electronically on a paper tape within the apparatus and simultaneously on an electronic tabulation device.

15. This is an antiquated definition used to describe direct recording devices (DRE). DREs have not been used in Colorado since 2017 and the definition of Voting Device has not been updated in statute recently. However, C.R.S. § 1-10.5-102 has been amended in 2018 and as recently as June 21, 2021, to include the words “Voter Verified Paper Records” see page 33 of Senate Bill 21-250. <https://legiscan.com/CO/text/SB250/2021>

16. Cody Davis, a Mesa County Commissioner, responded to one elector with direction he had received from Dwight Shellman of the Secretary’s office who stated, “1-10.5-102(3), C.R.S. thus prescribes an equipment test for voting systems and components no longer used in this state, such as precinct optical scanners and direct recording electronic (DRE) touchscreen devices.” Mr. Davis goes onto to ask “How are clerks supposed to compare something to “voting devices” when the “voting devices” no longer exist? Not one single county uses “voting devices” anymore---only paper ballots! Hence the promulgation of election rules for testing the machines without “voting devices.” And “Would love to hear how you think I’m wrong on the definition of “voting devices” and what the implications of a defunct statute is.” See Exhibit B

17. Contrary to the unambiguous, specific requirements in C.R.S. § 1-10.5-102(3), the Secretary has directed the canvass boards to test their voting devices through

the use of paper test ballots in accordance with rules created by the Secretary. In that regard, the Secretary has sent a **Summary of Colorado Recount Procedures November 2022** to the Clerk and Recorder of each County involved in the subject recount. See Exhibit C. In it, the Secretary has misrepresented Colorado Law to the canvass boards. The Secretary had previously issued identical guidance to Clerks in July during the Primary Election Recount. See Exhibit D

18. With regard to the testing of the devices required, the Secretary's July 2022 and November 2022 Procedures states:

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.

19. In her Orders to the Clerks, the Secretary has materially changed the wording of C.R.S. § 1-10.5-102 (3)(a) by substituting the canvass board's use of "voter-verified paper records" with "paper test ballots" instead. Fundamentally, these are very different items, and do not serve the same purpose in a recount. Furthermore, despite Dwight Shellman of the Secretary's office insisting that the term "voting devices" is antiquated and no longer applies to Colorado elections, the Secretary herself uses the same term "voting devices" to refer to the ballot tabulators in her Orders, even though the legal and official definition of "voting devices" clearly does not include tabulators. The

Secretary does not have the right to pick or choose which parts of C.R.S. § 1-10.5-102 she wants to apply; as per her Oath of Office, she must follow the law.

20. The guidance provided by the Secretary directs the canvass boards to test the 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.

21. In fact, in Election Order 2022-14 the Secretary has already ordered the canvass boards, prior to the recount, to use paper test ballots and then do a re-scan of the ballots and, once again, perform that test as a substitute for the statutorily required comparison of the original tabulation records of certain randomly selected devices used in the election, against a manual tabulation of the voter verified paper records. C.R.S. § 1-10.5-102(3)(a)&(b).

22. As stated in her recent order:

3. Pursuant to Election Rule 10.9.3, Candidate Frisch has requested that the recount be conducted by means of a re-scan of the ballots cast in the CD-3

race. As a result, all counties that used a certified voting system for the initial tabulation must re-scan all ballot cards counted during the initial tabulation.

23. Election Rule 10.9.3 states:

The losing candidate with the most votes, or an interested party as defined in section 1- 10.5-106, C.R.S., may request that the county rescan ballots. The request is due no later than the day after the deadline to order a mandatory recount or the day after the deadline to request a recount, whichever is applicable.

24. While Candidate Frische is within his rights to request a re-scan of the ballots, the Secretary has conflated the distinctions and relationship between a rescan and a recount. A recount is a statutory procedure that may incorporate, as a portion of the overall recount, a “re-scan” of ballots, as provided in the Secretary’s Election Rule 10.9.6. This Rule is intended to provide an opportunity for a greater protection of the rights of interested parties in a recount. This tabulation procedure is computational and is performed by the computer component of the device without the need to re-scan the ballots with the peripheral scanning component of the device.

25. Ballot tabulation devices are capable of performing their tabulation function either with or without re-scanning the ballots of a subject election. Each tabulation device stores scanned images of the ballots in the computer component of the tabulation device on an internal storage unit, such as a hard drive, after each ballot is scanned by the scanner component of the tabulation device. Each tabulation device is capable of performing a tabulation of the ballot images stored on that device with the images of the ballots alone, using the device’s image processing, ballot reading and tabulation capabilities.

26. A voting device in its current use by the General Assembly and the Secretary of State’s rules and guidance, often constitutes a computer case and internal

parts, a monitor, mouse, keyboard, and an attached or internal networking equipment. Installed on the voting devices' internal storage units are the ballot's scanned image reading software and vote counting software, which have been developed for Colorado by either Dominion Voting Systems, Inc., or Clear Ballot Group, Inc. The scanner component of the device constitutes a generic high speed paper scanner produced by Canon U.S.A., Inc., or one of their competitors.

27. When the tabulator devices performed the respective tabulations in the 2022 General Election, these devices read the scanned images stored on the devices, then counted the votes and provided a total tabulation of the elections held. A re-scan of the ballots is a preliminary step to recount tabulation, but is not essential to the tabulation itself. According to Election Rule 10.9.6, at an interested party's request, a recount may include a re-scan of the ballots prior to the re-tabulation of the then re-scanned ballot images.

28. The purpose of Election Rule 10.9.6 is to provide an interested party with an additional, optional step in the recount process and, as stated in 8 Colo. Code Regs. § 1501-10.12.2, to "test all ballots scanners that will be used." Conversely, testing the voting devices prior to the recount is required under C.R.S. § 1-10.5-102(3)(a), and contemplates testing the voting devices used in the recount before determining whether the recount will be manual, or "conducted in the same manner as the original ballot count." See C.R.S. § 1-10.5-102(3)(b). Neither the offering nor acceptance of a re-scan prevents the comparison of a manual count of voter verified paper against the tabulation of randomly selected voting devices already completed on election day. Simply put, a re-scan has no impact upon, or relevance to, the applicability of C.R.S. § 1-10.5-

102(3)(a)&(b), and does not excuse the Secretary, the Clerks or the Canvass Boards from following the law which specifically requires a different test prior to the recount.

29. In a letter sent to Respondent Clerk Simillion by citizens, the Clerk was made aware of the conflict between the rules and the statute. “The Secretary’s Order is in conflict with Colorado Law. I ask that you take your oath seriously and follow Colorado Law. This can be done by adhering to CRS§1-10.5-102 along with the guidance set by the Secretary. You can hand count the paper ballots to reconcile with one tabulator’s count, perform a Logic and Accuracy Test, and other actions the Secretary has ordered. You will not be disobeying the Secretary’s Order by omitting an action, you will be following the law by performing the comparison in addition to the Secretary’s Orders.” Clerk Simillion chose not to perform the required test prior to the recount. See Exhibit E

30. Upon knowledge and belief Respondents, Clerk Simillion, and canvas board members Roberts and Archuleta, did not perform the required test according to C.R.S. § 1-10.5-102(3)(a)&(b) prior to the start of the recount in Gunnison County on December 7, 2022

31. In the Affidavit of Recount Witness James Wiley, the stated intentions of the Secretary to circumvent the law were confirmed by both the Alamosa County Election Supervisor, Terry Carver, and with Caleb Thornton, attorney for the Colorado Secretary of State. In Alamosa County, on Friday, December 2nd, 2022, a Logic and Accuracy test was substituted for the recount testing outlined in C.R.S. § 1-10.5-102(3)(a)&(b) “prior to any recount”. This information was confirmed through an in-person discussion with Terry Carver and through a phone conversation with Caleb Thornton. See Exhibit F.

V. CLAIM FOR RELIEF

32. Petitioners incorporate herein by reference all of the allegations contained in the foregoing paragraphs, as though fully contained herein.

33. Pursuant to C.R.S. § 1-1-113, a controversy has arisen between the Petitioner and the Respondents.

34. The Respondents are under a duty to fairly and equally discharge their respective duties as election officials, who have sworn an oath to uphold the laws of the state of Colorado, including conducting the required recount according to statute.

35. The Respondents have breached that duty and committed a wrongful act by omitting the manual test that is required to be performed prior to any recount.

36. Pursuant to C.R.S. § 1-10.5-106, a recount of votes must be completed no later than the thirty-seventh day after a primary election, which in this circumstance is Tuesday, December 13, 2022.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court Order the Respondents:

1. to require the Colorado Secretary of State to forthwith order any County actively conducting a recount without first conducting the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. prior to starting the recount as required by law, halt the invalid recounting process and conduct a new recount preceded by

performing the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. prior to starting the recount as required by law;

2. to require the Colorado Secretary of State to forthwith order any County which conducted a recount without conducting the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. prior to starting the recount as required by law, to disregard those invalid recount results and conduct a new recount preceded by performing the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. prior to starting the recount as required by law;

3. to prohibit the Secretary of State from acting upon any amended and resubmitted abstract, unless and until each of the canvass board members has certified in writing, under oath and subject to penalty of perjury, that the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. was conducted prior to starting the recount as required by law, plus details as to who conducted the prior to recount test, when it was conducted by date and time, and what the results were.

4. To require the County Clerk and Canvas Board Members (Respondents) to disregard Gunnison County's invalid recount results and conduct a new recount preceded by performing the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. prior to starting the recount as required by law;

Respectfully submitted this 9th day of December 2022, and verified by the
Petitioner:

I, David Justice, hereby 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 Justice

/s/ David Justice

