

SUPREME COURT STATE OF COLORADO 2 East 14 th Avenue, Denver, CO 80202	DATE FILED: October 18, 2021 11:17 PM FILING ID: 94CBF68758BA3 CASE NUMBER: 2021SA307
Original Proceeding District Court, Mesa County, Case No. 2021CV30214	
<p>In Re: Plaintiff-Appellees: JENA GRISWOLD, in her official capacity as Colorado Secretary of State; HEIDI JEANNE HESS, in her capacity as a Mesa County registered elector,</p> <p>v.</p> <p>Defendants-Appellants: TINA PETERS, in her official capacity as the Clerk and Recorder for Mesa County, Colorado; BELINDA KNISLEY, in her official capacity as the Deputy Clerk and Recorder for Mesa County, Colorado,</p> <p>v.</p> <p>BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY Intervenor.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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Petition for Review under C.R.S. § 1-1-113 and Opening Brief	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

- It contains 9,443 words.
It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R., p.____), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Scott E. Gessler

Scott E. Gessler, #28944

INTRODUCTION

Mesa County Clerk and Recorder Tina Peters and Mesa County Deputy Clerk and Recorder Belinda Knisley petition this Court to invoke its jurisdiction under C.R.S. § 1-1-113 to reverse the district court's order removing Clerk Peters and Deputy Clerk Knisley as Mesa County's DEO ("DEO") and Deputy Clerk, respectively. The district court's action directly contradicts Colorado statute, which states that "the county clerk and recorder shall be the chief DEO for all coordinated elections."¹ Because of the accelerated timelines involved in this election law matter, and for this Court's convenience, this *Petition* also serves as an *Opening Brief*.

ISSUES PRESENTED FOR REVIEW

This *Petition* presents three issues of public importance and first impression:

A. Tina Peters is the elected Clerk and Recorder for Mesa County, and under Colorado law the "county clerk and recorder shall be the chief designated election official for all coordinated elections."² The District Court, however, removed Clerk Peters as DEO and replaced her with an agent from the Secretary of State's office for the November 2021 coordinated election and beyond. Can the court replace the duly elected Clerk as DEO?

¹ C.R.S. § 1-1-110(3).

² *Id.*

B. The substantial compliance standard is a rule of leniency that treats technical departures from Colorado law as nonetheless substantially complying with statutory requirements. The court below, however, used the standard to impose a remedy that expressly departed from plain statutory language. Does the substantial compliance standard allow a court to impose a remedy not does *not* comply with statute?

C. Only a candidate, political party officer or representative, person making a nomination, or eligible elector may bring an action under C.R.S. § 1-1-113. In this case, the Secretary – in her official capacity – brought an action under Section 113, along with an elector. May a public official use Section 113’s expedited, summary procedures, contrary to the plain language?

NATURE OF THE CASE

Relevant Facts

The facts in this case derive from the pleadings, party assertions, and exhibits. The material facts are not contested, and accordingly the lower court decided this matter without an evidentiary hearing or oral argument.³

³ **Ex. 1**, *Order Re: Verified Petition for Relief Under C.R.S. § 1-1-113, Jena Griswold v. Peters*, Case No. 2021CV30217 (Mesa Dist. Ct., October 13, 2021).

This dispute between the Clerk Peters and the Secretary of State arises out of the “trusted build” process that took place in May 2021. The “trusted build” process is conducted by the Secretary’s office, and it updates software on a county’s electronic vote-tabulating equipment.⁴

Because of the intense controversy surrounding the 2020 general election, Clerk Peters developed concerns that the trusted build might permanently remove important election records that she was required by law to maintain and that were necessary to conduct a potential audit of the 2020 election⁵ For that reason, on May 23, 2021 – two days before the trusted build – she authorized an expert consultant to create an image of the hard drive of the electronic vote-tabulating equipment, using non-intrusive imaging software.⁶ Likewise, after the trusted build she authorized the consultant to create another image of the hard drive.⁷ Her intent was, in part, to commission a report comparing the before and after images to determine whether, in fact, important data were deleted.⁸ At the time of these actions in May 2021, the Secretary’s rules allowed “Non-county employee access” to voting equipment.⁹

⁴ **Ex. 7**, *Respondents’ Counterclaims Against Petitioner Jenna Griswold and Cross Claims Against Board of County Commissioners of Mesa County*, Ex. A, September 17, 2021.

⁵ **Ex. 8**, *Respondents’ Opening Brief*, p. 14, September 22, 2021.

⁶ **Ex. 9**, *Petitioners’ Joint Opening Brief*, p. 3, September 22, 2021.

⁷ **Ex. 8**, p. 13.

⁸ *Id.*

⁹ 8 CCR § 1505-1, Rule 20.5.4 (effective September 4, 2020).

At the trusted build on May 25 and 25, 2021, Clerk Peters also authorized the consultant to attend and observe the trusted build process.¹⁰ This was done against the guidelines emailed by the Secretary to the county office, and the Clerk's office did not transmit the consultant's background check to the Secretary's office, in violation of the applicable rule.¹¹ Further, the Mesa County elections director told the Secretary's office that the consultant was a staff member, when in fact he was not.¹² At the trusted build, the consultant only observed the process. He did not touch equipment or interfere in any way. Clerk Peters took several photos and video of the trusted build process. She provided these photos and video to the consultant, for his analysis and development of the report.¹³

There is no evidence that the Secretary was aware of the before-and-after imaging of Mesa County's electronic voter-tabulating equipment hard drive. Nonetheless, approximately three weeks after the trusted build process in Mesa County, on June 17, 2021, the Secretary revised Rule 20.5.4 to prohibit non-county employees from accessing county election equipment, in order to prevent, as she stated, "fraudits" or the "big lie."¹⁴

¹⁰ **Ex. 8 at 20.**

¹¹ **Ex. 9**, *Petitioners' Joint Opening Brief*, Ex. 1, September 27, 2021.

¹² *Id.*

¹³ **Ex. 7**, § 32.

¹⁴ **Ex. 8**, p. 19; **Ex. 7**, *See Ex. C.*

Clerk Peters' videos came to light on August 2, 2021, when a video of the trusted build was posted on one or more internet web sites.¹⁵ One week later, the image made on May 23, 2021 (before the trusted build), was also posted online.¹⁶ Clerk Peters did not authorize any of this information to be publicly disclosed or posted online.¹⁷

The public release of the images drew immediate consequences. On August 9, 2021 the Secretary ordered an inspection of Mesa County's election records and equipment.¹⁸ At this time, the Secretary further stated that Clerk Peters may have violated the law, initiating simultaneous criminal investigations by the District Attorney for the 21st Judicial District, the Colorado Attorney General, the United States Attorney's Office for the District of Colorado, and the U.S. Department of Justice, Criminal Division, Public Integrity Section.¹⁹ During the inspection, an investigator from the District Attorney's office accompanied Secretary of State personnel.²⁰ The criminal investigations remain pending, but to date Clerk Peters has

¹⁵ **Ex. 6**, *Verified Petition for Relief Under C.R.S. § 1-1-113*, ¶ 38.

¹⁶ *Id.* at ¶ 39.

¹⁷ **Ex. 7**, ¶ 41.

¹⁸ **Ex. 6**, ¶ 42.

¹⁹ **Ex. 8**, p. 1.

²⁰ **Ex. 6**, ¶ 43.

not been accused of any crime or violating any statute, either by any prosecuting authority or by the Secretary.²¹

Colorado law authorizes the Secretary to take a range of actions for equipment that does not meet appropriate standards, including full decertification of election equipment, which prohibits a county from using the equipment.²² And that is exactly what the Secretary did – on August 12, 2021, she prohibited Mesa County from using 41 pieces of election equipment.²³ At the same time, the Secretary announced that the U.S. Cyber Security and Infrastructure Security Agency (CISA), did “not view this breach as a significant heightening of the election risk landscape at this point,” and announced that Colorado had multiple security protocols in place.²⁴

On August 17, 2021, the Secretary appointed a supervisor to supervise the conduct of elections in Mesa County. Two days later, the Mesa County Board of County Commissioners declared that the Secretary had created a vacancy in the office

²¹ **Ex. 9**, p. 15, n. 3.

²² C.R.S. § 1-5-621.

²³ **Ex. 9**, p. 7; Ex. 6, *Verified Petition*, Ex. 2.

²⁴ News Release, Colorado Secretary of State, *Colorado Secretary of State’s Office Confirms that Mesa County Election Equipment Hard Drive Images were Publicly Posted; DHS Confirms Posting does not Heighten Risk to State or Nation’s Elections* (August 16, 2021) (**Ex. 2**).

of the Clerk and Recorder, and therefore the Board determined, via resolution, that it could replace Clerk Peters as the county's DEO.²⁵

At the time of the Secretary's investigation and appointment of a supervisor, Clerk Peters was out of town at a conference.²⁶ She did not, however, immediately return to Grand Junction or her office, due to the intense publicity and resulting threats to her life and physical security.²⁷ Instead she worked remotely.²⁸ But she did not interfere with the Secretary's activities or appointment of a supervisor, nor did she publicly comment on these matters in any way. She took this hands-off approach based on direct advice and direction from her attorney representing her in the potential criminal matter.²⁹

Meanwhile, the supervisor appointed by the Secretary prohibited both the Mesa County Deputy Clerk and Recorder and the county Elections Director from participating or being involved in the county elections in any manner whatsoever.³⁰ Mesa County placed Deputy Clerk Belinda Knisley on paid administrative leave for

²⁵ Ex. 10, Briefing in Support of Mesa County's 113 Claims, ¶ 39, September 22, 2021.

²⁶ Ex. 7, ¶ 43.

²⁷ Ex. 7, ¶ 46 and Ex. I, *Declaration of Tina Peters*, ¶ 2.

²⁸ *Id.*, ¶ 3.

²⁹ *Id.* ¶ 4.

³⁰ Ex. 9, p. 8.

“inappropriate conduct.”³¹ At one point, Clerk Peters directed Deputy Clerk Knisley to return to the office and download several files from Clerk Peters’ office computer, which Clerk Peters needed as part of her job duties. When Deputy Clerk Knisley tried to do this, however, she was told to leave the office (which she did), but the District Attorney promptly charged her with burglary and computer crime.³² Those charges remain pending, and that entire episode reinforced Clerk Peters’ hesitation to return to Grand Junction or comment on the matter. It was not until mid-September that Clerk Peters returned to Grand Junction or commented publicly on this matter.³³

Procedural History

Following decertification of Mesa County’s election equipment and the appointment of a supervisor, on August 30, 2021, the Secretary filed an action under C.R.S. § 1-1-113 asking the district court to declare both Clerk Peters and Deputy Clerk Knisley absent and unable to carry out their duties, and further asked the court to apply the substantial compliance test and allow the Secretary to name a new DEO. On the same day, the Board of County Commissioners filed a motion to intervene. Following a status conference and court order, the Board filed an answer, counterclaim and cross-claim on September 11, 2021. With respect to the Section 113

³¹ **Ex. 9**, p. 9; **Ex. 10**, *See* Exhibit I-3.

³² **Ex. 11**, pp. 7-8.

³³ **Ex. 11**, *See* Ex. I, ¶ 5.

Petition, the Board argued that the Secretary’s actions had created a vacancy, and therefore the Board – and not the Secretary – had authority to appoint a DEO for Mesa County.

The Court granted the unopposed motion to intervene on September 14, 2021, and ordered Clerk Peters and Deputy Clerk Knisley to file their answer and any counterclaims or cross claims six days later by September 17, 2021, which they did. Five days later, the Secretary filed a motion to transfer venue over certain counterclaims brought by Clerk Peters. Upon the parties’ motion and consent, the court has stayed action on the counterclaims, cross claims, and motion to transfer venue. Therefore, the court ruled solely on the *Petition* brought under Section 113.

Judgment Below

The lower court issued its decision on Wednesday, October 13, 2021. The opinion granted the Secretary the relief she sought. The Court declared that both Clerk Peters and Deputy Clerk Knisley were absent and unable to act as Clerk and Deputy Clerk, and the court further granted the Secretary’s request to appoint her selected DEO. This appointment authority does not end on election day, but explicitly includes “tabulation and re-tabulation of ballots using voting machines, alternate voting machines, and a hand-count.”³⁴

³⁴ **Ex. 1**, p. 22.

The three-day deadline for appeal under Section 113 fell on Saturday, October 16, 2016, the deadline was thereby extended by C.R.S. § 1-1-106(2) until Monday, October 18, 2016. Accordingly, this appeal is timely filed under C.R.S. § 1-1-113(3).

SUMMARY OF ARGUMENT

This Court should review this this matter, because it involves three very important issues of public concern; (1) whether the Secretary may remove a Clerk and Recorder as DEO, (2) whether the substantial compliance standard allows a court to order removal of an elected officer in direct contravention of Colorado statute, and (3) whether the Secretary, in her official capacity, may initiate summary proceedings under Section 113. If allowed to stand, the district court ruling will fundamentally alter election administration and application of Colorado's election laws.

Colorado law unambiguously mandates that a county clerk and recorder fulfill the duties as the county DEO, and a court may not override this statutory mandate. Likewise, Colorado law does not give a court authority to declare that an elected official is unwilling or unable to carry out her duties, based on a past violation of election rules. As a practical matter, Clerk Peters and Deputy Clerk Knisley are willing and able to perform their duties, and the Secretary's ability to supervise the conduct of elections does not allow her to remove Clerk Peters as DEO.

The lower court misapplied the substantial compliance standard. As an initial matter, compliance with the Election Code means that Clerk Peters must serve as county DEO. Likewise, applying the substantial compliance standard would result in an order to follow the Election Code, which in this case means complying with the statutory mandates. Here, the Secretary has alleged rule violations only, and she has already imposed adequate remedies under her regulatory authority – the decertification of equipment and appointment of a supervisor.

As a public official, the Secretary cannot seek relief under Section 113 by that statute’s plain terms, and she may not combine Section 113 with another procedure under the Election Code. An individual voter may not use a Section 113 to bar an elected official from carrying out her duties, and the Secretary’s supervisory authority does not allow her to remove an elected Clerk and Recorder.

ARGUMENT

I. This Court should review Peters’ appeal.

This case involves three issues of statewide importance that will profoundly affect the conduct of elections in Colorado. First and foremost, for the first time in Colorado history the district court granted the Secretary authority to remove a DEO. This fundamentally alters the statutory framework for election administration. Under the Colorado Election Code, county clerks have primary responsibility for

administering of elections, while the Secretary has supervisory authority over elections. Thus “[a]s the chief election official for the county, the county clerk and recorder shall be the chief designated election official for all coordinated elections.”³⁵

By contrast, the Secretary of State may “supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state.”³⁶ But the lower court permitted the Secretary to assume primary responsibility for administering elections, by removing and replacing the DEO.

Second, this case determines how Colorado’s longstanding substantial compliance test may be applied to elections. This Court established the substantial compliance test in the mid-1990’s, and that test has been explicitly incorporated into the Election Code.³⁷ How courts interpret the test has major consequences for how elections may be conducted. Until the district court’s order, the substantial compliance standard has always been used as a method of interpretation by which a court will deem a person in compliance with statutory requirements, even if the person fails to meet all technical, statutory requirements. In other words, the court accept non-compliance as nonetheless complying with the statute. But in this case, the court used the substantial compliance standard to order a remedy that did *not* comply

³⁵ C.R.S. § 1-1-110(3).

³⁶ C.R.S. § 1-1-107(1)(a).

³⁷ C.R.S. § 1-1-103(3).

with statute. Namely, the court declared that a technical violation created a vacancy, on the theory that the infraction meant that Clerk Peters and Deputy Clerk Knisley were unwilling or unable to carry out their duties, thus justifying the removal their removal as DEO and Deputy Clerk, respectively. Under this reasoning, any future breach or neglect of duty by a clerk and recorder concerning an election rule can result in her complete removal as DEO. This is much different than a court ordering an election official to comply with the Election Code – the only remedy allowed by the statute.

Third is a major shift in procedure. On several occasions this Court has been asked to interpret the summary election challenge procedures contained in C.R.S. § 1-1-113. This case presents a radical departure from both statute and controlling case law, and if left to stand it will allow the Secretary to use Section 113 in a manner never intended by the legislature or approved by this Court. Under Section 113, only a private individual (candidate, party representative, nominator, or eligible elector) may bring a Section 113 action. Yet here, the Secretary brought an action in her official capacity. Further, the lower court based its rulings partly on the Secretary's authority under Section C.R.S. § 1-1-107 which allows the Secretary to seek an injunction to enforce the code. This directly contravenes the Court's rulings in *Frazier v. Williams*,³⁸

³⁸ *Frazier v. Williams*, 401 P.3d 541 (Colo. 2017).

which prohibited combining a Section 113 proceeding with another cause of action, and *Carson v. Reiner*,³⁹ which prohibited use of Section 113 when a more specific procedure in the election code existed.

Despite the impending odd-year coordinated election, this Court has adequate time to review the matter because the scope of the district court’s order removes Clerk Peters as DEO not only for the November 2, 2021, election date, but also for post-election activities that include, according to the Court’s order, “tabulation and re-tabulation of ballots using voting machines, alternate voting machines, and a hand-count.”⁴⁰ Because some of these specific “re-tabulation” activities are neither prescribed nor defined in Colorado statute, the removal of Clerk Peters as DEO does not have a specific termination date and is therefore an ongoing harm. Furthermore, it has recently come to light that the Board of County Commissioners has begun hiring permanent employees to run elections now and into the future, thus permanently divesting Clerk Peters of her authority to hire personnel as the DEO.⁴¹

II. A Court may not declare an “absence” and remove a duly elected Clerk; the Secretary’s powers are limited to enforcing specific provisions in the Election Code.

A. Standard of Review

³⁹ *Carson v. Reiner*, 370 P.3d 1137 (Colo. 2016).

⁴⁰ **Ex. 1**, p. 22.

⁴¹ Job Bulletin, Mesa County, *Mesa County Invites Applications for the Position of: Elections Specialist* (October 15, 2021) (**Ex. 3**).

The district court erred as a matter of law in determining that it, or the Secretary, has authority to replace a DEO. This court reviews the statutory interpretation of election law *de novo*.⁴² Further, due to the accelerated timeline and lack of factual disputes, the parties have agreed that the assertions in the pleadings and pleading exhibits established the undisputed, material facts.

B. The court may not override Colorado statute, which mandates that the clerk and recorder serve as the county DEO.

Colorado statute directly, specifically, and without qualification states that “[a]s the chief election official for the county, the county clerk and recorder shall be the chief DEO for all coordinated elections.”⁴³ The district court cannot enter an order that directly violates this explicit statutory mandate.

“In construing a statute,” this Court “seeks to give effect to the General Assembly's intent by according words and phrases their plain and ordinary meanings. If the statutory language is clear,” the Court “appl[ies] it as written” and “need not resort to interpretive rules of statutory construction.”⁴⁴ Here, the language is clear and unambiguous. First, Section 110(3) specifically identifies the county clerk and

⁴² *Griswold v. Warren*, 462 P.3d 1081, 1084 (Colo. 2020).

⁴³ C.R.S. § 1-1-110(3).

⁴⁴ *State Farm Mut. Auto. Ins. Co. v. Fisher*, 418 P.3d 501, 504 (Colo. 2018) (citations and internal quotations omitted).

recorder. Second, it states that the clerk and recorder “shall” serve as the DEO and use of the term “shall” has long been held to deem mandatory action.⁴⁵ And finally, the duties are broad in their sweep, applying to “all” coordinated elections.

The district court noted that “The [Board] also requests that the Court affirm Williams as the DEO for the November 2021 coordinated election.”⁴⁶ But the Board does not have statutory authority to appoint a DEO, and it erroneously relies on the Election Code *definitions*, which state that the DEO “*means* the member of a governing board, secretary of the board, county clerk and recorder, or other person designated by the governing body as the person who is responsible for the running of an election.”⁴⁷ This definition is not a grant of appointment power, but rather a description. The word “means” reinforces the descriptive nature of Section 104(8), which reflects the Code’s applicability to many different types of elections, including general, primary, congressional vacancy, school district, special district, ballot issue, other authorized elections, and any municipal election conducted as part of a coordinated election.⁴⁸ But with respect to county and state elections, Section 110(3) makes clear — in mandatory terms — that the DEO is the county clerk and recorder.

⁴⁵ See, e.g., *People v. District Court, Second Judicial District*, 713 P.2d 918, 921 (Colo. 1986).

⁴⁶ **Ex. 1**, p. 2.

⁴⁷ C.R.S. § 1-1-104(8) (emphasis supplied).

⁴⁸ C.R.S. § 1-1-102(1).

Canons of statutory interpretation require courts to “give consistent effect to all parts of a statute and construe each provision in harmony with the overall statutory design.”⁴⁹ Section 110(3) specifically grants sole authority to the county clerk and recorder (the county clerk and recorder *shall* be the county’s DEO), while Section 104(8) recognizes the clerk’s authority as the “DEO.” In short, one must “give effect” to the “special, or more specific, provision” in Section 110(3),⁵⁰ compared to Section 104(8)’s vague reference to a “governing body.” Thus, the specific, mandatory language of Section 110(3) establishes the clerk and recorder as the DEO.

C. The Court may not declare a vacancy or absence due to a “breach of duty, neglect, or wrongful act.”

The district court ruled that because Clerk Peters and Deputy Clerk Knisley committed a “breach and neglect of duty and other wrongful acts” they were “unable or unwilling to appropriately perform the duties of the Mesa County DEO.”⁵¹

The district court has no authority to remove a DEO (or her deputy) due to a “breach and neglect of duty and other wrongful acts.” That language is directly drawn from Section 113, which states that, upon a “finding of good cause,” “a person

⁴⁹ *In re Associated Governments of Northwest Colorado v. Colorado PUC*, 275 P.3d 646, 649 (Colo. 2012).

⁵⁰ *Carson*, 370 P.3d at 1142.

⁵¹ **Ex. 1** at 22.

charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act”⁵² a 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.⁵³

This language limits the court to an order that the respondent comply with the Election Code, by either performing or halting certain action. And by use of the word “shall,” the statute mandates that the court merely order compliance with the Code. Likewise, Section 113 only allows a court to issue an order requiring substantial compliance with the provisions of *this code*.⁵⁴ And “this code” means the “Uniform Election Code of 1992,” which constitutes Articles 1 to 13 of Title I.⁵⁵

Bluntly put, the Colorado Election Code contains no provision mandating an election official resign or withdraw from certain duties, regardless of any breach, neglect or wrongful act. Indeed, the Secretary forthrightly admits that the Code “does not directly authorize either the Secretary of State or the Board of County

⁵² C.R.S. § 1-1-113(1).

⁵³ *Id.* (emphasis supplied).

⁵⁴ *Id.*

⁵⁵ C.R.S. § 1-1-101.

Commissioners to replace a county clerk, even one who has violated her duties as the chief designated election officer.”⁵⁶

By contrast, other Colorado statutes provide very explicit, and limited, grounds for removing a clerk and recorder through a vacancy: death, resignation, removal, residency, refusal of oath or bond, voided election or appointment, or incapacitation.⁵⁷ None of these apply, and indeed the district court did not cite any of these factors. Even if it did, activities such as spending time outside of the county cannot create a vacancy.⁵⁸ In short, Colorado law contains no statutory, regulatory, or common law authority allowing a district court to declare a vacancy due to a breach or neglect of duty or wrongful act.

Colorado law also contains specific provisions for a Clerk’s absence, which is defined as “a failure to be present at a usual or expected place.”⁵⁹ If the Clerk and Recorder is absent, the Deputy Clerk and Recorder “shall perform all the duties of the county clerk during such absence or until such vacancy is filled.”⁶⁰ And the Election

⁵⁶ **Ex. 9** at 18.

⁵⁷ C.R.S. § 30-10-105(1)(a) through (g).

⁵⁸ *Goodwin v. Crockett*, Case No. 90-1286, 1992 U.S. App. LEXIS 6115, at *6 (10th Cir. Mar. 25, 1992).

⁵⁹ Absence, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/absence> (last visited October 18, 2021).

⁶⁰ C.R.S. § 30-10-403.

Code is very specific that the Deputy Clerk and Recorder, not the court or the Secretary, may take over for the Clerk when she is absent:

All powers and authority granted to the county clerk and recorder by this code may be exercised by a deputy clerk in the absence of the county clerk and recorder or if the county clerk and recorder for any reason is unable to perform the required duties.⁶¹

And Colorado law expressly vests authority to appoint a Deputy Clerk with the Clerk. Specifically, “[e]very county clerk shall appoint a deputy, in writing, under the county clerk’s hand, and shall file such appointment in the office of the county clerk.”⁶² Accordingly, the clerk – and no one else -- has the authority and the duty to appoint a deputy clerk.

Finally, the lower court did not have authority to declare an absence and remove and replace a Clerk or Deputy Clerk. No statute gives a lower court this authority, and C.R.C.P. 57 likewise does not constitute sufficient procedural authority for a district court to make a declaration of inability or unwillingness to serve. Relief under C.R.C.P. 57 is a “remedy . . . [that] neither expands nor contracts the jurisdiction of Colorado’s courts.”⁶³ A petitioner must still plead a valid claim, because declaratory and injunctive relief were “never intended to be a substitute for, or a short cut to, proper pleading.”⁶⁴

⁶¹ C.R.S. § 1-1-110(2).

⁶² *Id.*

⁶³ *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 41 (Colo. 1995).

⁶⁴ *Home Owners’ Loan Corporation v. Meyer*, 136 P.2d 282, 285 (Colo. 1943).

And with respect to this 113 proceeding, it well established that “[a] declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case.”⁶⁵ Section 113 is exactly this type of special statutory proceeding, and controversies under the election code are that “special type of case.” By its plain language, Section 113 does not allow for declaratory relief. It states that “the district court *shall issue an order* requiring substantial compliance with the provisions of this code.”⁶⁶ And that “the procedure specified in this section shall be the *exclusive* method for the adjudication of controversies.”⁶⁷

D. Clerk Peters and Deputy Clerk Knisley are willing and able to perform their duties.

Even though the court declared that Clerk Peters and Deputy Clerk Knisley were “unable or unwilling” to “appropriately” perform their duties, this was based solely on their past actions, without regard to their capabilities and willingness. As a practical matter, both have a track record of competence, having successfully run the following seven elections in less than two and one-half years:

- The Grand Junction municipal election, held on April 2, 2019.
- The 2019 odd year coordinated election, held on November 5, 2019.

⁶⁵ *Public Service Com. v. Wycoff Co.*, 344 U.S. 237, 243 (1952).

⁶⁶ C.R.S. § 1-1-113(1).

⁶⁷ C.R.S. § 1-1-113(4).

- The Colorado presidential primary election, held on March 3, 2020.
- The Colorado primary election, held on June 28, 2020.
- The Colorado general election, held on November 3, 2020.
- The Grand Valley Pest Control election, held on February 12, 2021.
- The Grand Junction municipal election, held on April 6, 2021.

And although Clerk Peters had been working remotely due to numerous safety threats and as directed by security professionals retained by her attorney,⁶⁸ she is physically in Grand Junction and prepared to serve as DEO.⁶⁹ Practically, Mesa County has leased new equipment to go forward with the 2021 election,⁷⁰ and Clerk Peters is prepared to cooperate with the supervisor appointed by the Secretary as her agent going forward.⁷¹

Frankly, the only impediment to Clerk Peters and Deputy Clerk Knisley performing their duties are the Secretary and the Board of County Commissioners, who have blocked the two of them from conducting the election:

⁶⁸ **Ex. 11**, See Ex. I; **Ex. 11**, Declaration of S. Michael McColloch (Ex. J).

⁶⁹ *Id.*

⁷⁰ *Mesa County Second Amendment to and Extension of Voting System and Managed Services Agreement by and Between Dominion Voting Systems, Inc. and Mesa County, Colorado*, August 24, 2021 (**Ex. 4**).

⁷¹ **Ex. 11**, See Ex. I.

- The Secretary issued Order 2021-03, which she admits “bars” Deputy Clerk Knisley from performing her duties.⁷²
- Mesa County has attempted to prohibit both the Deputy Clerk and the elections director from entering the building or using their work computers. As justification, Mesa County has claimed “inappropriate” behavior but not provided any detail or content beyond vague, inchoate accusations.
- When Clerk Peters directed Deputy Knisley to retrieve necessary documents from a county work-computer at the Clerk’s office, Mesa County kicked Deputy Knisley out of the building and filed criminal charges.
- The Board of County Commissioners has disabled Clerk Peters’ key card access to the Clerk and Records’ elections office space, advised her that she cannot enter the elections division, and covered the windows of the elections division with paper so that no one (including Clerk Peters) can observe any election-related activities.⁷³
- And this heavy-handedness takes place against a backdrop of numerous security threats to Clerk Peters’ well-being,⁷⁴ and one of the people appointed by the

⁷² **Ex. 9** at 17.

⁷³ **Ex. 11**, *See* Ex. I.

⁷⁴ *Id.*

Secretary has a proven track record of hostility toward Clerk Peters and has worked to recall Clerk Peters from office.⁷⁵

The district court fashioned a legal construct to declare Clerk Peters and Deputy Clerk Knisley unwilling and unable to perform their duties. This legal construct bears no relation to those officials' actual willingness and ability.

E. The Secretary's supervisory powers do not grant her the ability to replace a DEO.

Lastly, the lower court also issued an injunction under C.R.S. 1-1-107(2)(d). The Secretary's authority is set forth in C.R.S. § 1-1-107, and she has authority to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state."⁷⁶ This authority is confined to supervising the "conduct" of an election, not removing or replacing officials. The word "supervise" does not include the power to remove or replace personnel. It is limited to "coordinate, direct and inspect continuously and at first hand the accomplishment: oversee the powers of direction and decision the implementation of one's own or another's intention."⁷⁷ Accordingly, the Secretary may oversee clerks to ensure that

⁷⁵ **Ex. 11**, *See, e.g.*, Nancy Lofholm, *The attempted recall of Mesa County's clerk comes up short. But the battle over her office isn't over*, Colorado Sun (August 3, 2020) (Ex. K).

⁷⁶ C.R.S. § 1-1-107(1)(a).

⁷⁷ Supervise, Webster's Third New International Dictionary, Unabridged (1993) 2296.

they comply with election laws and regulations. But this is a far cry from removing and replacing a DEO in contravention of a mandatory statute.

Section 107 also precisely identifies the Secretary’s authority – and limitations – on her enforcement powers. She may “enforce the provisions of *this code* by injunctive action brought by the attorney general in the district court for the judicial district in which any violation occurs.”⁷⁸ As with Section 113, any enforcement action must be grounded in statute. She may enforce a statute, but in this case no statute grants authority to remove and replace a clerk and recorder. And the Secretary may not create new procedures that are not authorized by law.⁷⁹

III. The substantial compliance test requires compliance *with* the statute establishing the Clerk as DEO; it does not authorize a court to remove the Clerk from her statutory duties.

A. Standard of Review

The district court erred as a matter of law in determining that the substantial compliance standard justifies removal of a clerk and recorder as DEO. This court reviews the application of the substantial compliance standard *de novo*, as a matter of statutory interpretation.⁸⁰ Further, this case presents undisputed facts.

B. Compliance with the election code requires Clerk Peters to serve as Mesa County’s DEO, as mandated by Section 110(3).

⁷⁸ C.R.S. § 1-1-107(2)(d) (emphasis supplied).

⁷⁹ *De Koevend v. Board of Education*, 688 P.2d 219, 229 (Colo. 1984).

⁸⁰ *Griswold*, 462 P.3d at 1084.

At its core, substantial compliance is a way of ensuring elected officials adhere to the Election Code. It is designed to *require* an election official to perform duties under the code. But instead, the lower court used the standard to *prohibit* an elected official from carrying out her duties. According to the court’s order, “substantial compliance with the provisions of the Code require [*sic*] an injunction prohibiting Peters and Knisley from performing the duties of the DEO.”⁸¹ But compliance with the code means that Clerk Peters must continue to serve as the county’s DEO. Removing her as an official is clear *non-compliance* with the code.

Despite the substantial compliance language in Sections 103 and 113, “there are some aspects of the Code that simply cannot be subject only to substantial compliance.”⁸² Where a statutory provision is “clear, direct and specific,”⁸³ or “clear and unequivocal”⁸⁴ substantial compliance will not apply, and strict compliance applies. Thus, substantial compliance substantial did not excuse the signature requirements of 1,500 signatures per congressional district for state candidate petitions,⁸⁵ and “residency is not a mere technical requirement that is subject to

⁸¹ **Ex. 1**, p. 22.

⁸² *Griswold*, 462 P.3d at 1085.

⁸³ *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994).

⁸⁴ *Griswold*, 462 P.3d at 1086.

⁸⁵ *Id.*

substantial compliance. . . . A person either is a resident for purposes of the Election Code or he is not.”⁸⁶

Compliance with the Code means that only Clerk Peters can be the DEO. Section 110(3) states “the county clerk and recorder *shall* be the chief DEO for all coordinated elections.”⁸⁷ This statute is “clear, direct, and specific” and “clear and unequivocal.” Use of the word “shall” is mandatory language,⁸⁸ and accordingly the clerk and recorder must serve as the chief DEO for all coordinated elections, like the upcoming odd year coordinated election. Neither the Secretary, nor an elector, nor the Intervenor may designate someone else in place of the statutorily mandated county clerk and recorder.

Likewise, Colorado statute is clear, direct, specific and unequivocal that the *deputy* clerk and recorder has unfettered discretion to exercise the “power and authority” of the clerk and recorder “in the absence of the county clerk and recorder or if the county clerk and recorder for any reason is unable to perform the required duties.”⁸⁹ This language reflects the general authority of the deputy clerk and recorder to assume *all* of the clerk’s responsibilities, “in case of the absence or disability of the

⁸⁶ *Kuhn v. Williams*, 418 P.3d 478, 489 n. 4. (Colo. 2018).

⁸⁷ C.R.S. § 1-1-110(3).

⁸⁸ *See, e.g., Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 700 (Colo. App. 2010).

⁸⁹ C.R.S. § 1-1-110(2).

county clerk, or in case of a vacancy in the office thereof.”⁹⁰ Because these provisions are clear, direct, specific, and unequivocal, the substantial compliance test does not apply. Furthermore, the deputy clerk’s appointment and authority to assume the clerk’s duties fall outside of the election code, and accordingly outside of the substantial compliance standard and outside of the boundaries of a Section 113 proceeding.

C. The court improperly relied upon the substantial compliance test to fashion a remedy contrary to the election code.

This Court developed the substantial compliance standard to excuse technical violations of the election code, in part to “avoid potential constitutional difficulties” – particularly in areas where voters exercise their “fundamental rights.”⁹¹ For example, in *Erickson v Blair* the Court overlooked certain legal noncompliance, because “[a]bsentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote.”⁹²

The substantial compliance standard is one of leniency – simply put, courts allow conduct that does not strictly comply with a statute. In other words, the test frowns upon unduly rigid enforcement of election laws. Accordingly, when

⁹⁰ C.R.S. § 30-10-403.

⁹¹ *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993).

⁹² *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983).

considering laws of a more technical nature, “courts should construe such provisions to be directory in nature and not mandatory.”⁹³ This rule of leniency is reflected in C.R.S. 1-1-103(3), which states “Substantial compliance with the provisions or intent of this code shall be *all* that is required for the proper conduct of an election to which this code applies.”⁹⁴ Use of the word “all” indicates that substantial compliance is less than full (or strict) compliance with the code.

This Court has traced the common law roots of the substantial compliance standard back to the late 1800’s,⁹⁵ but it did not fully develop the doctrine until a trio of cases in 1993-1994. In *Meyer v. Lamm*, this Court accepted write-in votes for a candidate, even though the write-in votes did not strictly match the candidate’s first and last name.⁹⁶ The next year, in *Bickel v. City of Boulder*, it held that a district need only substantially comply with certain ballot notice requirements for a tax increase. Most importantly, *Bickel* set out the three-part test to determine whether one has “substantially complied” with the Code. This test looks at (1) the extent of noncompliance (isolated examples verses systematic disregard), (2) whether the

⁹³ *Bickel v. City of Boulder*, 885 P.2d 215, 226, (Colo. 1994).

⁹⁴ C.R.S. § 1-1-103(3) (emphasis supplied).

⁹⁵ *Meyer v. Lamm*, 846 P.2d 862, 877 (Colo. 1993).

⁹⁶ *Id.*

purpose of the provision was met despite noncompliance, and (3) whether there was a good faith effort to comply with the law.⁹⁷

Lastly, in *Loonan v. Woodley* (decided the same year) this Court applied the substantial compliance test but determined that petition circulators' use of an outdated and incorrect circulator affidavit did *not* substantially comply with Colorado law.⁹⁸

Shortly after this trio of cases, the Colorado General Assembly in 1996 formally incorporated this doctrine into the Colorado Election Code, as C.R.S. § 1-1-103(3).⁹⁹ In doing so, the General Assembly adopted the substantial compliance test to “make[] substantial compliance with the Code sufficient for properly conducting an election.”¹⁰⁰

As a starting point, any remedy under Section 113 or Section 107 is limited to compliance with the Election Code. Substantial compliance with the provisions or intent of *this code* shall be all that is required for the proper conduct of an election to which *this code* applies.”¹⁰¹ Accordingly, “this court has jurisdiction to consider only

⁹⁷ *Bickel*, 885 P.2d at 227.

⁹⁸ *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994).

⁹⁹ H.B. 96-1061, 60th General Assembly, 2d Reg. Sess. (Colo. July 1, 1996). C.R.S. § 1-1-103(3) (1996).

¹⁰⁰ Office of Legislative Legal Services, Digest of Bills Enacted by the Sixtieth General Assembly (June 1996), p. 206.

¹⁰¹ C.R.S. 1-1-103(3).

claims of ‘breach or neglect of duty or other wrongful act’ *under the Colorado Election Code* when a petition is brought through a section 1-1-113 proceeding.”¹⁰²

If substantial compliance were to apply here, a court must first identify the statute that the official has violated (or threatens to violate) and must therefore comply with. Here, that statute is Section 110(3) – the statutory mandate that the Clerk serve as the county’s DEO for coordinated elections.

To properly apply the substantial compliance standard in this case, a court would consider accusations the Clerk Peters was not acting (or threatened to refuse to act) as the DEO. For example, the court would look at Clerk Peters physical absence and apply the three-part test -- namely (1) the extent of her inability to perform her functions, (2) her reasons for working remotely, and (3) whether her actions met the General Assembly’s purposes in requiring the Clerk to serve as the DEO.

Then, the court would either rule (1) that Clerk Peters substantially complied with the statute, or (2) that she did not comply with the statute and issue an order requiring compliance. In no instance would the Court find non-compliance (that she was not acting as DEO) and then order *further* non-compliance, by prohibiting her from serving as DEO.

¹⁰² *Kuhn*, 418 P.3d at 489 (Colo. 2018) (emphasis in original).

This understanding of the substantial compliance test shows how deeply the district court erred. The court’s order did not identify any Election Code provision that Clerk Peters failed to follow. The court did not apply the three-part test. And finally, the court did not issue an order mandating compliance with the code – the only remedy available under Section 113.

D. Removal of Clerk Peters is inappropriate, because the Secretary has exercised already her authority to adequately remedy any violations.

The Secretary has several avenues by which she can enforce the Election Code. First is authority to “promulgate, publish, and distribute, . . . such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws.” Second the Secretary may prohibit use of or decertify voting equipment.¹⁰³

As relevant here, the Secretary alleged several rule violations, but she did not identify a single statutory violation. The *Petition* alleges four violations: (1) Rule 20.3.1 (failure to maintain adequate documentation of chain of custody of voting machine), (2) Rule 20.5.4 (failure to ensure a secure process for the May 25 trusted build), (3) Allowing unauthorized individuals to be present during the May 25 trusted build, and

¹⁰³ C.R.S. § 1-5-621(4).

(4) Failing to cooperate with state and local election officials' efforts to respond to and minimize the damage caused by the above breaches.¹⁰⁴

And the *Joint Opening Brief* alleged five additional rules that were “were violated or implicated;”¹⁰⁵ (1) Rule 20.3.2 (uninterrupted chain of custody from trusted build to present), (2) Rule 20.5.3(a) (access to code, lock, or combination restricted to employees), (3) Rule 20.5.5 (access to place where election management software is being used, limited to authorized officials or watchers), (4) Rule 20.6 (voting system internal controls), and (5) Rule 20.9 (requirement for video surveillance).¹⁰⁶

Several of these nine allegations do not claim that the Clerk violated any rule (such as allowing unauthorized individuals at the trusted build, or failing to cooperate), and others are not violations on their face. For example, Rule 20.9 requires video surveillance of election equipment starting 90 days prior to an election and continuing 30 days after an election. As applied to the six elections starting in November 2019, the clerk's office had to maintain continuous video surveillance (except for seven days) from August 6, 2019, until May 21, 2021. Deputy Clerk Knisley therefore scheduled video equipment to be turned off from mid-May until early August 2021, as explicitly authorized by the Rule 20.9.

¹⁰⁴ **Ex. 6**, ¶ 55

¹⁰⁵ **Ex. 5** at 12 (emphasis added).

¹⁰⁶ *Id.*

Likewise, in May 2021, Rule 20.5.4 authorized the Clerk to allow non-employees to handle election equipment.¹⁰⁷

The election rules already contain remedies for violations of Rule 20. Rule 20.15 is entitled “remedies” and identifies several authorized actions for violating rule 20. Likewise, Rule 21.7 expressly allows the Secretary to decertify equipment that does not meet certain standards. More broadly the Secretary has statutory authority to decertify equipment under C.R.S. § 1-5-621. And of course, the Secretary has supervisory authority over the conduct of elections under C.R.S. § 1-1-107(1)(a).

Ultimately, district court found three areas of wrongdoing; (1) that Clerk Peters and Deputy Clerk Knisley “failed to follow the rules and orders of the Secretary and the Code,” (2) that they did not “take adequate precautions to protect confidential information” (such as photos of passwords and the May 23, 2021 image), and (3) that they were “untruthful” because the Clerk’s office misled the Secretary’s office into believing that the consultant retained by Clerk Peters was in fact an employee.¹⁰⁸

To be sure, the district judge pejoratively described Clerk Peters’ arguments as “rationalizations.” But the fact remains that the Secretary took dramatic action that adequately addressed each item in the court’s order. First and foremost, the Secretary

¹⁰⁷ **Ex. 7, 8** CCR § 1505-1, Rule 20.5.4 (effective Sept. 4, 2020) (*Respondents’ Counterclaims*, Ex. B).

¹⁰⁸ **Ex. 1** at 19.

decertified 41 pieces of equipment. To understand the gravity of this remedy, no Secretary has decertified equipment since December of 2017.¹⁰⁹ And this action adequately addressed any release of confidential passwords, which only affected Mesa County’s equipment and according to the Secretary did not pose a “significant heightening of the election risk landscape.”¹¹⁰

Second, the Secretary appointed a supervisor over Mesa County’s elections, and this supervisor can ensure that the office follows applicable rules. Likewise, the supervisor can monitor and promptly address any potential future “untruthfulness.” Indeed, the two people accused of being untruthful – the elections director (for sending an email) and the Deputy Clerk (for failing to correct the email) have been barred from participating in Mesa County’s elections.¹¹¹ And lastly, the Secretary has issued several orders which specifically impose certain requirements on the Mesa County Elections office.

The remedial actions taken by the Secretary are the most aggressive and robust action available, and they adequately address any concerns raised in Mesa County. Indeed, the scope of these remedial measures shows that summary removal of a clerk and recorder is contrary to statute, unnecessary, and improper.

¹⁰⁹ **Ex. 5.**

¹¹⁰ **Ex. 2.**

¹¹¹ **Ex. 6, See Ex. 3.**

But now the Secretary wants to go beyond her own rules and statutory authority, and instead impose another remedy. More broadly, it is difficult to contemplate how a failure to follow rules or protect confidential information – failures that occur throughout government on a regular basis – should lead to summary removal of an elected official.

And “untruthfulness” in an elected official has never been a basis for summary judicial removal. If so, it would lead to endless litigation and frequent removal of public officials. In this matter it seems that the Board – or someone connected to it – also acted “untruthfully.” Specifically, in its September *Answer Brief*, filed September 27, 2021, the Board argued that Clerk Peters “[f]ailed to affirmatively take any actions whatsoever to secure new voting systems components after Election Order 2021-02 was issued,” and “[f]ailed to appear before the BoCC when they negotiated for and secured new voting system equipment.”¹¹² So apparently someone on or connected with the Board “untruthfully” affixed Clerk Peters’ signature to a contract extending a lease for voting equipment until 2029, without her knowledge or consent.¹¹³

The ultimate decision for whether an elected official retains his or her job lies with the electorate. That means the voters of Mesa County get to decide if their clerk

¹¹² **Ex. 12**, *Response in Support of Mesa County’s C.R.S. § 1-1-113 Claims*, p. 4, September 27, 2021.

¹¹³ **Ex. 4**, p. 3.

and recorder may continue to serve as the DEO, or alternatively the elected representatives at the General Assembly may redefine the clerk and recorders' duties and authorities under the Election Code.

IV. The Secretary may not file a 113 petition, nor may she obtain the benefits of a 113 action by combining it with a different procedure.

A. Standard of Review.

Review is de novo, because “[t]he nature and scope of proceedings permitted by section 1-1-113(1) is clearly a matter of statutory interpretation.”¹¹⁴

B. Under plain language of the statute, the Secretary has no standing to bring a Section 113 action

The Secretary “initiate[d] this § 113 action”¹¹⁵ and the Board of County Commissioners also brought its claims under Section 113.¹¹⁶ But the legislature has established an expedited, summary proceeding to allow private individuals the ability to quickly and expeditiously obtain relief – not to give a statewide elected official a tool to sue other officials to enforce her rules, under the claim that “Colorado’s electorate cannot wait.”¹¹⁷

¹¹⁴ *Carson*, 370 at 1140.

¹¹⁵ **Ex. 9** at 20.

¹¹⁶ **Ex. 12** at 2.

¹¹⁷ **Ex. 6**, ¶ 3.

Words and phrases are construed according to “grammar and common usage,” and “[i]f the statutory language is clear and unambiguous, [a court] will apply it as written—venturing no further.”¹¹⁸ Under the plain language of the statute, only private parties may bring an action under Section 113:

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 .
..¹¹⁹

This section does not create a cause of action, but rather is a procedural vehicle only.¹²⁰ Those entitled to avail themselves of this procedure are limited to (1) candidates, (2) political party representatives, (3) persons who have made nominations, and (4) eligible electors. It does not allow an official to bring an action against another official. Simply put, the Secretary -- acting in her official capacity -- is not and cannot be one of these private actors.

Indeed, the Colorado Supreme Court has recognized that Section 113 applies only to a petition filed by an eligible elector. The Section:

requires the district court, upon a finding of good cause, to issue an order requiring substantial compliance with the provisions of the election code

¹¹⁸ *Grismold*, 462 P.3d at 1084 (internal quotation and citation omitted).

¹¹⁹ C.R.S. § 1-1-113(1) (emphasis supplied).

¹²⁰ *Carson*, 370 P.3d at 1141.

whenever *any eligible elector* files a verified petition alleging that a person charged with a duty under the code has committed a breach or neglect of that duty or other wrongful act.¹²¹

In short only private parties – not public officials – may benefit from the expedited procedures in Section 113.

C. The court may not grant relief under Section 107 as part of a Section 113 proceeding.

Section 113’s summary proceedings are the exclusive manner for adjudicating a breach or neglect of duty:

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.¹²²

This court has interpreted the term “exclusively” in a very expansive fashion, and both *Carson v. Reiner* and *Frazier v. Williams* hold that a court cannot mix and match other election provisions with a Section 113 action. In *Carson v. Reiner*,¹²³ a petitioner sought to bring a Section 113 action to challenge the eligibility of a candidate to stand for election. But this Court denied relief under Section 113, because a more specific provision provided jurisdiction to challenge a candidate’s eligibility, and because that specific provision conflicted

¹²¹ *Id.* (emphasis supplied).

¹²² C.R.S. § 1-1-113(4) (emphasis supplied).

¹²³ *Carson*, 370 P.3d at 1137.

with Section 113.¹²⁴ Here, Section 107(2)(d) is a specific grant of authority to the Secretary to seek injunctive relief to enforce the code, and Sections 107 and 113 directly conflict with one another; Section 107 only gives the Secretary authority to seek injunctive relief only. By contrast, Section 113 grants eligible electors the ability to seek compliance with the code, using a summary procedure that substantially departs from normal litigation.

Just as importantly, proceedings under Section 107(2)(d) are *not* summary proceedings like Section 113. As such, Clerk Peters is entitled the normal procedural safeguards that apply to standard civil litigation – the opportunity to conduct discovery, file motions under Rule 12, and litigate the issue in an orderly way. Here, Clerk Peters was denied standard procedural safeguards applicable to litigation under Section 107(2)(d).

In *Frazier*, this Court also rejected an effort to combine Section 113 with constitutional claims arising from the same conduct, due in part to “substantial inconsistencies between [42 U.S.C. §] 1983 and section 1-1-113 proceedings.”¹²⁵ Those same inconsistencies apply here – Section 113 has unique appellate procedures and strictly limits the class of complainants who can utilize the

¹²⁴ *Id.* at 1141

¹²⁵ *Frazier*, 401 P.3d at 545.

procedure. Indeed, Section 113 and Section 107 identify two different and mutually exclusive types of complainants.

In *Carson*, this Court upheld dismissal of the Section 113 action,¹²⁶ and likewise in *Frazier* this Court directed the district court to dismiss the non-Section 113 claim, without prejudice.”¹²⁷

D. Ms. Hess may not bring a Section 113 proceeding to remove an elected official.

To be sure, Heidi Jean Hess, an eligible elector, has also jointly filed the Section 113 claim with the Secretary. But this elector adds nothing, and in fact she did *not* ask for relief as authorized by Section 113. And the Court granted the Secretary – not Hess – relief. Namely the Court authorized the Secretary, not Hess, to appoint a replacement DEO.

As a matter of plain statutory language and common sense, Hess cannot use Section 113 to bar a public official from carrying out her duties. As noted above, relief under Section 113 is limited to “an order requiring substantial compliance *with* the provisions of this code.”¹²⁸ No statute allows an elector to remove an elected official, and such a step would be unprecedented. Bluntly put, individual voters do not get to

¹²⁶ *Carson*, 370 P.3d at 1142.

¹²⁷ *Frazier*, 401 P.3d at 545.

¹²⁸ C.R.S. § 1-1-113(1) (emphasis supplied).

choose who may serve as a county's DEO. Hess may, if she desires, file a suit under C.R.S. 30-10-105(1) to declare a vacancy under those standards. But she brought her *Petition* under the election code, not county vacancy provisions.

Bluntly put, Hess is along for the ride and only serves as a tactic for the Secretary to attempt to invoke jurisdiction under Section 113.

E. Section 107 does not give the Secretary authority to remove a county clerk and recorder as DEO.

To the extent the Secretary relies on Section 107 and to the extent the lower court granted relief under Section 107, the Secretary's enforcement authority is also limited by statute. She may "enforce the provisions of this code by injunctive action."¹²⁹ Like the substantial compliance analysis, Section 107 allows the Secretary to enforce provisions of the Code. It does not give her authority or a court equitable power to remove a DEO, in direct contravention to the clear and unambiguous statutory mandate contained in Section 110(3).

Nor does Section 107 grant the Secretary or the court authority to declare a vacancy, absence, or inability or unwillingness to serve as DEO. Had the legislature intended to extent this authority, it could have stated that the Secretary may "enforce the provisions of this code by injunction *or seek declaratory relief.*" But the legislature

¹²⁹ C.R.S. § 1-1-107(2)(d) (emphasis supplied).

chose not to grant the Secretary that latitude, and no other provision gives the Secretary the right to bring an action seeking declaratory relief.

In short, the summary proceedings in Section 113 may not be used to obtain a declaration of rights and responsibilities. Rather, the proceedings are intended to be a course correction on the eve of an election.

LIST OF SUPPORTING DOCUMENTS

No.	Description	Date
1	Order Re: Verified Petition for Relief Under C.R.S. § 1-1-113	10/13/2021
2	Colorado Secretary of State's Office Confirms that Mesa County Election Equipment Hard Drive Images were Publicly Posted; DHS Confirms Posting does not Heighten Risk to State or Nation's Elections	8/16/2021
3	Mesa County Invites Applications for the Position of: Elections Specialist, October 15, 2021	10/15/2021
4	Mesa County Second Amendment to and Extension of Voting System and Managed Services Agreement by and Between Dominion Voting Systems, Inc. and Mesa County, Colorado	8/24/2021
5	Coffman Completes Electronic Voting Equipment Tests	
6	Verified Petition for Relief Under C.R.S. § 1-1-113 with Exs. 1-4	8/30/2021
7	Respondents' Counterclaims Against Petitioner Jenna Griswold and Cross Claims Against Board of County Commissioners of Mesa County with Exs. A-H	9/17/2021

8	Respondents' Opening Brief with Ex. A	9/22/2021
9	Petitioners Joint Opening Brief with Exs. 1-2	9/22/2021
10	Briefing in Support of Mesa County's 113 Claims with Exs. 1-6	9/22/2021
11	Respondents' Answer Brief with Exs. I-K	9/27/2021

CONCLUSION

The district court's order removing Clerk Peters as county DEO should be promptly vacated, and this Court should return Clerk Peters to her duties as county DEO. This Court should also reject the lower court's application of Colorado's substantial compliance standard and prohibit the Secretary from bringing a claim under Section 113.

Respectfully submitted 18th day of October 2021,

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CERTIFICATE OF SERVICE

I certify that on this 18th day of October 2021, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

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