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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Appeal from the 2nd Judicial District The Honorable Judge Andrew P. Mccallin District Court Case No. 2022CV032225	
In Re: TINA PETERS, Petitioner, v. JENA GRISWOLD, in her official capacity as Secretary of State of Colorado, *et al.* Respondents.	**▲ COURT USE ONLY▲**
Attorney for Petitioner David Willson, Esq. #43369 600 17th Street Suite 2800 South Denver, CO 80202 Phone: (719) 648-4176 Email: David@DRAdvocates.com	Case No.
VERIFIED PETITION FOR EXPEDITED REVIEW PURSUANT TO C.R.S. § 1-1-113 and C.R.S. § 1-10.5-109	

I. INTRODUCTION

The Petitioner makes application to this Honorable Supreme Court and requests the Court review and issue an order to JENA GRISWOLD in her official capacity as Secretary of State of Colorado, directing that she immediately initiate a

recount on behalf of Petitioner, Tina Peters, and that such recount be conducted according to Colorado law, C.R.S. § 1-10.5-102(3), only.

II. ISSUES PRESENTED

1. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT C.R.S. §1-1-113 COULD NOT BE INVOKED AFTER THE PRIMARY ELECTION.

2. WHETHER JENA GRISWALD, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE, NEGLECTED HER DUTY AND/OR COMMITTED WRONGFUL ACTS BY IGNORING OR SUBVERTING THE ELECTION LAWS ESTABLISHED BY THE GENERAL ASSEMBLY AS IT RELATES TO C.R.S. 1-10.5-102(3)(a)&(b), IN THE RECOUNT FOR PETITIONER.

3. WHETHER THE CLERK AND RECORDERS OF THE NAMED COUNTIES, ACTING IN THEIR OFFICIAL CAPACITIES AND AUTHORITY AS CLERK AND RECORDERS OF SUCH COUNTIES, NEGLECTED THEIR DUTY BY NOT COMPLYING WITH THEIR DUTIES AND RESPONSIBILITIES SET FORTH BY THE GENERAL ASSEMBLY UNDER C.R.S. § 1-10.5-102(3)(a) & (b).

4. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT IT DID NOT HAVE JURISDICTION OVER PETITIONER'S CLAIMS, E.G., A REQUEST FOR A VALID RECOUNT AND TO REQUIRE THE RESPONDENTS TO FOLLOW THE LAW.

5. WHETHER THE FAILURE OF THE CANVASS BOARD TO FOLLOW THE TESTING PROCEDURES REQUIRED UNDER C.R.S. § 1-10.5-102(3)(a) INVALIDATES THE RECOUNT MAKING IT VOID.

III. PARTIES

Petitioner, Tina Peters, a natural person, is a citizen of the state of Colorado and of the United States of America and ran as Republican Party (GOP) primary candidate for the office of Secretary of State in the state of Colorado.

Respondents are Jena Griswold, named in her official capacity as Secretary of the State of Colorado (Secretary); along with the above-named County Clerk and Recorders, also named in their official capacities as Clerk and Recorders of the counties of Adams, Alamosa, Arapahoe, Archuleta, Baca, Bent, Boulder, Broomfield, Chaffee, Cheyenne, Clear Creek, Conejos, Costilla, Crowley, Custer, Delta, Denver, Dolores, Douglas, Eagle, Elbert, El Paso, Fremont, Garfield, Gilpin, Grand, Gunnison, Hinsdale, Huerfano, Jackson, Jefferson, Kiowa, Kit Carson, La Plata, Lake, Larimer, Las Animas, Lincoln, Logan, Mesa, Mineral, Moffatt, Montezuma, Montrose, Morgan, Otero, Ouray, Park, Phillips, Pitkin, Prowers, Pueblo, Rio Blanco, Rio Grande, Routt, Saguache, San Miguel, Sedgwick, Summit, Teller, Washington, Weld, and Yuma. (Clerk and Recorders).

IV. COURT BELOW

The court below is the district court for the city and county of Denver, the Honorable Judge Andrew P. McCallin, presiding.

V. NATURE OF THE CASE

To date, this case has been litigated on an accelerated timeline. However, the district court dismissed the case for lack of jurisdiction, arguing that once the recount was completed and results certified, if not halted prior, the court no longer possessed jurisdiction. Additionally, that relief under C.R.S. § 1-1-113 is limited to conduct before the subject primary election.

On June 28, 2022, the Republican primary election was held to determine the party's candidates for offices across the state of Colorado. Petitioner allegedly lost her primary election for Secretary of State. As an "interested party," pursuant to C.R.S. § 1-10.5-106, the Petitioner formally requested a recount by submitting notarized requests to the Secretary within the statutory time period of 28 days from the primary election.

Pursuant to C.R.S. § 1-10.5-107, the Secretary arranged to have the recounts conducted by the counties' canvass boards. On Friday, July 29, 2022, the recounts started in the offices of the Clerk and Recorders across the named counties.

C.R.S. § 1-10.5-102 (3)(a) states:

> Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot

issue, or ballot question to the corresponding manual count of the voter-verified paper records.

C.R.S. § 1-10.5-102 (3)(b) states:

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

Rather than follow the law, the Secretary, who is also the incumbent Democratic candidate for Secretary of State, thus creating a potential conflict of interest, directed the Clerk and Recorders to perform a Logic and Accuracy Test (LAT) through the use of test ballots. In that regard, the Secretary sent a **Summary of Colorado Recount Procedures July 2022** to the Clerk and Recorders.[1] In it,

[1] Jena M. Griswold Secretary of State Judd Choate Director, Elections Division, *Summary of Colorado Recount Procedures July 2022*, Appendix I, p. 50-56.

the Secretary misrepresented Colorado law to the Clerks. With regard to the testing 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.[2]

8 Colo. Code Regs. § 1501-10.12.2, states:

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

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

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

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

[2] *Id*. at p. 3, ¶ 7.

> contest, or person or organization who could have requested the recount, may also mark up to 10 ballots.
>
> (3) In a mandatory recount, at least two canvass board members of different party affiliations must each mark an additional 10 ballots containing the recounted contest.
>
> (b) A bipartisan team, of election judges and/or staff, must hand tally the recounted contest on the test ballots and verify that the hand tally matches the voting system's tabulation.
>
> (c) The test is limited to the race or measure that is recounted.

The Election Rules promulgated by the Secretary state that "an interested party may request that the county re-scan ballots." 8 Colo. Code Regs. § 1501-10.9.3. The request must be made no later than "the day after the deadline to request a recount…" *Id.* However, Petitioner, on multiple occasions in writing stated that she did not want a re-scan and requested a hand recount, even after having been offered a re-scan of the ballots by the Secretary.

Nonetheless, the guidance provided by the Secretary lead the canvass boards to test the scanners and voting devices as outlined by 8 Colo. Code Regs. § 1501-10.12.2. While that test may have been conducted in addition to the requirements of § 1-10.5-102(3)(a), it does not fulfill the requirements under the law. The performance of the test under the Election Rules did not alleviate the requirement of the canvass boards 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 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 by the chosen devices on June 28, 2022.

Accordingly, the canvass board did not comply with C.R.S. § 1-10.5-102 (3)(a). Rather than using "voter-verified paper ballots" as required by 102 (3)(a), they were directed to use "paper test ballots" per paragraph 7.a of the "Summary of Colorado's Recount Procedures." By directing the canvassing boards not to comply with C.R.S. § 1-10.5-102 (3)(a), the Clerk and Recorders and Secretary breached their duties to conduct a fair, impartial, and uniform recount.

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) 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 boards in the various counties 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) have also not been meet. Therefore, Petitioner's recount was conducted in the same manner as the ballots were counted in the primary election, i.e., with the voting machines, but without compliance with C.R.S. § 1-10.5-102 (3)(a)&(b), a comparative hand count of voter-verified paper ballots.

During the recount, on Monday, August 1, 2022, the El Paso County Candidates, which included Petitioner Peters at the time, filed their, case number 22CV031292, Pursuant to C.R.S. § 1-10.5-109. C.R.S. § 1-10.5-109(1)(a), states:

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

Petitioner Peters then filed a separate 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.on August 3, 2022, case number 22CV032225. In both cases, the Secretary and the respective Clerk and Recorders were timely served with copies of the Petition.[3] Nonetheless, the canvass board continued the recount and finished on Wednesday, August 3, 2022. On Thursday, August 4, 2022, the district court entered a standard pretrial order and delay prevention order.

Additionally, on August 8, 2022, Petitioner filed her Verified Motion for Preliminary Injunction with Notice to Respondents.[4] On that same day, the Attorney General entered his appearance.[5]

The county attorneys for the Clerk and Recorders then began to enter their appearances.[6] Also, on August 8, 2022, the district court entered an order stating, "Petitioner shall set this matter for a status conference to address further proceedings in this matter."[7] On August 16, 2022, Petitioners filed their waivers of

[3] Appendix 2 pp.214-283, Appendix 3 pp. 284-346, Appendix 4 pp. 523-524.
[4] Appendix 1 pp. 95-107.
[5] Appendix 1 pp.89-91, 92-94.
[6] Appendix 1 pp.81-84, 87-88, 108-140, 155-185, 188-213, Appendix 4 pp. 347-348, 355-385, 391, 399-400, 525-526.
[7] Appendix 1 pp. 85-86.

service from the Secretary and on August 18 Petitioners filed the returns of service for the 63 Clerk and Recorders.[8]

A status conference was held on Wednesday, August 24, 2022, at which time the district court outlined a briefing schedule and set the matter for hearing on Wednesday, September 7, 2022. After the parties filed their briefs, the district court entered an order finding that the court lacked jurisdiction, and also 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.

VI. CLAIMS PURSUANT TO § 1-1-113 ARE ACTIONABLE AFTER AN ELECTON

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

[8] Appendix 1 pp. 186-187.

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

Further, the words "prior to the day of an election" appear to be in reference to "other wrongful acts," and does not otherwise prohibit a candidate from moving under § 1-1-113 against an election official for breach or neglect of duty. Otherwise, how would a candidate in a recount know that an election official was going to violate the code ahead of time. The Clerk and canvass board were under a duty to test the devices used in the primary and recount, pursuant to C.R.S § 1-10.5-102(3)(a)-(b). Thus, in many parts of the election code, the duties of election officials are often ongoing.

"Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to

election day." Frazier v. Williams, 401 P. 3d 541, 544 (2017). Despite the design of the statute, not all duties required by an election official are required to be completed by an election day.

In fact, concerning the primary election held on June 28, 2022, the ultimate issue is the presence of the Petitioners on the ballot for Colorado's election on November 08, 2022. This case was filed immediately after the Respondents' breached their duty, and there was no way the Petitioners would have been able to predetermine their conduct.

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, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).

Petitioner, as a party with the El Paso candidates, sent a letter to the Secretary on July 31, the day she determined the recount was not lawful, then filed her Petition on August 1, 2022, and then another separately on August 3, 2022, and served the Clerk and Recorders, immediately. The Petitioner has followed the rules and procedures set out by the General Assembly, and the Rules of Civil Procedure.

Therefore, this controversy is properly before this Court, pursuant to the authority set forth in C.R.S. §§ 1-10.5-109 and 1-1-113(1).

VII. MATTER OF GREAT PUBLIC IMPORTANCE AND FIRST IMPRESSION: WHETHER THE COLORADO SECRETARY OF STATE HAS AND CONTINUES TO NEGLECT HER DUTY AND/OR COMMIT WRONGFUL ACTS

A. Standard of Review

Constitutional interpretation and statutory interpretation present questions of law that this Court must review de novo. *See Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo.2006); *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo.2010). 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, e.g., Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 172 (Colo. 1988); *see also* § 24- 4-106(7), C.R.S. (2013) (providing that courts "*shall* hold unlawful and set aside" any agency action that is "contrary to law" (emphasis added)).

B. Analysis of Violation of Law

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

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

This appeal is timely filed under C.R.S. § 1-1-113(3). The lower court rendered its decision on Tuesday, September 7, 2022, at approximately 11:14 AM.

This Petition is filed within three days of the dismissal and, despite the accelerated timeline in this case. The impact to the election currently in question is not until November 8, 2022. Noting that a recount must be requested within 28 days of the primary, and completed within 37 days, a week to conduct a recount is the anticipated time needed to perform the task. Here, however, the necessary recounts have not been conducted.

In order for the canvass boards to conduct a legal recount, they must comply with the law that requires testing of the devices used in the primary. The statutorily required test requires the canvass boards to make a comparison between its own manual tabulation of the actual ballots of voters in the primary against the machine 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 machines for testing. For example, the canvass board would select, out of a hat, the number of devices that the board wished to test. The ballots those devices counted on election day, by known batch numbers, would be manually counted by the canvass board. After which, the canvass board's tabulation would be compared to the machine's count from the primary election day. In this manner, no interaction is necessary with the voting machines. Its calculation was already made on election day.

If the comparison has no discrepancies, the recount may be done in the same manner as the primary election. However, if there are discrepancies, then a legal presumption is created that a hand count should be done. Through the actions of the Secretary and Clerk and Recorders, Petitioner's right to 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 LAT substantial complies with § 1-10.5-102(3)(a), but those arguments 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 ballots against the particular voting machine's tabulation. However, because recounts are rare, there is little to no body of law concerning this topic. Petitioners are unaware of any petition ever being filed pursuant to § 1-10.5-109. However, the plain language of the statute is that the Petitioners can petition the district court of the city and county of Denver for an order to stop the recount based upon their reasonable belief that the recount was not being conducted in a fair, unbiased, and uniform manner. The petition was

verified. Accordingly, the district court should have granted or denied the motion, immediately. There are no notice requirements in § 1-10.5-109.

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

> 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.

The record reflects that the parties and attorneys were served in a timely manner after the original petition was filed, and a waiver of services was provided by the Secretary. Accordingly, the Petition was the request for immediate relief. The Respondents had an opportunity to be heard and to this day have chosen to remain silent on the factual issues. The district court states that Petitioner should have also requested immediate relief seeking a preliminary injunction. But 109 provides a candidate the avenue to challenge and makes no reference to any other

action. Requiring a preliminary injunction to stop a recount in addition to 109 would seem to make 109 irrelevant. Certainly, the General Assembly understood the short timeline of a recount. Therefore, it would seem that their solution, § 1-10.5-109, was sufficient to address the issue. Petitioner believes the district court was in error believing that a petition under § 1-10.5-109 did not provide it sufficient jurisdiction and authority to halt the recount.

This is evidenced by the nature of this and any recount. First, the Petitioner was not aware that the canvass boards weren't going to follow the law until, after taking two days to perform the LAT, the unlawful recount began, on approximately July 31, 2022. The same day, after observing the law was not being followed, the Petitioner filed a letter with the Secretary requesting that the recount be conducted lawfully.

The Petitioner, as part of the group of candidates in El Paso County, jointly filed their motion the next day on Monday, August 1, 2022. Petitioner then filed separately on August 3, 2022. Obviously, the district court didn't view the Petition with any particularity, as it simply issued its standard pre-trial and delay prevention orders.[9] Granted, at that time, the district court was not aware that service had been accomplished, but the petition *was* served upon the parties, thus giving them an

[9] Appendix 1 pp. 59-71.

opportunity to be heard. Accordingly, the Petitioner was not required to file an additional pleading requesting the same relief outlined by the original petition.

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

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

VIII. THE CASE IS NOT MOOT

Mootness is addressed since Respondents raised the issue in their briefs. 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, Petitioner filed her 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 Petitioner's claims under § 1-10.5-

109 but continued to conduct the recount and then certified the results, despite those objections.

Once again after the recount, the Petitioner filed her motion to stay on Thursday, August 4, 2022, although the district court claimed it was hours late. The Secretary waived service on August 8th, 2022, which was filed on the 16th by Petitioners. Additionally, the Petitioner filed a motion for preliminary injunction on Monday, August 8, 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 was allegedly moot. Respondents did claim, in their Answer Brief dated September 1, 2022, that the facts are contested, and they were ready to show such at the hearing on September 7, 2022. Respondents never provided any indication prior to that regarding contested facts, nor did they provide any information to show what facts were contested at any time. In its order, the district court outlined the facts and did not indicate that any were in dispute. As stated, it was the Respondents that did not engage in the process to resolve the issue, despite the letter they received from Petitioner on July 31, the petition filed by Petitioner and El Paso candidates on Aug. 1, and the Petitioner's pleading on Aug. 3d, but rather pushed forward to finish the recount—apparently believing that would be the end of the controversy.

Granted, the district court stated that the counties could not without an order just stop the recount, but the Secretary never even acknowledged Petitioner's concerns, much less sought to address the issue.

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

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

Further, 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). *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, the violation of law will be repeated by clerk and recorders as well as canvass boards across the state concerning the recount of an election.

Respondents admit that there exists limited caselaw relating to recounts and mootness, however, there have been matters that have proceeded in Colorado courts under C.R.S. § 1-1-113, which reviewed conduct and behavior subject to repetition. *See Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987). Thus, Colorado courts have determined that mootness cannot forever deprive plaintiffs of the opportunity of review. *Rocky Mountain Ass'n of Credit Management v. District Court*, 565 P.2d 1345, 1346 (Colo. 1977).

IX. JURISDICTION OF THE COURT

The district court claims that due to the fact the recount was completed and the results certified it has lost its jurisdiction. The law as set out by the General Assembly likely did not anticipate that the Secretary would enact rules and provide instruction that would violate or ignore the law for recounts, as the language includes, “fair, impartial, and uniform manner.” In this case, the recount cannot be considered as having been completed since a lawful recount was never conducted. Lawful elections are clearly of great public interest, as are the processes associated with them.

Petitioner has been placed in a catch 22. The recount as conducted is unlawful and therefore not a valid recount. But the district court claimed that the recount was over and thus it did not have jurisdiction. Petitioner therefore must somehow overcome the lack of jurisdiction to secure her day in court to prove that the recount was not conducted lawfully and is not valid, and that the court does have jurisdiction.

Petitioner contends that her filing of a petitioner under § 1-10.5-109 did preserve the issue, and her ability to prove the law was not followed continues as a recount that was conducted illegally is not a recount at all, by law.

X. REMAND IS UNNECESSARY EXCEPT REGARDING JURISDICTION

A remand to the district court for further findings of fact is unnecessary, except with regard to one issue, which is that of jurisdiction. As stated, the district court stated it does not have jurisdiction since the recount was completed. If the recount was not conducted lawfully, then a recount never occurred. Petitioner asks that this Court remand the case to the district court for this single issue, whether the recount was conducted lawfully. If yes, jurisdiction does not exist. But if not, then jurisdiction exists. Other than that issue, remand is not necessary. The canvass boards failed to conduct the proper testing of the devices under Colorado law and its recount is void. The Colorado Constitution authorizes the general assembly "to pass laws to secure the purity of election, and guard against abuses of the elective franchise." Colo. Const., Art. 7, § 11. The general assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto…" Colo. Const., Art 7, § 12.

If the language of a statute is clear and unambiguous, the Court's analysis is at an end. *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo.2010). Only if the Court finds the language ambiguous does it then look beyond the express statutory language for other evidence of legislative intent and

purpose, such as legislative history or other rules of statutory construction. *Id*. Here, this Court's jurisdiction to hear election cases and controversies is absolute and established by the plain language of C.R.S. §§ 1-1-113(1) and 1-10.5-109, as a part of maintaining the purity of elections from abuses of the elective franchise from systemic flaws as to its administration.

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

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

XI. PRAYER FOR RELIEF

Wherefore, the Petitioner hereby requests that this Honorable Court issue an order accepting the case for review and requiring the parties to file briefs with the

Court immediately. The Petitioner seeks relief from this Supreme Court, pursuant to C.R.S. §§ 1-10.5-109 & 1-1-113, against the Respondents, Secretary and the Clerk and Recorders, to (1) declare the previously conducted recount void; (2) require the Clerk and Recorders to give the Secretary access to all pertinent election records used in conducting the recount; (3) require the Secretary to conduct the recount; (4) require the Clerk and Recorders to become an official observer to any recount conducted by the Secretary; (5) require that all expenses incurred by the Secretary in conducting the recount be paid from the state general fund; (6) require the expenses incurred prior to this Court's order requiring the Secretary to conduct the recount to be paid by the State; (7) return all monies paid by the Petitioner to the Secretary; (9) require Secretary Griswold to officially recuse herself from any recount due to a conflict; and, (8), pursuant to C.R.S. § 1-1-113, issue an order requiring the Secretary to substantial comply with the provisions of C.R.S. § 1-10.5-102(3)(a)&(b), and (109) for such other relief as is just and proper, as the Court deems appropriate.

Respectfully submitted this 9th day of September 2022,

By: */s/ David Willson, Esq.*
David Willson

Verification

Tina Peters
PO Box 128
Grand Junction, Colorado 81502

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

Tina Peters

SUBSCRIBED AND SWORD TO ME this 9th day of August, 2022, by Tina Peters.

Witness my hand and official seal:

My Commission Expires: 2/22/2023

CASSIE LARUE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20014036823
My Commission Expires February 22, 2023