DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203 **Plaintiff:** RON HANKS, AMY MITCHELL, GARY MOYER, JEFF RECTOR, MERLIN KLOTZ, individually and as the Clerk and Recorder for Douglas County, Colorado, and DALLAS SCHROEDER, individually and as the Clerk and Recorder for Elbert County. **v.** **Defendant:** JENA GRISWOLD, individually and as Colorado Secretary of State	**□COURT USE ONLY□** Case No. 2021CV33691 Ctrm./Div.: 280
Attorneys for Defendants: PHILIP J. WEISER Attorney General EMILY BURKE BUCKLEY, #43002* Assistant Attorney General PETER G. BAUMANN, #51620* Assistant Attorney General Colorado Department of Law Ralph L. Carr Colorado Judicial Center 1300 Broadway Denver, Colorado 80203 Telephone: (720) 508-6152 Email: emily.buckley@coag.gov; peter.baumann@coag.gov *Counsel of Record	
MOTION TO DISMISS	

Amidst its many allegations, the Amended Complaint poses three questions: (1) Did the Secretary of State[1] violate § 1-5-608.5 by improperly certifying electronic voting systems in a

[1] All claims included in the Amended Complaint arise from acts or omissions allegedly taken in the Secretary's official capacity only, are grounded in state law only, and seek only prospective relief. Therefore, maintaining those claims against the Secretary in her individual capacity is unfounded. *Cf. Freedom from Religion Found., Inc. v. Romer*, 921 P.2d 84, 89–90 (1996).

way that injured Plaintiffs? (2) Did the Secretary violate § 1-7-802 by deleting "election records" during a software update of county voting systems in 2021 in a way that injured Plaintiffs? And (3) Did the Secretary's adoption of Election Rules 20.5.4, 2.12.3, and 7.11 violate the Colorado Administrative Procedures Act ("APA")?

The answer to each of these questions is emphatically "no."

And, for the reasons outlined below, the Plaintiffs' case should be dismissed in its entirety, with prejudice.

CERTIFICATE OF CONFERRAL

Undersigned counsel conferred with Plaintiffs' counsel by email and telephone regarding this Motion. Plaintiffs' counsel indicated that Plaintiffs oppose the requested relief.

FACTUAL BACKGROUND

I. Declaratory Judgment Claims

This action involves three distinct and unrelated claims[2] brought by three sets of separately situated Plaintiffs. Plaintiffs Amy Mitchell, Gary Moyer, and Jeff Rector (the "County Commissioner Plaintiffs") serve as county commissioners in two separate counties in Colorado. Am. Compl. ¶¶ 3–5. Plaintiffs Merlin Klotz and Dallas Schroeder (the "County Clerk Plaintiffs") serve as county clerks in Douglas County and Elbert County respectively. *Id.* ¶¶ 6–7. Plaintiff Ron Hanks serves in the Colorado House of Representatives. *Id.* ¶ 2. The County Clerk Plaintiffs purport to bring their claims in their official capacities as well as their individual capacities. *Id.* at 1 (caption). And both the County Commissioner Plaintiffs and the County Clerk Plaintiffs rely

[2] Claims I and II, which are generally subject to Rule 57 and the procedure established by Rule 16, differ significantly from Claim III, which is generally subject to specialized procedure under § 24-4-106. By filing this Motion to Dismiss, the Secretary does not waive the right to request later that the claims subject to the normal Rule 16 civil process (Claims I and II) be bifurcated from the claim arising under the APA (Claim III), should any claims survive.

on their purported, derivative exposure to criminal liability for failure to satisfy their official duties as injury stemming from the Secretary's alleged conduct. Am. Compl. ¶¶ 43, 44, 82, 83.

The Amended Complaint's first two claims for relief are declaratory judgment claims. Am. Compl. at 2, 7. In Claim I, Plaintiffs seek a declaration that the Secretary "violated C.R.S. § 1-5-608.5 by failing to have Colorado voting systems tested by a federally accredited laboratory" before certifying those systems for use in the 2020 election. Am. Compl. ¶ 37. Under Colorado law, political subdivisions "may . . . adopt an electronic or electromechanical voting system," § 1-5-612(1), so long as the system "has been certified by the secretary of state." § 1-5-612(2). The Secretary is required to provide such certification if a "federally accredited laboratory" has "test[ed], approve[d], and qualif[ied]" the system. § 1-5-608.5(1), (3).

In Claim II, Plaintiffs ask the Court to declare the Secretary "violated C.R.S. § 1-7-802 by deleting or destroying records of the 2020 election." Am. Compl. ¶ 77. That statute requires a "designated election official" to preserve "election records" for at least twenty-five months after an election. § 1-7-802. Both "designated election official" and "election records" are defined terms under the Uniform Election Code of 1992, § 1-1-101, *et seq.* C.R.S. (2021) (the "Code"). § 1-1-104(8), (11).

The allegations in Claim II relate to a "Trusted Build" software update performed in counties across the state in the summer of 2021. Am. Compl. ¶¶ 46–49. The claim alleges that during this Trusted Build, the Secretary "permanently deleted or destroyed log files that were election records from the 2020 election." *Id.* ¶ 75. The only specific allegations of such deletion relate to the Trusted Build in Mesa County, which occurred on May 25 and 26, 2021. *Id.* ¶ 74.

II. APA Claim

In Claim III, Plaintiffs ask the Court to invalidate three Election Rules, Election Rule 20.5.4, promulgated on an emergency basis on June 17 and adopted permanently on October 15,

2021; and Election Rules 2.12.3 and 7.11, which became effective on October 15, 2021. *See* 8 CCR 1505-1. Plaintiffs challenge these rules under the APA, specifically § 24-4-106. Am. Compl. at 11. That section carefully circumscribes the grounds on which agency action may be invalidated, including where the rule is "arbitrary or capricious," "contrary to a constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, purposes, or limitations." § 24-4-106(7)(b).

LEGAL STANDARD

The proponent of a claim has the burden of establishing the court's subject matter jurisdiction. *See Barry v. Bally Gaming Inc.*, 2013 COA 176, ¶ 8. "In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), a district court examines the substance of the claim based on the facts alleged and the relief requested." *Id.* "If the complaint fails to allege injury, the case must be dismissed." *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985).

Under C.R.C.P. 12(b)(5), a claim must be dismissed if, accepting the factual allegations as true, the complaint does not state a claim for relief that is plausible on its face. *Warne v. Hall*, 2016 CO 50, ¶ 2.

ARGUMENT

I. Plaintiffs' declaratory judgment claims (Claims I & II) must be dismissed.

a. Plaintiffs lack standing to pursue the declaratory judgment claims, meriting dismissal under C.R.C.P 12(b)(1).

i. Plaintiffs may not maintain the declaratory judgment claims in their official capacities.

Plaintiffs Merlin Klotz and Dallas Schroeder purport to bring their declaratory judgment claims in their official capacities as Clerk and Recorder for El Paso County and Elbert County respectively. *See* Am. Compl. at 1 (caption). Plaintiffs Klotz and Schroeder, along with Plaintiff

Amy Mitchell, a Park County Commissioner, and Plaintiffs Gary Moyer and Jeff Rector, both Rio Blanco County Commissioners, rely on their official capacities as grounds for the alleged harm giving rise to their complaint.[3] *See, e.g.*, *id.* ¶¶ 43, 44, 82, 83.

"It is well established that as a general rule, neither a county officer nor a subordinate agency has any standing or legal authority to question or obtain judicial review of an action taken by a superior state agency." *Lamm v. Barber*, 192 Colo. 511, 519 (1977). The sole exception to this rule occurs when the legislature "has exercised its prerogative to grant to the subsidiary agency by an express statutory right the ability to sue a superior agency." *Romer v. Bd. of Cty. Comm'rs of Cty. of Pubelo, Colo.*, 956 P.2d 566, 573 (Colo. 1998).

No such right exists here. The Code establishes the Secretary of State as the superior state agency charged with "supervis[ing]" the conduct of elections, *see* §§ 1-1-107(1)(a), 1-7.5-106(1)(c), and requires county clerks to "consult with the secretary of state and follow the rules and orders promulgated by the secretary of state," § 1-1-110(1); *see also* § 1-7.5-104(1) (county clerks "shall conduct any election for the political subdivision by mail ballot under the supervision of, and subject to rules promulgated . . . by, the secretary of state").

The only judicial remedy granted county clerks under the code is "pursuant to section 24-4-106.(4.7)" "to seek judicial review of final action undertaken by the Secretary of State arising under this code." § 1-1-110(1.5). But because it arises under the APA, § 24-4-106(4.7), that remedy applies to agency "action," which is "the whole or any part of any agency rule, order, interlocutory order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." § 24-4-102(1). The alleged conduct cited in Claims I and II is not encompassed in this definition.

[3] Plaintiff Ron Hanks does not appear to invoke any official capacity as a basis for his standing, although he does reference his status as an elected legislator. *See* Am. Compl. ¶ 2.

And if it were, the APA establishes a 35-day statute of limitations for review of final agency actions. § 24-4-106(4). The certifications challenged in Claim I occurred on June 7, 2019 and July 31, 2020 respectively, Am. Compl. ¶¶ 20, 21, or more than a year (or two) before this action was initiated. And the only dates identified in Claim II are May 25 and 26, 2021, which are also well outside the 35-day limitations period. *Id.* ¶ 74.

Finally, the County Clerk Plaintiffs may not pursue a declaratory judgment action to avoid the APA statute of limitations. "The general rule is that one seeking to exercise a statutorily provided right of review must comply with the time limitations imposed by that statute." *Klasby v. Clapper*, 636 P.2d 682, 684 (Colo. 1981). "[A] party cannot circumvent these limitations on his right of review by attempting to obtain declaratory or injunctive relief where the prescribed avenue of review is adequate." *Id.* Section 1-1-110(1.5) offers county clerks the right to seek judicial review of final agency actions under the APA. Because the APA affords county clerks adequate opportunity for judicial review, they must comply with the limitations established in that statute.

The County Clerk Plaintiffs therefore lack standing to bring claims in their official capacities that the Secretary has violated §§ 1-5-608.5 and 1-7-802 as alleged in Claims I and II, respectively. Am. Compl. at 2, 7. And to the extent the County Commissioner Plaintiffs bring these claims in their official capacities, they are also without standing to pursue these claims.

ii. Plaintiffs allege no injury in fact sufficient to confer standing in their individual capacities.

In light of their inability to pursue claims against the Secretary in their official capacities, Plaintiffs' standing to maintain this action, if at all, must derive separate and apart from their official capacities. To establish such standing, a plaintiff must show that he has suffered (1) an

injury-in-fact, (2) to a legally protected interest. *Reeves-Toney v. Sch. Dist. No. 1 in City & Cty. of Denver*, 2019 CO 40, ¶ 22 (quotations omitted).

Although both tangible and intangible injuries may satisfy the first prong of this test, "an injury that is overly indirect and incidental to the defendant's action will not convey standing, nor will the remote possibility of a future injury." *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 9 (quotations omitted). Relevant here, the injury-in-fact requirement "distinguishes those particularly injured by . . . government action, who may present their controversy for resolution by the courts, from members of the general public, whose interests are more remote and who must address their grievances against the government through the political process." *Reeves-Toney*, 2019 CO 40, ¶ 22. (quotations omitted).

This demarcation was first enunciated in Colorado's "seminal" standing case, *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). *Barber v. Ritter*, 196 P.3d 238, 255 (Colo. 2008) (Eid, J., concurring). There, the court held that "suit must be brought not by 'any and all members of the public,' but rather by persons directly—and not remotely—interested in the challenged government action." *Id.* (quoting *Wimberly*, 570 P.2d at 538). In cabining judicial review to instances in which a party is actually harmed by the activity he challenges, *Wimberly*'s first prong "maintains the separation of powers mandated by article III of the Colorado Constitution by preventing courts from invading legislative and executive spheres." *Hickenlooper*, 2014 CO 77, ¶ 9. This concern is particularly acute where, as here, Plaintiffs are elected officials fully capable of seeking recourse for the Secretary's policymaking choices with which they disagree through the political process.

With regards to Plaintiff Ron Hanks, the Amended Complaint is devoid of even a single allegation of an injury stemming from the Secretary's alleged violations. Having failed to plead

any injury at all, let alone a cognizable one, Plaintiff Ron Hanks has no legal standing to maintain either declaratory judgment claim.

As for the remaining Plaintiffs, the only harm alleged is that due to their positions as county officers, each "could face potential criminal liability under C.R.S. 1-13-107 and 1-13-723" as a result of the Secretary's alleged violations. Am. Compl. ¶¶ 43, 44, 82, 83. The cited criminal provisions create misdemeanor liability for public officials who violate duties imposed by Colorado's election laws. *See* §§ 1-13-107, -723.[4] The derivative theory of harm is that the Secretary's actions somehow have exposed the county clerks and commissioners to some future, potential criminal prosecution that they argue may materialize under some set of yet to be imagined facts.

But the hypothetical leaps necessary to link these allegations are too great to establish injury-in-fact. Any criminal liability that might eventually be suffered by Plaintiffs could be imposed only to the extent it derived from their own violations, failure, or neglect. *See id.* Necessarily, then, any such harm would be "overly indirect and incidental" to the Secretary's alleged conduct. *Hickenlooper*, 2014 CO 77, ¶ 9 (quotations omitted). Moreover, Plaintiffs' purported standing does not even rest on the imposition of criminal liability, but instead on its mere prospect. This "remote possibility of a future injury" is insufficient to confer standing. *Id.*

And even if the hypothetical liability potentially to be imposed by §§ 1-13-107 and 1-13-723 were sufficient to confer standing, Plaintiffs fail to link the Secretary's alleged conduct to that harm. Sections 1-13-107 and 1-13-723 address violations of duties imposed by Colorado

[4] The statutory text of these provisions is: § 1-13-107 ("Any public officer . . . upon whom any duty is imposed by this code who violates, neglects, or fails to perform such duty . . . shall be punished as provided in section 1-13-111."); § 1-13-723 ("Every officer upon whom any duty is imposed by any election law who violates his duty or who neglects or omits to perform the same is guilty of a misdemeanor[.]").

election laws. For the liability imposed by these sections to satisfy the standing inquiry, the Amended Complaint must first identify a duty imposed upon Plaintiffs by Colorado's election laws, and then plausibly allege that the Secretary's alleged violations of §§ 1-5-608.5 or 1-7-802 place the Plaintiffs at risk of violating their own obligations and exposing them to liability under the Code. The Amended Complaint fails on both accounts.

As to Claim I, the sole duty imposed upon county commissioners with regards to electronic or electromechanical voting systems is that counties may adopt such systems only if they are certified by the Secretary of State. Am. Compl. ¶ 18 (citing § 1-5-612(b)). And the two systems in question were, in fact, certified. *Id.* ¶¶ 20, 21. Thus, the Amended Complaint itself invalidates the only purported injury allegedly sufficient to convey standing on the County Commissioner Plaintiffs.

Similarly, with respect to Claim I, the Amended Complaint merely alleges county clerks "are responsible for ensuring that voting systems in their counties comply with Colorado statutes and regulations promulgated by Defendant." Am. Compl. ¶ 40. But the County Clerk Plaintiffs identify no statute or regulation imposing on them a duty that might be jeopardized by an alleged violation of § 1-5-608.5. Nor could they. The Code imposes no duty or obligation on county clerks as to the certification of voting systems.

The same analysis applies to Claim II. Here, the County Commissioner Plaintiffs fail to allege any duty—even a conclusory duty—stemming from the maintenance of election records that could serve as the basis for a claim under §§ 1-13-107 or 1-13-723. *Compare* Am. Compl. ¶ 82 *with id.* ¶ 39. As for the County Clerk Plaintiffs—and as is explained in more detail below—county clerks do have an obligation to maintain election records when they are serving as the designated election official. § 1-7-802. But the log files identified in the Amended

Complaint and Exhibit 6 to the Amended Complaint are not included within the definition of "election records" under Colorado law. *See* § 1-1-104(11) (defining "election records").

Plaintiffs have failed to plausibly allege any injury stemming from the implausible allegations in Claims I and II. Even if these allegations were sufficient to establish standing—which they plainly are not—Plaintiffs' recourse is at the ballot box, not in court. *See Reeves-Toney*, 2019 CO 40, ¶ 22; *Wimberly*, 570 P.2d at 538.

b. Claim II must be dismissed under C.R.C.P. 12(b)(5).

Claim II alleges the Secretary violated § 1-7-802 by deleting or destroying election records. Am. Compl. at 7. Even if Plaintiffs had standing to pursue this claim, which they do not, this claim fails because the records identified in the Amended Complaint and Exhibit 6 are not election records under Colorado law. Thus, Plaintiffs fail to allege a violation of § 1-7-802.

"Election records," as used in § 1-7-802, is a defined term under the Code. It means only: "accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, voter applications, other voter lists and records, mail ballot return envelopes, voted ballots, unused ballots, spoiled ballots, and replacement ballots." § 1-1-104(11). There is not a single allegation in the Amended Complaint that any materials meeting the definition of "election records" under § 1-1-104(11) were destroyed during the 2021 trusted build process in Mesa County or elsewhere. The "log files" described in the Amended Complaint as "individual log events which represent a system-time correlated record of hardware and software event history," Am. Compl. ¶ 56, do not fall within the definition of "election records." *See also* Ex. 6 to Am. Compl. at 7 (page 4 of the Report) (differentiating between "election data," which generally tracks the definition of "election records" under Colorado law, and "election-related data," including log files, which does not).

And even if they were, Claim II is brought under § 1-7-802—a statute that does not mention, let alone impose an obligation upon, the Secretary. That section plainly requires the "designated election official" to preserve election records for at least twenty-five months. § 1-7-802. Such officials include "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." § 1-1-104(8). In other words, it imposes a duty on the local official charged with conducting an election. It does not include the Secretary.

Thus, Claim II must be dismissed.

II. Plaintiffs fail to state a claim for relief under the APA.

The APA, § 24-4-106, controls judicial review of agency rulemaking.[5] In general, "[t]he appropriate standard of review for a rulemaking proceeding is one of reasonableness." *Brighton Pharm., Inc. v. Colo. State Pharm. Bd.*, 160 P.3d 412, 415 (Colo. App. 2007) (citation omitted). It is a highly deferential inquiry. "Rules adopted by an administrative or regulatory agency are presumed valid," and plaintiffs have "a heavy burden to establish invalidity of the rule." *Colo. Ground Water Comm'n. v. Eagle Peak Farms, Ltd*., 919 P.2d 212, 216–17 (Colo. 1996).

A reviewing court may not substitute its judgment for that of the administrative agency on the merits of the adopted rule. *Citizens for Free Enter. v. Dep't of Revenue*, 649 P.2d 1054, 1065 (Colo. 1982). Courts "defer to the interpretation of a statute adopted by the agency charged with its administration unless the interpretation is inconsistent with the statute's clear language or legislative intent." *Lawless v. Standard Ins. Co.*, 2013 COA 153, ¶ 16. Courts also "presume

[5] Instead of initiating a separate proceeding for judicial review under § 24-4-106, Plaintiffs include a claim under the APA in this lawsuit, *i.e*. Claim III. Because Plaintiffs fail to state a claim under the APA as a matter of law, Claim III should be dismissed under Rule 12(b)(5). In raising these defenses, the Secretary does not waive any arguments or other defenses that may be raised in a full merits briefing, on the full agency record, pursuant to § 24-4-106.

the validity and regularity of the administrative proceedings and resolve all reasonable doubts as to the correctness of the administrative ruling in favor of the agency." *Romero v. Colo. Dep't of Human Servs.*, 2018 COA 2, ¶ 25. A court may only set aside an agency rule if the rule is "arbitrary or capricious"; "contrary to constitutional right"; "in excess of statutory . . . authority"; "an abuse . . . of discretion"; "unsupported by substantial evidence when the record is considered as a whole"; or "otherwise contrary to law." § 24-4-106(7)(b).

Plaintiffs disagree with the Secretary's policy choices codified in Election Rules 20.5.4, 2.12.3, and 7.11. But such disagreement is not grounds for challenge under the APA. To succeed on this Claim, Plaintiffs must plausibly allege that the challenged Rules fall into at least one of the § 24-4-106(7)(b) statutory categories. The Amended Complaint fails to do so on its face, and Claim III should be dismissed.

A. Plaintiffs fail to state a claim that Election Rule 20.5.4(a) is invalid.

Plaintiffs have not plausibly alleged Election Rule 20.5.4(a) is invalid.[6] As described in the Amended Complaint, the Secretary is alleged to have adopted this rule to prohibit "sham election audits," in response to concern regarding "increasing instances of purported forensic audits conducted by unknown and unverified third parties nationwide." Am. Compl. ¶¶ 95–96.

[6] Plaintiffs' challenge to Election Rule 20.5.4 is directed at subsection (a), which provides:

> Except for voters using a voting system component to vote during an election, county clerks may not allow any person to access any component of a county's voting system unless that person has passed the background check required by this or any other rule of law, is performing a task permitted by the county clerk or the office of the Secretary of State under statute or rule, and is:
>
> (1) an employee of the county clerk;
>
> (2) appointed as an election judge by the county clerk […]
>
> (3) an employee of the voting system provider for the county's voting system; or
>
> (4) an employee or designee of the Secretary of State.

Plaintiffs assert Election Rule 20.5.4(a), which limits whom county clerks may permit to access election equipment, is undesirable because it prevents county clerks from hiring their own cybersecurity consultants to conduct "legitimate forensic and other audits of Colorado elections." Am. Compl. ¶ 97. Plaintiffs further allege that it would be better and safer if county clerks were permitted to conduct their own independent audits. *Id*. And they allege, generally, that Election Rule 20.5.4 prevents county clerks "from exercising their statutory duties to conduct free and fair elections." *Id*. ¶ 120. But amidst these policy disagreements, Plaintiffs do not identify a conflict between Rule 20.5.4 and a single statute or constitutional provision.

Plaintiffs' allegations, taken as true at this stage, fail to state a claim that Election Rule 20.5.4 is invalid as a matter of law. Specifically, Plaintiffs have not set forth a factual or legal basis showing the Secretary acted in an unconstitutional manner, exceeded her statutory authority, or acted in a manner contrary to statutory rulemaking requirements. *See* § 24-4-106(7)(b); *Brighton Pharm., Inc.*, 160 P.3d at 415. Instead, they argue, in essence, that Election Rule 20.5.4 should be overturned as *unwise*—inviting this Court to substitute its own judgment for that of the agency. The Court, of course, may not do so. *See Citizens for Free Enter.*, 649 P.2d at 1065. Because Plaintiffs fail to state a claim for relief under the APA as a matter of law, their challenge to Election Rule 20.5.4 must be dismissed.

B. Plaintiffs fail to state a claim that Election Rule 2.13.2 is invalid.

Plaintiffs also fall short of alleging a claim under the APA as to amended Election Rule 2.13.2. *See* Am. Compl. ¶¶ 128–135. Election Rule 2.13.2 provides that "the Department of State, working in conjunction with county clerks, will cancel the registrations of electors" who meet specific "inactive" criteria set forth in § 1-2-605(7). Before being amended, Election Rule 2.13.2 tasked county clerks with the cancelation of these inactive voter registrations; the rule was

amended in October 2021 to clarify that such cancellation will be completed by "the Department of State, working in conjunction with county clerks." Plaintiffs' protest to the amendment alleges that the new rule conflicts with § 1-2-605(7), which Plaintiffs claim vests county clerks with the "exclusive authority" to cancel inactive voter registrations. Am. Compl. ¶¶ 131–32.

Plaintiff's claim fails on its face because neither § 1-2-605(7), nor the Code generally, grants county clerks exclusive authority over inactive voter registrations. Section 1-2-605(7) merely directs that "the county clerk and recorder shall cancel the elector's registration record" if the elector meets the statute's inactive registration criteria. In contrast to this limited authority, the General Assembly has granted the Secretary broad supervisory and rulemaking authority over elections, including the authority to "[t]o promulgate, publish and distribute . . . such rules as the secretary finds necessary for the proper administration and enforcement of the election laws." 1-1-107(2)(a). County clerks are required to "follow the rules and orders promulgated by the secretary of state pursuant to this code." 1-1-110(1).

The General Assembly has also charged the Secretary with coordinating Colorado's "responsibilities . . . under the federal 'National Voter Registration Act of 1993.'" § 1-1-107(1)(d). That Act requires states, including Colorado, to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters" from voter registration lists, 52 U.S.C. § 20507. Thus, Election Rule 2.13.2, as amended, falls squarely within the authority granted to the Secretary by the General Assembly.

Because Plaintiffs fail to allege, adequately, statutory conflict or another basis for a challenge under the APA, their challenge to Election Rule 2.13.2 must be dismissed.

C. Plaintiffs fail to state a claim that Election Rule 7.11.2 is invalid.

Finally, Plaintiffs challenge Election Rule 7.11.2 on public policy grounds—and thus fail to allege a cognizable challenge under the APA. Am. Compl. ¶¶ 153–55. The Amended Complaint lacks allegations that the agency acted in an unconstitutional manner, exceeded its statutory authority, or acted in a manner contrary to statutory rulemaking requirements. *See* § 24-4-106(7)(b); *Brighton Pharm.*, 160 P.3d at 415. Instead, Plaintiffs object, on policy grounds, to the portion of the rule that requires election judges and election staff at each Voter Service and Polling Center, to "[u]se WebSCORE to register voters; update existing voter registrations; issue and replace mail ballots; and issue, spoil, and replace in-person ballots." Am. Compl. ¶¶ 153–54. They argue that the rule should be stricken because it "requires county clerks to use the vulnerable statewide voter registration system as part of county voting systems." *Id*. at ¶ 154.

Plaintiffs' policy disagreement is not a proper basis for judicial invalidation of agency rulemaking. *See Citizens for Free Enter.*, 649 P.2d at 1065. Plaintiffs' challenge to Election Rule 7.11.2 must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Claims I, II, and III in the Amended Complaint with prejudice.

Respectfully submitted this 20th day of December, 2021.

PHILIP J. WEISER
Attorney General

/s/ Peter G. Baumann

EMILY BUCKLEY*
Assistant Attorney General, No. 43002
PETER G. BAUMANN*
Assistant Attorney General, No. 51620
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Telephone: 720-508-6152
Fax: 720-508-6041
emily.buckley@coag.gov
peter.baumann@coag.gov
*Counsel of Record

CERTIFICATE OF SERVICE

The undersigned duly certifies that he served the foregoing upon all counsel of record listed below via the Colorado Courts e-Filing System this 20th day of December, 2021:

John Case
brief@johncaselaw.com

s/ Peter G. Baumann