

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,    Petitioners,    vs.    JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,    Respondent.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>PETITION FOR A RULE TO SHOW CAUSE  PURSUANT TO C.A.R. 21</b></p>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21, 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):

- It contains **5560** words in those portions subject to the Rule. The brief complies with C.A.R. 21(e):
- It contains the following: (A) The identity of the petitioner and of the proposed respondent, together with their party status in the proceeding below (e.g., plaintiff, defendant, etc.); (B) The identity of the court or other tribunal below, the case name and case number or other identification of the proceeding below, if any, and identification of any other related proceeding; (C) The identity of the persons or entities against whom relief is sought; (D) The ruling, action, or failure to act complained of and the relief being sought; (E) The reasons why no other adequate remedy is available; (F) The issues presented; (G) The facts necessary to understand the issues presented; (H) Argument and points of authority explaining why a rule to show cause should be issued and why relief requested should be granted; and (I) A list of supporting documents, or an explanation of why supporting documents are not available.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21, and C.A.R. 32.

By: /s/ Gary D. Fielder, Esq.  
Gary D. Fielder, #19757

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## INTRODUCTION

Petitioners request that this Honorable Supreme Court issue a Rule to Show Cause in the nature of Quo Warranto, Mandamus and Prohibition directed at Respondent, JENA GRISWOLD, in her official capacity as Secretary of State of Colorado, contesting her authority to, and prohibiting her from, issuing rules that circumvent the law established by the General Assembly, in protection of the purity and integrity of elections under Colo. Const. Art. 7, § 11; and, in the nature of Mandamus directed at the Secretary requiring her to comply with the election law established by the General Assembly, pursuant to C.R.S. § 1-10.5-102(3)(a) &(b).

This Honorable Supreme Court may exercise its supervisory jurisdiction under C.A.R. 21 to review questions of law related to the separation of powers of the executive branch's rulemaking authority where it conflicts with the legislative intent of the General Assembly, and may decide issues of great public importance and first impression to the exclusion of all other courts. The Petitioners are entitled to a legal remedy and prospective relief regarding the recount of ballots cast in the 2022 general election for the office of Representative from Colorado's 3<sup>rd</sup> Congressional District of the United State Congress, as against the Secretary for her continued violations of law, therein.

## **A. IDENTITIES OF PARTIES**

Petitioner, Gordon Carleton, is a natural person, citizen of the state of Colorado and of the United States of America, and a voter who participated in the general election held on November 8, 2022, for the office of Representative from Colorado's 3rd Congressional District of the United State Congress. The Affidavit of Gordon Carleton is attached hereto as Exhibit 1, as though fully contained herein.

Petitioner, Sheryl Harmon, is a natural person, citizen of the state of Colorado and of the United States of America, and a voter who participated in the general election held on November 8, 2022, for the office of Representative from Colorado's 3rd Congressional District of the United State Congress. The Affidavit of Sheryl Harmon is attached hereto as Exhibit 2, as though fully contained herein.

Petitioner, Deanna Janckila, is a natural person, citizen of the state of Colorado and of the United States of America, and a voter who participated in the general election held on November 8, 2022, for the office of Representative from Colorado's 3rd Congressional District of the United State Congress. The Affidavit of Deanna Janckila is attached hereto as Exhibit 3, as though fully contained herein.

Petitioner, Yolanda Melendez, is a natural person, citizen of the state of Colorado and of the United States of America, and a voter who participated in the

general election held on November 8, 2022, for the office of Representative from Colorado's 3rd Congressional District of the United State Congress. The Affidavit of Yolanda Melendez is attached hereto as Exhibit 4, as though fully contained herein.

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The Proposed Respondent is JENA GRISWOLD, in her official capacity as Secretary of State of Colorado (Secretary). Counsel for the Proposed Respondent are:

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**B. ACTION OR FAILURE TO ACT COMPLAINED OF AND THE RELIEF BEING SOUGHT**

Following the Colorado general election on November 8, 2022, a recount of the race regarding Colorado's 3rd Congressional District of the United States Congress was required, pursuant to C.R.S. § 1-10.5-101. In that regard, pursuant to



C.R.S. § 1-10.5-102(3)(a)&(b), the canvass boards of each county are required to test the devices used in election, prior to the recount, before use in the latter.

Instead, the canvass boards have been ordered by the Secretary to perform Logic and Accuracy Tests—as more thoroughly described below.

Based upon the Secretary’s prior conduct concerning certain recounts performed after the 2022 GOP primary election, and the recent recount conducted by the Alamosa County canvass board concerning the race for Colorado’s 3rd Congressional District, the Petitioners believe in good faith that the Secretary will and has provided the same erroneous directions to the canvass boards in this required recount.

Petitioners request the Court require the Secretary to show by what authority she changed Colorado law to avoid the testing of voting devices prior to a recount through a comparison of manually counted, voter-verified paper records, against the tabulation made by a number of randomly selected devices used in the recent election held on November 8, 2022, as required by the laws of the General Assembly. C.R.S. § 1-10.5-102(3)(a)&(b).

Petitioners further request the Court issue an Order to the Secretary mandating that her office follow the law regarding the required testing prior to conducting a recount, pursuant to C.R.S. § 1-10.5-102(3)(a)&(b).

### C. REASONS NO OTHER ADEQUATE REMEDY IS AVAILABLE

Proceedings under C.A.R. 21 are authorized to consider whether an election official acted without or in excess of her jurisdiction, or has abused her discretion where an appellate remedy would not be adequate. *See Hanlen v. Gessler*, 333 P.3d 41, 48 (Colo 2014).

On November 30, 2022, the Secretary issued Election Order 2022-14, attached hereto as Exhibit 8, to all counties of Colorado Congressional District 3. Here the Secretary again order that the law, according to C.R.S. § 1-10.5-102(3)(a)&(b), as she had previously done in before in the primary recount on July 28<sup>th</sup>, 2022. *See Exhibit 7*. The order directs the counties to report their recount schedule to the Secretary within 24 hours, with a requirement that any recount “be completed no later than the thirty-fifth day after any election.”

Petitioners cannot now seek relief through some other mechanism, which may include appellate review of an order of district court. *Pearson v. Dist. Ct.*, 924 P.2d 512, 515 (Colo. 1996) (original jurisdiction under C.A.R. 21 appropriate where “the damage [petitioner] hopes to avoid would already be done before appellate review occurs”). *See also People v. C.V.*, 64 P.3d 272, 274 (Colo. 2003) (“[O]riginal jurisdiction may be necessary to review a serious abuse of discretion that could not adequately be remedied by appellate review.”).

Relief in the nature of prohibition or mandamus is appropriate “in matters of great public importance.” *Smarko v. Huisenga*, 412 P.2d 431, 432 (Colo. 1966).

**D. ISSUES PRESENTED**

1. WHETHER THE SECRETARY ACTED IN EXCESS OF HER RULE MAKING AUTHORITY WHICH CIRCUMVENTED ELECTION LAW ESTABLISHED BY THE GENERAL ASSEMBLY IN RELATION TO C.R.S. 1-10.5-102(3)(a)&(b).
2. WHETHER THE SECRETARY MUST COMPLY WITH HER DUTIES AND RESPONSIBILITIES UNDER ARTICLE IV, SECTION 2 OF THE COLORADO CONSTITUTION TO FAITHFULLY EXECUTE THE LAW AS SET FORTH BY THE GENERAL ASSEMBLY UNDER C.R.S. § 1-10.5-102(3)(a) & (b).

**E. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED**

Each Petitioner, as an elector and citizen of the state of Colorado and the United States, has standing as a registered voter who participated in the general election held on November 8, 2022, for the office of Representative from Colorado’s 3<sup>rd</sup> Congressional District of the United State Congress.

Here, the Secretary recently reported the results of Colorado’s 3<sup>rd</sup> Congressional District race. Out of 327,134 total votes cast, the Republican Party candidate, Lauren Boebert, received 163,842 votes (50.08%), and the Democrat Party candidate, Adam Frische, received 163,292 votes (49.92%).

C.R.S. § 1-10.5-101, states, in pertinent part:

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

On Wednesday, November 30, 2022, the Secretary issued Election Order 2022-14. In the order, the Secretary states:

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

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

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

C.R.S. § 1-10.5-102(2), states:

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

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

(a) Prior to *any* recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the *voter-verified paper records*. [Emphasis added].

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

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

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

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

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

These laws were passed by the Colorado General Assembly who, being familiar with the rapid pace of technology, fulfilled the will of the People in 2005 by providing timeless laws to apply to election recounts for however long into the future voting devices and voter verified paper records are used. However, contrary to the unambiguous, specific requirements in C.R.S. § 1-10.5-102(3), the Secretary has directed the canvass boards to test their voting machines through the use of paper test ballots in accordance with rules created by the Secretary. In that regard, the Secretary has sent a **Summary of Colorado Recount Procedures November 2022** to the clerk and recorder of each county involved in the subject recount. *See* Exhibit 9. In it, the Secretary has misrepresented Colorado law to the canvass boards as she had previously done with identical guidance from July. *See* Exhibit 7. With regard to the testing of the devices required, the Secretary states:

## **7. Testing Prior to Recount**

### *a. Generally*

1-10.5-102 (3) (a) and (b), C.R.S. and Rules 10.12.2, 10.13.1 The canvass board must, prior to any recount in which scanners will be used, randomly choose and test voting devices used in the original race. The canvass board must compare a manual count of the *paper test ballots* against the machine count of the randomly selected scanners or voting devices. If the results of the comparison are identical, or if any discrepancy can be attributed to voter or ballot marking error, the county must conduct the recount in the same manner as the original count. [Emphasis added].

As this Court can see, the Secretary materially changed the wording of C.R.S. § 1-10.5-102 (3)(a). Most importantly, the requirement that the canvass board use “voter-verified paper records” was changed to “paper test ballots.”

The guidance provided by the Secretary leads the canvass boards to test the voting devices as outlined by 8 Colo. Code Regs. § 1501-10.12.2, which states:

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

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

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

(2) In a requested recount, the person requesting the recount may mark up to 10 ballots. Any other candidate in the contest, or person or organization who could have requested the recount, may also mark up to 10 ballots.

(3) In a mandatory recount, at least two canvass board members of different party affiliations must each mark an additional 10 ballots containing the recounted contest.

(b) A bipartisan team, of election judges and/or staff, must hand tally the recounted contest on the test ballots and verify that the hand tally matches the voting system's tabulation.

(c) The test is limited to the race or measure that is recounted.

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

As stated in her recent order:

3. Pursuant to Election Rule 10.9.3, Candidate Frisch has requested that the recount be conducted by means of a re-scan of the ballots cast in the CD-3 race. As a result, all counties that used a certified voting system for the initial tabulation must re-scan all ballot cards counted during the initial tabulation.

Election Rule 10.9.3 states:



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

While Candidate Frische is within his rights to request a re-scan of the ballots, the Secretary has conflated the distinctions and relationship between a re-scan and a recount. A recount is a statutory procedure that may incorporate, as a portion of the overall recount, a “re-scan” of ballots, as provided in the Secretary’s Election Rule 10.9.6. This Rule is intended to provide an opportunity for a greater protection of the rights of interested parties in a recount.

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

the need to re-scan the ballots with the peripheral scanning component of the device.

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

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

The purpose of Election Rule 10.9.6 is to provide an interested party with an additional, optional step in the recount process and, as stated in 8 Colo. Code Regs. § 1501-10.12.2, to "test all ballots scanners that will be used." Conversely, testing

the voting devices prior to the recount is required under C.R.S. § 1-10.5-102(3)(a), and contemplates testing the voting devices used in the recount before determining whether the recount will be manual, or “conducted in the same manner as the original ballot count.” *See* C.R.S. § 1-10.5-102(3)(b). Neither the offering or acceptance of a re-scan prevents the comparison of a manual count of voter verified paper against the tabulation of randomly selected voting devices already completed on election day. Simply put, a re-scan has no impact upon, or relevance to, the applicability of C.R.S. § 1-10.5-102(3)(a)&(b), and does not excuse the Secretary or the canvass boards from following the law which specifically requires a different test prior to the recount.

In the Affidavit of Recount Witness James Wiley, the stated intentions of the Secretary to circumvent the law were confirmed by both the Alamosa County Election Supervisor, Terry Carver, and with Caleb Thornton, attorney for the Colorado Secretary of State. In Alamosa County, on Friday, December 2<sup>nd</sup>, 2022, a logic and accuracy test was substituted for the recount testing outlined in C.R.S. § 1-10.5-102(3)(a)&(b) “prior to any recount”. This information was confirmed through an in-person discussion with Terry Carver and through a phone conversation with Caleb Thornton. *See* Exhibit 5.

## F . REASONS TO ISSUE A RULE TO SHOW CAUSE AND GRANT RELIEF

1. C.A.R. 21 is designed to accommodate the rapid resolution of disputes arising under the Election Code.

C.A.R. 21 empowers this Court to issue an order requiring substantial compliance with the provisions of the election code. Here, the Secretary is vested with authority to promulgate rules in the administration of Colorado elections that support the statutory laws established by the General Assembly. However, that authority is not limitless and does not allow the Secretary to create new laws that circumvent the general laws established to maintain the purity of elections. *See* Colo. Const. Art 7, Section 11.

Accordingly, Election Rules may not conflict with other provisions of law. *See* C.R.S. § 24-4- 103(4)(b)(IV)(providing that an agency rule can be adopted only if it “does not conflict with other provisions of law.”). *See also* C.R.S. § 24-4-103(8)(a)(providing that “any rule ...which conflicts with a statute shall be void.”); and, § 24-4-106(7)(requiring courts to set aside agency actions that are “contrary to law”). Thus, resolution of this case turns on: (1) whether the use of 8 C.C.R. § 1501-1.10.12.2 conflicts with the prerequisites of C.R.S. § 1-10.5-102(3)(a) & (b); and, (2) whether the Secretary exceeded her authority by instructing the canvass

board to use paper test ballots—rather than “voter verified paper records,” as expressly required by the General Assembly.

2. The Secretary is not following the law with regard to the necessary testing of the devices in the upcoming recount.

The Petitioners’ relief in the nature of prohibition or mandamus is particularly appropriate “in matters of great public importance.” *See Smardo v. Huisenga*, 412 P.2d 431, 432 (Colo. 1966).

The Petitioners are requesting that the Court issue an order to the Secretary to establish by what authority she changed Colorado law by completely ignoring C.R.S. § 1-10.5-102(3)(a). The test of the devices under the statute requires a canvass board to make a *comparison* between its own tabulation of the actual ballots of voters in an election against the count of a randomly selected devices—already counted by the device in the subject election.

C.R.S. § 1-1-104 (50.6)(b) states:

Any paper ballot that lists the title, along with any number, as applicable, of each candidate race, ballot issue, or ballot question, on which the elector has marked his or her choices in such races, issues, or questions shall constitute a voter-verified paper record for purposes of this subsection (50.6).

Thus, the ballots the selected devices counted on election day include mail-in ballots. As such, the ballots counted by a selected device, by known batch

numbers, are required to be manually counted by the canvass board. After which, the canvass board is required to compare their tabulation to the machine's count on election day. In this manner, no interaction is necessary with the voting machines. It has already made its tabulation on election day; the canvass board's comparison of that already reported tabulation to the canvass board's manual tabulation of the ballots counted on that machine is the prior to recount test which the statute requires. *See* C.R.S. § 1-10.5-102(3)(a). It is this C.R.S. § 1-10.5-102(3)(a) prior to recount test which the Secretary has repeatedly ignored.

If the C.R.S. § 1-10.5-102(3)(a) comparison has no discrepancies, then the recount may be done in the same manner as the election. However, if there are discrepancies, then a legal presumption is created that a manual recount should be conducted. *See* C.R.S. § 1-10.5-102(3)(b). Of course, the Secretary may argue that she has the authority to promulgate rules as may be necessary to administer and enforce the requirements of § 1-10.5-102(3)(a), and that the use of test ballots substantially complies with the statute. However, those arguments bely the fact that the devices are not being tested according to statute. As such, the will of The People, as expressed through the General Assembly, is being thwarted.

The obvious policy behind the statute is to allow for the comparison of actual voter verified paper against a voting machine's tabulation. This simple

comparison either validates the accuracy of the tabulation reported by the machine, or – in the case of unaccounted for discrepancies, creates a presumption for a hand recount. Yet the Secretary has ordered canvass boards to ignore this crucial validation step and perform a Logic and Accuracy test which does nothing to truly validate the voting machine’s tabulation of actual ballots cast.

However, because recounts are rare, there is little to no body of case law addressing this topic. So C.R.S. § 1-10.5-102(3)(a) speaks for itself; the plain language of the statute is that the canvass board “shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.”

The Secretary appears to be justifying her circumvention of the law by relying on a definition of “voting devices” found in C.R.S. § 1-1-104(50) as:

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

This is an antiquated definition what has not been updated as recently as C.R.S. § 1-10.5-102 which was revised as recently as 2021. Cody Davis, a Mesa County Commissioner, responded to one elector with direction he had received

from the Secretary regarding C.R.S. § 1-10.5-102(3)(a). Voting devices necessarily include tabulation devices. *See* Exhibit 10.

3. Determination of the issue is a matter of great public importance.

Controversies concerning elections are important. Here, the issue as to whether a canvass board must follow the statutory prerequisite of C.R.S. § 1-10.5-102(3)(a)&(b), prior to a recount, is of great public importance. Whether the Secretary obeys the law in conducting a recount in an extraordinarily close race for a U.S. Congressional seat is certainly of great public importance, as it obviously implicates the balance of power in the United States Congress.

These are also issues of first impression, involving an important governmental office that is in violation of the clear meaning of the recount statute. In order for the public to have confidence that the recount is conducted in accordance with all of the applicable laws, this Court should resolve these issues as they apply to the race to become the Representative from Colorado's 3<sup>rd</sup> Congressional District of the United State Congress. Additionally, without resolution of these issues by this Court, the Secretary's violation of law will be repeated by canvass boards across the state concerning the recount of any election in the future.



The Colorado Constitution authorizes the General Assembly “to pass laws to secure the purity of election, and guard against abuses of the elective franchise.” Colo. Const., Art. 7, § 11. The General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto. Colo. Const., Art 7, § 12.

Here, the statutory law concerning the testing of devices prior to a recount has been rewritten by the Secretary’s Orders and Rules, in a manner beyond her legal authority to do so. The canvass boards will have no choice but to follow the Secretary’s orders, unless the latter is mandated to follow the law and prohibited from violating the law in the future.

Pursuant to C.R.S. § 1-10.5-102 (3)(a), prior to *any* recount, a canvass board is required to manually count the ballots that were counted by the randomly selected devices in the general election on November 8, 2022. After the manual count of the ballots that were previously counted by the chosen devices used in the general election, the canvass board must then *compare* the manual count of those ballots with the results of the machine count that was counted on November 8, 2022.

Comparing the manual count of newly created paper test ballots is not legally sufficient because C.R.S. § 1-10.5-102 (3)(a) plainly and unequivocally requires a different prior to recount test procedure.

Accordingly, the canvass board are not complying with C.R.S. § 1-10.5-102 (3)(a). Thus, by directing the canvassing board not to comply with C.R.S. § 1-10.5-102 (3)(a), the Secretary is abusing her authority by imposing a rule over a law.

Generally, a statute finds meaning according to the legislative intent expressed in the language chosen for the statute by the legislature itself. *People v. Jones*, 346 P.3d at 48 (citing *Pham v. State Farm Auto. Ins. Co.*, 296 P.3d 1038, 1043 (Colo. 2013)). When the language of a statute is susceptible of more than one reasonable interpretation, and is therefore considered ambiguous, or when there is conflicting language in different provisions, intrinsic and extrinsic aids may be employed to determine which reasonable interpretation actually reflects the legislative intent. *Id.* (citing *Frank M. Hall & Co., Inc. v. Newsom*, 125 P.3d 444, 448 (Colo.2005)). However, here, no such ambiguity exists.

At this juncture in the history of Colorado jurisprudence, the Secretary's Orders and Rules have needlessly created confusion about the otherwise plain meaning of C.R.S. § 1-10.5-102 (3)(a)&(b), e.g. "any recount," "the canvass board shall," and "manual count of the voter-verified paper records." At the very least,

the Secretary's Orders and Rules have put the county canvass boards between a rock and a hard place, with C.R.S. § 1-10.5-102 (3)(a)&(b) clearly telling them to do one thing prior to conducting a recount, and the Secretary telling them to ignore the law and do something else. Most certainly, election officials have important duties concerning a recount, one of which is for the canvass board involved in a recount to test the devices that counted the vote in the election—and are going to be used in the recount to validate the tabulation already reported.

The Secretary has ordered the canvass boards in 27 county recounts of the Colorado 3<sup>rd</sup> Congressional race to not comply with C.R.S. § 1-10.5-102 (3)(a), so it naturally follows that the requirements of C.R.S. § 1-10.5-102 (3)(b) also will not be met. Petitioners object to their votes being recounted without compliance with the C.R.S. § 1-10.5-102 (3)(a)&(b) prior to recount comparison test.

Accordingly, the Petitioners respectfully file this petition for relief, pursuant to C.A.R. 21, for a specific order to show cause, as described herein.

#### **G. LIST OF SUPPORTING DOCUMENTS**

Exhibit 1: Affidavit of Plaintiff Gordon Carleton

Exhibit 2: Affidavit of Plaintiff Sheryl Harmon

Exhibit 3: Affidavit of Plaintiff Deanna Janckila

Exhibit 4: Affidavit of Plaintiff Yolanda Melendez

Exhibit 5: Affidavit of Recount Witness James Wiley

Exhibit 6: Election Order 2022-11

Exhibit 7: Summary of Colorado's Recount Procedures July 2022

Exhibit 8: Election Order 2022-14

Exhibit 9: Summary of Colorado's Recount Procedures November 2022

Exhibit 10: Email from Cody Davis regarding C.R.S. § 1-10.5-102(3)(a)

## **CONCLUSION**

Wherefore, the Petitioners hereby request that this Honorable Supreme Court issue an Order to Show Cause directed at the Secretary to show by what authority she changed the law requiring the testing of voting devices prior to a recount, and why she should not be prohibited from doing so, in the future.

Petitioners further request that the Court issue an Order to the Secretary to show cause why the Court should not order that she follow the law which specifies the prior to recount test which must occur in every county in the Colorado 3<sup>rd</sup> Congressional District race before starting a recount, pursuant to C.R.S. § 1-10.5-102(3)(a) &(b).

Petitioners further request that the Court issue an Order to the Secretary to show cause why the Court should not grant each of the orders which Petitioners

have requested in Petitioners' Emergency Motion for Forthwith Orders to the Colorado Secretary of State in regard to the recount of the November 8, 2022 Colorado 3<sup>rd</sup> Congressional District race (filed contemporaneously with this Petition), as follows:

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

and

in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to immediately order that each county canvassing board member certify in writing under oath and subject to penalty of perjury that the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. was conducted prior to starting the recount as required by law, plus details as to who conducted the prior to recount test, when it was conducted by date and time, and what the results were;

and

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

and

in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to forthwith order that the costs of a lawful recount in accord with 1-10.5-102 (3)(a) C.R.S. be borne by the county which performed an unlawful recount in violation of 1-10.5-102 (3)(a) C.R.S.

Respectfully submitted this 6<sup>th</sup> day of December, 2022.

By: /s/ Gary D. Fielder, Esq.  
Gary D. Fielder, #19757

<p>Colorado Supreme Court 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM FILING ID: F5A34114FDAA3 CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON, DEANNA JANCKILA, and YOLANDA MELENDEZ,  Petitioners,  vs.  JENA GRISWOLD, in her official capacity as Secretary of State for the State of Colorado,  Respondent.</p>	<p><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Counsel for Petitioners:</b> Gary D. Fielder, Esq., #19757 1435 Stuart St. Denver, CO 80204 (303) 650-1505 gary@fielderlaw.net</p>	<p>Case No. 2022SA _____</p>
<p style="text-align: center;"><b>EMERGENCY MOTION FOR FORTHWITH ORDERS TO THE COLORADO SECRETARY OF STATE IN REGARD TO THE RECOUNT OF THE COLORADO 3<sup>RD</sup> CONGRESSIONAL DISTRICT RACE</b></p>	

COME NOW Petitioners, Gordon Carleton, Sheryl Harmon, Deanna Janckila, and Yolanda Melendez (Petitioners), by and through counsel, and hereby move this Honorable Court for forthwith orders to the Colorado Secretary of State

in regard to recount of the November 8, 2022 Colorado 3<sup>rd</sup> Congressional District race, as follows:

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

and

in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to immediately order that each county canvassing board member certify in writing under oath and subject to penalty of perjury that the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. was conducted prior to starting the recount as required by law, plus details as to who conducted the prior to recount test, when it was conducted by date and time, and what the results were;

and

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

and



in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to forthwith order that the costs of a lawful recount in accord with 1-10.5-102 (3)(a) C.R.S. be borne by the county which performed an unlawful recount in violation of 1-10.5-102 (3)(a) C.R.S..

## **INTRODUCTION**

“The General Election was held on November 8, 2022. Adam Frisch and Lauren Boebert were the two certified major party (or “named”) candidates in Colorado Congressional District 3 (“CD 3”) for a seat in the 118th United States Congress. At the conclusion of tabulation of all 27 counties making up CD 3, Adam Frisch received 49.92% of the overall vote total (163,292 votes) while Lauren Boebert received 50.08% (163,842 votes). Pursuant to Colorado law, the percentage difference of vote totals between the two candidates requires the Secretary of State to order a recount. 1-10.5-101, C.R.S.”

Secretary Griswold’s Election 2022-14 Order, dated November 30, 2022 *See* Exhibit 8.

This Emergency Motion seeks to preserve each Petitioner’s respective right to a fair, impartial, and uniform recount of Colorado 3<sup>rd</sup> Congressional District race in the November 8, 2022 general election, pursuant to C.R.S. § 1-10.5-102, by ensuring that the recount be conducted by all concerned in strict compliance with relevant Colorado election laws, specifically the prior to recount test required by C.R.S. § 1-10.5-102(3)(a).

It is imperative that this Honorable Court address this Motion with urgency because C.R.S. § 1-10.5-103 requires that any recount must be completed no later

than the thirty-fifth day after any election, which in this circumstance is Tuesday, December 13, 2022.

As discussed in the accompanying Petition for a Rule to Show Cause Pursuant to C.A.R. 21, Petitioners have presented *prima facie* evidence that Respondent has repeatedly breached her Constitutional duty to faithfully execute Colorado election laws by failing to conduct the test required by C.R.S. § 1-10.5-102(3)(a), “prior to any recount”.

This failure is a *per se* violation of C.R.S. § 1-10.5-102(3)(a) which denies each Petitioner their respective right to a fair, impartial, and uniform recount as required by law.

Petitioners have no desire to needlessly delay the recount beyond the statutory deadlines, but Petitioners insist that all actions by the Colorado Secretary of State in conducting the recount must be delayed unless and until a record is made in this Court which proves that the test required by C.R.S. § 1-10.5-102(3)(a) “prior to any recount” was performed as required by law in a timely manner before starting the recount in each of the 27 (twenty seven) counties which comprise the Colorado 3<sup>rd</sup> Congressional District.

Further, Petitioners demand that the Court prohibit any further action by the Colorado Secretary of State based upon either the original abstract of votes cast

already submitted by the county canvassing board in each of the relevant counties which comprise the Colorado 3<sup>rd</sup> Congressional District, or any abstract amended and resubmitted as provided at page 63 in Colorado Secretary of State Election Rules [8 CCR 1505-1] As adopted 7/1/2022.

Rule 10.14 Canvass and reporting of results for a recount

Rule 10.14.1 Totals of recount of ballots must be reported in summary form as follows:

- (a) Sum total of votes for each race, or measure recounted, under-votes, and over-votes for each location;
- (b) The totals must be a combined total, not totaled by individual precinct or location, unless the tabulation system allows.

Rule 10.14.2 In accordance with section 1-10.5-107, C.R.S., and this Rule 10, the canvass board must amend, if necessary, and resubmit the abstract of votes cast.

To the end that the Colorado election recount laws in their entirety - including C.R.S. § 1-10.5-102(3)(a) - be faithfully executed by all concerned, i.e. the Colorado Secretary of State, the County Clerk and Recorder in each of the relevant Counties, and each of the canvassing board members in each of the relevant Counties, Petitioners move the Court to forthwith issue orders to require compliance with C.R.S. § 1-10.5-102(3)(a), and provide time for resolution of this legal challenge and the relief requested in the Petition.

## **ARGUMENT**

The Governor of the State of Colorado is the head of the executive department of government of the State of Colorado. Colo. Const. Article IV, Section 2. Article IV, Section 2 of the Colorado Constitution states as follows:

§2. Governor supreme executive.

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.

Colo. Const. art. IV, § 2.

It follows that all subordinates of the Governor within the executive branch are charged with the same Constitutional duty to take care that the laws be faithfully executed; these executive branch subordinates of the Governor certainly include the Colorado Secretary of State, the County Clerk and Recorder in each of the relevant Counties, and each of the canvassing board members in each of the relevant Counties, along with the various staff personnel who assist those principals in the performance of their duties.

Thus, the Colorado Constitution imposes upon the Colorado Secretary of State (and all others involved in election recounts) a duty to take care that the laws be faithfully executed; that general duty requires the Colorado Secretary of State to

take care that the test required by C.R.S. § 1-10.5-102(3)(a) “prior to any recount” be conducted as specified by The People through their General Assembly.

Petitioners have made a *prima facie* showing that the test required by C.R.S. § 1-10.5-102(3)(a) “prior to any recount” test was not conducted in Alamosa County before the recount was started on Friday, December 2, 2022. See attached Affidavit of James Wiley Exhibit 5.

This follows the pattern established by the Colorado Secretary of State during the July/August 2022 recount of Colorado GOP primary races for Colorado Secretary of State and Colorado Senate 9<sup>th</sup> District; the evidence will show that the recounts in both of those races were conducted without first performing the prior to recount test required by C.R.S. § 1-10.5-102(3)(a).

These July/August 2022 recounts of Colorado GOP primary races were conducted under Secretary Griswold’s Election Order 2022-11, dated July 18, 2022 (Exhibit 6), and Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” (Exhibit 7), which, individually and collectively, ordered a completely different test procedure prior to recount that did not comply with the prior to recount test procedure specified in CRS § 1-10.5-102(3)(a) .

CRS § 1-10.5-102(3)(a) requires a prior to recount test procedure as follows:

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

Secretary Griswold’s Election Order 2022-11, dated July 18, 2022, on page 1 under “Order” number 4, ordered as follows:

I therefore order all counties that conducted their initial tabulation using tabulation machines to rescan ballots in accordance with section 1-10.5-102(2) and Rule 10.13.1. This method affords the most rigorous recount permitted by law.”

Close scrutiny of 1-10.5-102(3)(a) and (b), C.R.S. will reveal that the method ordered by Secretary Griswold immediately above - “... to rescan ballots in accordance with section 1-10.5-102(2) and Rule 10.13.1.”- is not “... the most rigorous recount permitted by law.” This statement purports to show compliance with CRS § 1-10.5-102(3)(b) which states: “The secretary of state shall decide which method of recount is used in each case, based on the secretary’s determination of which method will ensure the most accurate count”.

The problem with the statement is that it is patently false and misleading. The most rigorous recount method permitted by law is not the method ordered by

Secretary Griswold’s Election Order 2022-11 (Exhibit 6) and Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” (Exhibit 6); it is the “prior to any recount” specified in 1-10.5-102(3)(a) and (b), C.R.S.

It is cannot be disputed that the July/August 2022 recounts of Colorado GOP primary races were conducted under Secretary Griswold’s Election Order 2022-11 (Exhibit 6) and Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” (Exhibit 7), and that neither of those recounts complied with C.R.S. § 1-10.5-102(3)(a) because the prior to recount test specifically required by C.R.S. § 1-10.5-102(3)(a) was not performed in either recount as required by law.

Instead, Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” ordered a prior to recount test procedure on page 3 under “7. Testing Prior to Recount a. Generally” which materially differs from, and does not comply with, the requirements of the prior to recount test method specified in 1-10.5-102(3)(a) and (b), C.R.S. as follows:

Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” ordered the following prior to recount test procedure on page 3 under “7. Testing Prior to Recount a. Generally”:

“1-10.5-102(3)(a) and (b), C.R.S. and Rules 10.12.2, 10.13.1 The canvass board must, prior to any recount in which scanners will be used, randomly choose and test *voting devices* used in the original race. The canvass board must compare a manual count of the paper test ballots against the machine count of the randomly selected scanner or *voting devices*. If the results of the comparison are identical, or if any discrepancy can be attributed to voter or ballot marking error, the county must conduct the recount in the same manner as the original count.” [emphasis added]

The prior to recount test procedure ordered by Secretary Griswold immediately above reads very much like the prior to recount test procedure specified by 1-10.5-102(3)(a) and (b), C.R.S., but the two methods are materially different because the tabulation of “paper test ballots” ordered by Secretary Griswold immediately above is not the same as tabulation of “voter-verified paper records” specified in 1-10.5-102(3)(a) and (b), C.R.S.

In Secretary Griswold’s “Summary of Colorado’s Recount Procedures July 2022” prior to recount test procedure, the focus of the exercise is *comparison of the manual tabulation of paper test ballots to the tabulation of ballots reported by the voting machine selected for testing.*

Secretary Griswold’s method - manual tabulation *of paper test ballots* - is not manual tabulation of the “voter-verified paper records” specified in 1-10.5-102(3)(a) and (b), C.R.S., i.e. ballots actually cast by voters in the election, not



paper test ballots created after the election in accordance with Secretary Griswold's "Summary of Colorado's Recount Procedures July 2022".

Secretary Griswold's method - manual tabulation *of paper test ballots* - does not comply with the unambiguous requirements of 1-10.5-102(3)(a) and (b), C.R.S. And Secretary Griswold's method - manual tabulation *of paper test ballots* – completely subverts the purpose of the recount: to re-tabulate the ballots. *See* Colorado Secretary of State Election Rules [8 CCR 1505-1] As adopted 7/1/2022, at page 60: "10.9.1 The purpose of a recount is to re-tabulate the ballots."

Secretary Griswold's method – comparison of the manual tabulation *of paper test ballots to the tabulation of rescanned paper test ballots* - cannot possibly achieve the purpose of a recount – "... to re-tabulate the ballots."; that objective can be achieved only by faithful execution of the prior to recount test required by 1-10.5-102(3)(a) and (b), C.R.S., i.e. *comparison of the manual tabulation of voter verified paper records, i.e. ballots actually already cast in the election, to the tabulation of those same ballots already reported by the voting machine selected for testing.*

It cannot be overemphasized that with the prior to recount test method specified in 1-10.5-102(3)(a) and (b), C.R.S., the focus of the exercise is

comparison *of the manual tabulation of the actual ballots to the tabulation of ballots reported by the voting machine selected for testing*. The one and only way to accomplish the purpose of the recount – to re-tabulate the ballots – is by the prior to recount test method specified in 1-10.5-102(3)(a) and (b), C.R.S.

And it is only this method specified by The People through their General Assembly in 1-10.5-102(3)(a) and (b), C.R.S. that affords the most rigorous recount permitted by law, not the rescan of paper test ballots as Secretary Griswold ordered in her Election Order 2022-11, dated July 18, 2022, on page 1 under “Order” number 4.

When seen in this context, it is clear that Secretary Griswold’s statement - “This method affords the most rigorous recount permitted by law.” - is false and misleading.

When various 2022 GOP primary candidates requested hand recounts, the Secretary estimated costs of a re-scan recount, required large advance payment of costs, held funds in escrow, and ultimately billed the few candidates who could afford those costs for a recount methodology, re-scan, that no one had requested. When the Secretary charged the interested parties for the cost of the unrequested re-scan, she stated “[they] are deemed to have provided certified funds to cover the

cost of a rescan of all ballots,” as reason enough for ordering the primary recount by an expensive re-scan. But while making a show of the re-scan recount, the Secretary chose not to follow the law and conduct the prior to recount test expressly required by 1-10.5-102(3)(a) and (b), C.R.S.

When Secretary Griswold’s false and misleading statement in her Election Order 2022-11, dated July 18, 2022, on page 1 under “Order” number 4, is considered in conjunction with Secretary Griswold’s false and misleading prior to recount test procedure she ordered in “Summary of Colorado’s Recount Procedures July 2022” on page 3 under “7. Testing Prior to Recount a. Generally”, it is clear that the two orders, individually or collectively, are intentionally false and misleading.

Secretary Griswold’s prior to recount test procedure shifts the focus of the recount exercise in two ways:

**first, toward *comparison of the manual tabulation of paper test ballots to the tabulation of ballots reported by the voting machine selected for testing after the paper test ballots are run through the voting machine selected for testing;***

*and*

**second, away from.** *comparison of the manual tabulation of voter verified paper records, i.e. actual ballots, to the tabulation of ballots already reported by the voting machine selected for testing.*

The prior to recount test procedure specified by 1-10.5-102(3)(a) and (b), C.R.S. is inherently more accurate and relevant than Secretary Griswold's prior to recount test procedure, a procedure which is irrelevant because it does nothing to re-tabulate the ballots, i.e. validate the reported tabulation of the votes actually cast on the machine selected for testing.

Petitioners respectfully submit that if the utter irrelevance of Secretary Griswold's prior to recount test procedure is understood, then the absence of any reference in either her Election Order 2022-11, dated July 18, 2022, or her "Summary of Colorado's Recount Procedures July 2022" to the procedure specified by 1-10.5-102(3)(a) and (b), C.R.S. is conspicuous evidence of her intent to misdirect the recount procedure away from the requirements of the statute and toward the requirements of Election Rules and Orders she created.

Secretary Griswold had no lawful authority to issue Election Orders or Rules for a prior to recount procedure which did not comply with the prior to recount test procedure specified by 1-10.5-102(3)(a) and (b), C.R.S. Yet that is exactly what

she did in her Election Order 2022-11, dated July 18, 2022, and her “Summary of Colorado’s Recount Procedures July 2022”.

Secretary Griswold has now ordered the same irrelevant exercise in futility in her Election Order 2022-14, dated November 30, 2022, and her “Summary of Colorado’s Recount Procedures November 2022”. *See* Exhibits 8&9.

So now, as a direct consequence of Secretary Griswold’s failure to order recounts in compliance with 1-10.5-102(3)(a) and (b), C.R.S. in her Election Order 2022-14, dated November 30, 2022, and her “Summary of Colorado’s Recount Procedures November 2022”, imminent recounts in 26 of the 27 counties are now being or about to be conducted with no directive from the Colorado Secretary of State to comply with C.R.S. § 1-10.5-102(3)(a), in continuing violation of 1-10.5-102(3)(a) and (b), C.R.S. *See* Exhibit 8.

(six counties scheduled their recounts to begin Monday, December 5, 2022;  
six counties scheduled their recounts to begin Tuesday, December 6, 2022;  
seven counties scheduled their recounts to begin Wednesday, December 7, 2022;  
six counties scheduled their recounts to begin Thursday, December 8, 2022; and  
one county scheduled their recount to begin Friday, December 9, 2022.)

From these facts, it is reasonable to infer that the Colorado Secretary of State will not order the relevant County officers and canvassing boards to first perform the prior to recount test required by C.R.S. § 1-10.5-102(3)(a) before starting the recount unless this Court requires her to do so. That is precisely why this Court should forthwith order the rule to show cause for Secretary Griswold to account for why she has ordered County Clerks and Recorders and canvassing boards to comply with the bogus paper test ballot procedure she created to replace the specific prior to recount test requirements of C.R.S. § 1-10.5-102(3)(a) she has completely ignored.

For the reasons described above, failure by the relevant County officers and canvassing boards to obey the law, i.e. first perform the prior to recount test required by C.R.S. § 1-10.5-102(3)(a) before starting the recount, will cause irreparable harm to each Petitioner for which there will be no meaningful remedy at law.

The People of the Colorado 3<sup>rd</sup> Congressional District are entitled by the very existence of C.R.S. § 1-10.5-102(3)(a) to see it faithfully executed in the imminent and ongoing recounts. This statute outlined by the foresight of the legislature, who understood the rapid advance of technology, included language to “future-proof” for technologies which will still meet the definitions of voting device or devices

and voter verified paper records, both technologies still used today. If the Colorado Secretary of State will not do her duty to faithfully execute C.R.S. § 1-10.5-102(3)(a), then this Court should do its duty to make do her Constitutional duty – to faithfully execute C.R.S. § 1-10.5-102(3)(a) in each and every county conducting a recount.

If this Court expeditiously grants the relief requested in this Motion (and the Verified Petition, which is incorporated by reference as if fully set forth herein), there will be sufficient time to conduct the recount by the county canvassing board in each of the relevant counties which comprise the Colorado 3<sup>rd</sup> Congressional District within the statutory deadline of Tuesday, December 13, 2022.

And, if need be, this Court has the authority to stay completion of the recounts until the Colorado Secretary of State proves to the Court that the recounts were conducted with the prior to recount test required by C.R.S. § 1-10.5-102(3)(a). Indeed, Colorado courts have issued orders staying statutory election deadlines where there was ongoing legal challenge to the fairness of the election. *Cnf. Blaha v. Williams*, Case No. 2016CV31574 (Dist. Ct. Denver Cty., May 4, 2016). *See also Frazier v. Williams*, Case No. 2016CV31575 (Dist. Ct. Denver Cty., May 5, 2016).

In addition, the forthwith orders requested by Petitioners will ensure that

each and every county will conduct their recount lawfully - “done right the first time” - and avoid the needless costs of a lawful recount which complies with C.R.S. § 1-10.5-102(3)(a) to replace an unlawful recount which does not comply with C.R.S. § 1-10.5-102(3)(a). Therefore, time is of the essence in a ruling on this Motion.

Under these circumstances, for this Court to deny Petitioners their right to a lawful recount in the face of Respondents’ unlawful acts would be manifestly unreasonable and unfair to not only each Petitioner, but also to each person who cast a vote in the Colorado 3<sup>rd</sup> Congressional District race. Indeed, there is no greater policy objective in a Constitutional representative republic than to ensure free and fair elections according to both the letter and the spirit of the law.

Simply put, the issue before this Court is whether Secretary Griswold is above the law. Petitioners respectfully submit that so long as C.R.S. § 1-10.5-102(3)(a) is the law in Colorado, Secretary Griswold has no choice but to obey that law, no matter how much she may dislike it or disagree with it.

To put it another way, will this Court allow Secretary Griswold to ignore the lawful procedure which achieves the purpose of a recount – to re-tabulate the ballots – and replace it with her own procedure that cannot possibly achieves that purpose?



Will this Court order Secretary Griswold to do her Constitutional duty to faithfully execute C.R.S. § 1-10.5-102(3)(a) in each and every county recounting the ballots which will determine who serves as the Representative of Colorado Congressional District 3 the 118th United States Congress? Colo. Const. art. IV, § 2.

These are Constitutional issues of the highest order. No other policy consideration, even the timely resolution of elections, can outweigh the right of The People to have straight answers to these questions.

WHEREFORE, Petitioners, by and through counsel, hereby respectfully request that this Honorable Court issue forthwith orders to the Colorado Secretary of State in regard to recount of the Colorado 3<sup>rd</sup> Congressional District race, as follows:

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

and

in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to immediately order that each county canvassing board member certify in writing under oath and subject to

penalty of perjury that the prior to recount test required by 1-10.5-102 (3)(a) C.R.S. was conducted prior to starting the recount as required by law, plus details as to who conducted the prior to recount test, when it was conducted by date and time, and what the results were;

and

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

and

in the nature of a writ of mandamus or injunctive relief, to require the Colorado Secretary of State to forthwith order that the costs of a lawful recount in accord with 1-10.5-102 (3)(a) C.R.S. be borne by the county which performed an unlawful recount in violation of 1-10.5-102 (3)(a) C.R.S..

Respectfully submitted this 6<sup>th</sup> day of December 2022,

By: /s/ Gary D. Fielder, Esq.  
Gary D. Fielder, #19757

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>Affidavit of Gordon Carleton</b></p>	

## STATE OF COLORADO / COUNTY OF PUEBLO

1. I, the undersigned Affiant, Gordon Carleton, declare under penalty of perjury under the laws of Colorado that the following statements are true and correct.
2. I am 73 years old, over the age of 18 and am a resident of Pueblo County in the State of Colorado.
3. I suffer no legal disabilities and have either personal knowledge of the facts stated herein or reference other pertinent data sources included in the filing of the facts set forth below.
4. I have either personal knowledge of the facts stated herein or reference other pertinent data sources included in the filing, and, if called and sworn as a witness, would testify to their truth and accuracy as appropriate.
5. I am a person properly registered to vote in Pueblo County, Colorado as required under the laws of the State of Colorado.
6. Pueblo County, Colorado is within the Colorado's 3<sup>rd</sup> Congressional District in the United States House of Representatives.
7. I voted in the elections conducted on November 8, 2022 including the election of the Representative of Colorado's 3<sup>rd</sup> Congressional District.
8. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of this election and I am entitled as a matter of law to see every aspect of the election process is conducted as prescribed in Colorado law. C.R.S. § 1-10.5 Election Recount.
9. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are unofficially reported by the Colorado Secretary of State on the website of the Colorado Secretary of State.
10. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are reported by the Colorado Secretary of State as follows:
  - a. 327,134 total votes were cast;
  - b. the Republican Party candidate, Lauren Boebert, had 163,842 votes, or 50.08%;

- c. the Democratic Party candidate, Adam Frische, had 163,292 votes, or 49.92%;
  - d. The difference between the top two candidates in Colorado's 3rd Congressional District 2022 election is 0.16%, less than 0.50%, or one-half of one percent.
  - e. Each of the phrases "one-half of one percent" or "0.50%" or "0.005" is mathematically equal to the other.
11. When the results of the November 8, 2022 election for Colorado's 3rd Congressional District was determined by the Secretary to be within one half of one, the minimum threshold in C.R.S. § 1-10.5-101, she issued a November 30<sup>th</sup>, 2022 press release containing an order for the required recount to take place as required under C.R.S. § 1-10.5-102(1).
12. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of any recount of this election and I am entitled as a matter of law to see every aspect of the election recount process being conducted as prescribed in Colorado law C.R.S. § 1-10.5-102; including, but not limited to, the prerequisite testing of devices as specified in C.R.S. § 1-10.5-102 (3)(a) actually be conducted as prescribed by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a).
13. C.R.S. § 1-10.5-102 (3)(a) states:
- a. Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.
14. Between July 29, 2022 and August 3, 2022 various statewide and local primary election recounts were conducted were not conducted by the Colorado Secretary of State as required by C.R.S. § 1-10.5-102 (3)(a), as follows.
15. The Colorado Secretary of State ordered and instructed each county canvass board to substitute the procedure specifically required by C.R.S. § 1-10.5-102 (3)(a) - the comparison of a manual tabulation to the tabulation of the randomly selected devices used in the election - with a Logic and Accuracy Test of the tabulation devices to begin on July 29, 2022, outlined in Election Rule 10.12.2.

16. In due course, the various primary election recounts were conducted in accord with the instructions of the Colorado Secretary of State and the test specifically required in C.R.S. § 1-10.5-102 (3)(a) was not conducted in any county in the State of Colorado prior to beginning the recounts, and at no point were any voter verified paper records manually counted for a comparison.

17. As delineated in the Affidavit of Record of James Wiley, reports from the recount that began in the county of Alamosa at 9:00am on December 2<sup>nd</sup>, 2022, for the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, show the same substitution of Election Rules for Election Law has taken place as in the previous primary recount earlier in 2022.

18. Based upon the above described pattern and practice of the Colorado Secretary of State to repeatedly violate C.R.S. § 1-10.5-102 (3)(a) it is reasonable to infer that during the remainder of the recount of the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, the Colorado Secretary of State will continue to violate C.R.S. § 1-10.5-102 (3)(a) by directing the county canvass boards to the Election Rule 10.12.2 procedure rather than that specified in C.R.S. § 1-10.5-102 (3)(a).

19. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I am entitled as a matter of law to see that the prerequisite testing of devices as specified by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a) actually be conducted by the Colorado Secretary of State and the county canvass boards under her direct supervision exactly as prescribed in C.R.S. § 1-10.5-102 (3)(a).

20. I affirm I am under no duress to sign this Affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

FURTHER, AFFIANT SAYETH NOT.



Signature of Affiant/Witness

Subscribed and affirmed or sworn to before me in the County of Pueblo, State of Colorado, this 5<sup>TH</sup> day of December, 2022.



Notary Public

My Commission Expires: 07-25-2026

**TRENT TURNER**  
**NOTARY PUBLIC**  
**STATE OF COLORADO**  
NOTARY ID 20094023147  
M Commission res: Ju 25, 2026

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>Affidavit of Sheryl Harmon</b></p>	

## STATE OF COLORADO / COUNTY OF MESA.

1. I, the undersigned Affiant, SHERYL L HARMON, declare under penalty of perjury under the laws of Colorado that the following statements are true and correct.
2. I am 66 years old, over the age of 18 and am a resident of MESA County in the State of Colorado.
3. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
4. I have personal knowledge of the facts stated herein, and, if called and sworn as a witness, would testify to their truth and accuracy.
5. I am a person properly registered to vote in MESA County, Colorado as required under the laws of the State of Colorado.
6. MESA County, Colorado is within the Colorado's 3<sup>rd</sup> Congressional District in the United States House of Representatives.
7. I voted in the elections conducted on November 8, 2022 including the election of the Representative of Colorado's 3<sup>rd</sup> Congressional District.
8. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of this election and I am entitled as a matter of law to see every aspect of the election process is conducted as prescribed in Colorado law. C.R.S. § 1-10.5 Election Recount.
9. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are unofficially reported by the Colorado Secretary of State at the following link to the website of the Colorado Secretary of State.
10. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are reported by the Colorado Secretary of State as follow:
  - a. 327,134 total votes were cast;
  - b. the Republican Party candidate, Lauren Boebert, had 163,842 votes, or 50.08%;
  - c. the Democratic Party candidate, Adam Frische, had 163,292 votes, or 49.92%;



- d. The difference between the two top candidates, in or Colorado's 3rd Congressional District 2022 election is 0.16%, less than 0.50%, or one-half of one percent.
  - e. Each of the phrases "one-half of one percent" or "0.50%" or "0.005" is mathematically equal to the other.
11. When the results of the November 8, 2022 election for Colorado's 3rd Congressional District was determined by the Secretary to be within one half of one, the minimum threshold in C.R.S. § 1-10.5-101, she issued a November 30<sup>th</sup>, 2022 press release containing an order for the required recount to take place as required under C.R.S. § 1-10.5-102(1).
  12. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of any recount of this election and I am entitled as a matter of law to see every aspect of the election recount process being conducted as prescribed in Colorado law C.R.S. § 1-10.5-102; including, but not limited to, the prerequisite testing of devices as specified in C.R.S. § 1-10.5-102 (3)(a) actually be conducted as prescribed by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a).
  13. C.R.S. § 1-10.5-102 (3)(a) states:
    - a. Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.
  14. I have personal knowledge of the fact that between July 29, 2022 and August 3, 2022 various statewide and local primary election recounts were conducted were not conducted by the Colorado Secretary of State as required by C.R.S. § 1-10.5-102 (3)(a), as follows.
  15. The Colorado Secretary of State ordered and instructed each county canvass board to substitute the procedure specifically required by C.R.S. § 1-10.5-102 (3)(a) - the comparison of a manual tabulation to the tabulation of the randomly selected devices used in the election - with a Logic and Accuracy Test of the tabulation devices to begin on July 29, 2022, outlined in Election Rule 10.12.2.

- 16. In due course, the various primary election recounts were conducted in accord with the instructions of the Colorado Secretary of State and the test specifically required in C.R.S. § 1-10.5-102 (3)(a) was not conducted in any county in the State of Colorado prior to beginning the recounts, and at no point were any voter verified paper records manually counted for a comparison.
- 17. Verified reports from the recount that began in the county of Alamosa at 9:00am on December 2<sup>nd</sup>, 2022, for the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, show the same substitution of Election Rules for Election Law has taken place as in the previous primary recount earlier in 2022.
- 18. Based upon the above described pattern and practice of the Colorado Secretary of State to repeatedly violate C.R.S. § 1-10.5-102 (3)(a) it is reasonable to infer that during the remainder of the recount of the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, the Colorado Secretary of State will continue to violate C.R.S. § 1-10.5-102 (3)(a) by directing the county canvass boards to the Election Rule 10.12.2 procedure rather than that specified in C.R.S. § 1-10.5-102 (3)(a).
- 19. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I am entitled as a matter of law to see that the prerequisite testing of devices as specified by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a) actually be conducted by the Colorado Secretary of State and the county canvass boards under her direct supervision exactly as prescribed in C.R.S. § 1-10.5-102 (3)(a).
- 20. I affirm I am under no duress to sign this Affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

FURTHER, AFFIANT SAYETH NOT.

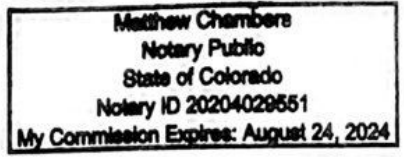
*Sheriff Harmon*

Signature of Affiant/Witness

Subscribed and affirmed or sworn to before me in the County of Mesa, State of Colorado, this 6<sup>th</sup> day of December, 2022.

*Matthew Chambers*  
Notary Public

My Commission Expires: 24 Aug 2024



<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,</p> <p>Petitioners,</p> <p>vs.</p> <p>JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,</p> <p>Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>Affidavit of Deanna Janckila</b></p>	

STATE OF COLORADO / COUNTY OF Eagle

1. I, the undersigned Affiant, Deanna Carol Jankila declare under penalty of perjury under the laws of Colorado that the following statements are true and correct.
2. I am 58 years old, over the age of 18 and am a resident of Eagle County in the State of Colorado.
3. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
4. I have personal knowledge of the facts stated herein, and, if called and sworn as a witness, would testify to their truth and accuracy.
5. I am a person properly registered to vote in Eagle County, Colorado as required under the laws of the State of Colorado.
6. Eagle County, Colorado is within the Colorado's 3<sup>rd</sup> Congressional District in the United States House of Representatives.
7. I voted in the elections conducted on November 8, 2022 including the election of the Representative of Colorado's 3<sup>rd</sup> Congressional District.
8. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of this election and I am entitled as a matter of law to see every aspect of the election process is conducted as prescribed in Colorado law. C.R.S. § 1-10.5 Election Recount.
9. The results of the election for Colorado's 3rd Congressional District are unofficially reported by the Colorado Secretary of State at the website of the Colorado Secretary of State.
10. The results of the election for Colorado's 3rd Congressional District are reported by the Colorado Secretary of State as follow:
  - a. 327,134 total votes were cast;
  - b. the Republican Party candidate, Lauren Boebert, had 163,842 votes, or 50.08%;
  - c. the Democratic Party candidate, Adam Frische, had 163,292 votes, or 49.92%;
  - d. The difference between the top two candidates in Colorado's 3rd Congressional District 2022 election is 0.16%, less than 0.50%, or one-half of one percent.

- e. Each of the phrases “one-half of one percent” or “0.50%” or “0.005” is mathematically equal to the other.
11. When the results of the November 8, 2022 election for Colorado’s 3rd Congressional District was determined by the Secretary to be within one half of one, the minimum threshold in C.R.S. § 1-10.5-101, she issued a November 30<sup>th</sup>, 2022 press release containing an order for the required recount to take place as required under C.R.S. § 1-10.5-102(1).
12. As a duly qualified voter in the November 8, 2022 election for Colorado’s 3<sup>rd</sup> Congressional District, I have an interest in the outcome of any recount of this election and I am entitled as a matter of law to see every aspect of the election recount process being conducted as prescribed in Colorado law C.R.S. § 1-10.5-102; including, but not limited to, the prerequisite testing of devices as specified in C.R.S. § 1-10.5-102 (3)(a) actually be conducted as prescribed by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a).
13. C.R.S. § 1-10.5-102 (3)(a) states:
- a. Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.
14. I have personal knowledge of the fact that between July 29, 2022 and August 3, 2022 various statewide and local primary election recounts were conducted were not conducted by the Colorado Secretary of State as required by C.R.S. § 1-10.5-102 (3)(a), as follows.
15. The Colorado Secretary of State ordered and instructed each county canvass board to substitute the procedure specifically required by C.R.S. § 1-10.5-102 (3)(a) - the comparison of a manual tabulation to the tabulation of the randomly selected devices used in the election - with a Logic and Accuracy Test of the tabulation devices to begin on July 29, 2022, outlined in Election Rule 10.12.2.
16. In due course, the various primary election recounts were conducted in accord with the instructions of the Colorado Secretary of State and the test specifically required in C.R.S. § 1-10.5-102 (3)(a) was not conducted in any county in the State of Colorado prior to beginning the recounts, and at no point were any voter verified paper records manually counted for a comparison.

- 17. Verified reports from the recount that began in the county of Alamosa at 9:00am on December 2<sup>nd</sup>, 2022, for the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, show the same substitution of Election Rules for Election Law has taken place as in the previous primary recount earlier in 2022.
- 18. Based upon the above described pattern and practice of the Colorado Secretary of State to repeatedly violate C.R.S. § 1-10.5-102 (3)(a) it is reasonable to infer that during the remainder of the recount of the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, the Colorado Secretary of State will continue to violate C.R.S. § 1-10.5-102 (3)(a) by directing the county canvass boards to the Election Rule 10.12.2 procedure rather than that specified in C.R.S. § 1-10.5-102 (3)(a).
- 19. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I am entitled as a matter of law to see that the prerequisite testing of devices as specified by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a) actually be conducted by the Colorado Secretary of State and the county canvass boards under her direct supervision exactly as prescribed in C.R.S. § 1-10.5-102 (3)(a).
- 20. I affirm I am under no duress to sign this Affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

FURTHER, AFFIANT SAYETH NOT.

Deanna Ganchillo  
Signature of Affiant/Witness

Subscribed and affirmed or sworn to before me in the County of EAGLE, State of Colorado, this 5 day of December, 2022.

Kelly  
Notary Public

KELLY MARIA SORTO  
Notary Public  
State of Colorado  
Notary ID # 20224042902  
My Commission Expires 11-08-2026

My Commission Expires: 11-08-2026

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,</p> <p>Petitioners,</p> <p>vs.</p> <p>JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,</p> <p>Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>Affidavit of Yolanda Melendez</b></p>	

AFFIANT INITIALS ym

STATE OF COLORADO / COUNTY OF Garfield

1. I, the undersigned Affiant, Yolanda Melendez, declare under penalty of perjury under the laws of Colorado that the following statements are true and correct.
2. I am 61 years old, over the age of 18 and am a resident of Garfield County in the State of Colorado.
3. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
4. I have personal knowledge of the facts stated herein, and, if called and sworn as a witness, would testify to their truth and accuracy.
5. I am a person properly registered to vote in Garfield County, Colorado as required under the laws of the State of Colorado.
6. Garfield County, Colorado is within the Colorado's 3<sup>rd</sup> Congressional District in the United States House of Representatives.
7. I voted in the elections conducted on November 8, 2022 including the election of the Representative of Colorado's 3<sup>rd</sup> Congressional District.
8. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of this election and I am entitled as a matter of law to see every aspect of the election process is conducted as prescribed in Colorado law. C.R.S. § 1-10.5 Election Recount.
9. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are unofficially reported by the Colorado Secretary of State at the following link to the website of the Colorado Secretary of State.
10. The results of the election for Colorado's 3<sup>rd</sup> Congressional District are reported by the Colorado Secretary of State as follow:
  - a. 327,134 total votes were cast;
  - b. the Republican Party candidate, Lauren Boebert, had 163,842 votes, or 50.08%;
  - c. the Democratic Party candidate, Adam Frische, had 163,292 votes, or 49.92%;



- d. The difference between the top two candidates in Colorado's 3rd Congressional District 2022 election is 0.16%, less than 0.50%, or one-half of one percent.
  - e. Each of the phrases "one-half of one percent" or "0.50%" or "0.005" is mathematically equal to the other.
11. When the results of the November 8, 2022 election for Colorado's 3rd Congressional District was determined by the Secretary to be within one half of one, the minimum threshold in C.R.S. § 1-10.5-101, she issued a November 30<sup>th</sup>, 2022 press release containing an order for the required recount to take place as required under C.R.S. § 1-10.5-102(1).
  12. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I have an interest in the outcome of any recount of this election and I am entitled as a matter of law to see every aspect of the election recount process being conducted as prescribed in Colorado law C.R.S. § 1-10.5-102; including, but not limited to, the prerequisite testing of devices as specified in C.R.S. § 1-10.5-102 (3)(a) actually be conducted as prescribed by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a).
  13. C.R.S. § 1-10.5-102 (3)(a) states:
    - a. Prior to any recount, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.
  14. I have personal knowledge of the fact that between July 29, 2022 and August 3, 2022 various statewide and local primary election recounts were conducted were not conducted by the Colorado Secretary of State as required by C.R.S. § 1-10.5-102 (3)(a), as follows.
  15. The Colorado Secretary of State ordered and instructed each county canvass board to substitute the procedure specifically required by C.R.S. § 1-10.5-102 (3)(a) - the comparison of a manual tabulation to the tabulation of the randomly selected devices used in the election - with a Logic and Accuracy Test of the tabulation devices to begin on July 29, 2022, outlined in Election Rule 10.12.2.

AFFIANT INITIALS gm

16. In due course, the various primary election recounts were conducted in accord with the instructions of the Colorado Secretary of State and the test specifically required in C.R.S. § 1-10.5-102 (3)(a) was not conducted in any county in the State of Colorado prior to beginning the recounts, and at no point were any voter verified paper records manually counted for a comparison.

17. Verified reports from the recount that began in the county of Alamosa at 9:00am on December 2<sup>nd</sup>, 2022, for the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, show the same substitution of Election Rules for Election Law has taken place as in the previous primary recount earlier in 2022.

18. Based upon the above described pattern and practice of the Colorado Secretary of State to repeatedly violate C.R.S. § 1-10.5-102 (3)(a) it is reasonable to infer that during the remainder of the recount of the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, the Colorado Secretary of State will continue to violate C.R.S. § 1-10.5-102 (3)(a) by directing the county canvass boards to the Election Rule 10.12.2 procedure rather than that specified in C.R.S. § 1-10.5-102 (3)(a).

19. As a duly qualified voter in the November 8, 2022 election for Colorado's 3<sup>rd</sup> Congressional District, I am entitled as a matter of law to see that the prerequisite testing of devices as specified by the Colorado General Assembly in C.R.S. § 1-10.5-102 (3)(a) actually be conducted by the Colorado Secretary of State and the county canvass boards under her direct supervision exactly as prescribed in C.R.S. § 1-10.5-102 (3)(a).

20. I affirm I am under no duress to sign this Affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

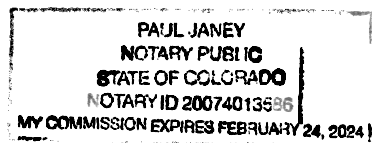
FURTHER, AFFIANT SAYETH NOT.

gm Melendez  
Signature of Affiant/Witness

Subscribed and affirmed or sworn to before me in the County of Garfield, State of Colorado, this 5<sup>th</sup> day of December, 2022.

[Signature]  
Notary Public

My Commission Expires: 02/24/2024



<p>Colorado Supreme Court 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM FILING ID: F5A34114FDAA3 CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON, DEANNA JANCKILA, and YOLANDA MELENDEZ,</p> <p>Petitioners,</p> <p>vs.</p> <p>JENA GRISWOLD, in her official capacity as Secretary of State for the State of Colorado,</p> <p>Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b> Gary D. Fielder, Esq., #19757 1435 Stuart St. Denver, CO 80204 (303) 650-1505 gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p style="text-align: center;"><b>Affidavit of James Wiley</b></p>	

**Affidavit of Record**

STATE OF COLORADO / COUNTY OF PUEBLO. The undersigned, James Brooks Wiley, declares under penalty of perjury under the laws of Colorado that the foregoing is true and correct:

1. I am over the age of 18 and am a resident of the state of Colorado. I have personal knowledge of the facts herein, and, if called as a witness, could testify to the truth and accuracy thereto.
2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
3. I affirm that at 10:54 pm on December 1<sup>st</sup>, 2022, I received a message containing an attachment titled CD3\_Recount\_-\_County\_Schedules\_\_as\_of\_12-1-2022.xlsx (Exhibit E), which

which contained the start times and dates for the upcoming recounts across the state. Alamosa had the earliest date and time listed of any county being the following day, December 2<sup>nd</sup>, 2022, at 9:00 am.

4. I made preparations the morning of December 2<sup>nd</sup>, 2022, departing from my residence in Pueblo, CO, around 10:00 am and arriving in Alamosa, CO, two hours later just after 12:00 noon.

5. The address listed for the Alamosa County recount led me to 8999 Independence Way, Ste 101 Alamosa, Colorado 81101, where, in an office market County Clerk and Recorder I found the recount taking place.

6. I was told the logic and accuracy test required prior to a ballot re-scan, as requested by candidate Adam Frische, had been completed successfully, and that they were waiting to be able to start the recount. I expected that this delay was due to the need for further testing to fulfill the requirement of the statute in determining the method to conduct the recount. Having been sued 3 times in District Court and 3 more times in the Colorado Supreme Court over her conduct in the Secretary's first ever recount which followed the 2022 Colorado primary election, I expected the Secretary would be meticulous in her compliance of the law in conducting her second recount as Secretary. Knowing that a comparison of the manual count of the voter verified paper records to the count from the one machine which would "randomly" be selected was still required and that this manual count could take several hours I decided to use the time to get lunch.

7. After just a few minutes at the Clerk's office I left for lunch at Emma's Authentic Food of the Southwest where I had Emma's Enchilada Special and made the purchasing transaction at exactly 1:00pm.

8. I then returned to the Clerk's office where I found they had still not performed the re-scan of the ballots. I continued to wait in the hallway until at approximately 1:40pm when I was informed that the re-scan had begun. As a concerned voter in the same Congressional District as the race that was being recounted, I requested to speak with Terry Carver, the Alamosa County Election Supervisor regarding what I know to be a blatant circumvention of Colorado election recount statute relating to the required preliminary testing of the voting devices.

9. I reviewed the language of the statute with Terry and showed her how, after having conducted a logic and accuracy test in place of the prerequisite testing required in C.R.S. § 1-10.5-102 (3)(a), the county election staff had performed a hand tabulation of the test deck used to test the scanner attached to the voting device, without ever manually counting the voter verified paper records counted by that voting device, randomly selected from among those used in the original count. Manual or hand counts were done that morning and comparisons were made to the counts from the machines. However, the ballots counted were test ballots from a test deck and not voter verified paper records. Further, the comparison had been made between the manual count and voting device count of test ballots rather than the required voter verified paper records. I verified with multiple parties that at no point prior to beginning the re-scan of the voter verified paper records had any of those same records been manually tabulated by hand as required by law.

10. I asked, "If it was of her own animus that the will of the People passed by the legislature was being circumvented in the Alamosa recount or if it was at the direction of the Secretary of State that they had substituted a logic and accuracy test for the required prerequisite testing?" Terry confirmed the latter and suggested I present my questions to the Secretary's office.

11. At 2:00 pm, I left Alamosa and returned to Pueblo where, following Terry's recommendation, I called to present my questions to the Secretary at 3:58pm. I reached the Secretary's office where I was put on hold until I could be relayed to a member of the Secretary's legal team to answer my statute related questions.

12. The transcription of my recorded call is as follows:

Automated Voice: We're glad you called. At the Colorado Secretary of State's office, our customers always come first. We work for you. During this brief delay, let us assure you that our mission is to provide you with information and services as quickly as possible. Thank you for your patience. A member of our staff will be with you shortly.

Customer Service Representative: All right, sir, I'm gonna get you over to Caleb. He's the manager in our legal team. Okay.

James: Excellent. Thank you so much. Is that Caleb Thorton?

Customer Service Representative: Yep.

James: Thank you.

Customer Service Representative: Just a moment.

Caleb: Colorado Secretary of State Elections Division.

James: Hey, Caleb, I think we've met before. My name is Jim Wiley. I wanted to ask you a question about the recount that started today.

Caleb: Okay,

James: Thanks for taking my call. Specifically, I wanted to ask about the preliminary testing that's required before any recount begins in Colorado specifically related to Title 1-10.5-102(3)a, the comparison of the manual tabulation of the voter verified [paper] records of the previous election, and comparing that tabulation to the tabulation from the election that took place on November 8, from that machine, and evaluating that tabulation comparison, and making a determination whether or not the machines are going to be used or not going to be used. It seems like in place of the lawful preliminary testing, there was instead a logic and accuracy test performed in Alamosa County. And I wanted to ask you about that, it seems like the director or the election supervisor indicated that it was at the instruction of the Secretary of State's office, that they had circumvent or that this statute was being circumvented.

Caleb: I'm gonna stop you there.

James: Oh, go ahead.

Caleb: I'm not gonna play games with you. You were at the El Paso County, recount for the statewide?

James: That's correct.

Caleb: I know you know all about the testing that happens before the recount.

James: That's correct.

Caleb: And I understand you disagree. That's fine. But, you know, the Alamosa County has done the testing as we require. So do you have any other questions? Or are you just gonna go and talk to, I don't know, one of your attorneys.

James: Well, I guess the final question is, is what you require the same thing as what the people of Colorado require through the legislature, when 102(3)a was passed?

Caleb: We require what is, we absolutely, counties when they do their testing before recount absolutely are doing in compliance with state law.

James: Thank you for that.

Caleb: Do you have any other questions so Jim?

James: That's all, Caleb. Have a wonderful day.

Caleb: Alright..

James: [Terminates call]

13. The Secretary has been made aware on multiple occasions that her orders and her conduct violate the law, but has ignored attempts by candidates and voters to inform her of her duties and encourage her compliance with the law. The fact that the current ongoing recount exhibits the same substitution of the Election Rule 10.12.2 test deck manual count for the voter verified paper record manual count in the prerequisite testing required by C.R.S. § 1-10.5-102 (3)(a), shows she is unable to learn the proper conduct of a recount without direction by the court.

14. I affirm I am under no duress to sign this affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete. Executed this 5<sup>th</sup> day of December, 2022.

At this address 1471 Stuart St. Denver CO 80204

AFFIANT SIGNATURE



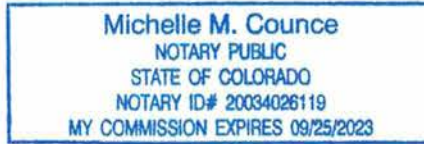
NOTARY ACKNOWLEDGMENT

STATE OF COLORADO, COUNTY OF Denver COUNTY, ss:

This Affidavit was acknowledged before me on this 5<sup>th</sup> day of December 2022 by James Wiley, who, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit subscribed by him/her, and that the matters stated herein are true to the best of his/her information, knowledge and belief.

Michelle M. Counce

Notary Public



Title (and Rank)

My commission expires 09/25/2023

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p align="center"><b>Exhibit 6 - Election Order 2022-11</b></p>	





# Jena M Griswold

Colorado Secretary of State

## Election Order 2022-11

**Re: Recount of Colorado Republican Secretary of State Primary and Republican State Senate District 9 Primary**

**Date: July 28, 2022**

### Operative Facts


On Tuesday, June 28, 2022, a primary election was held to determine the Republican candidates for Colorado Secretary of State and State Senate District 9. All 64 counties canvassed their results in accordance with Colorado law, and the results were certified by the Secretary on Monday, July 25<sup>th</sup>.

On Tuesday, July 26<sup>th</sup>, the Secretary received notarized, written requests for recounts of their respective races by candidate Tina Peters for the Secretary of State race and candidate Lynda Zamora Wilson for the Senate District 9 race. The requests also demanded that the recount be conducted by hand count. The Department notified both candidates that a hand-count method is not available under state election rules. The Department gathered cost estimates from all 64 counties to recount the Secretary of State race, and from El Paso County to recount the State Senate District 9 race as required by section 1-10.5-106 (2) C.R.S. On Wednesday, July 27<sup>th</sup>, the Department provided those cost estimates to Ms. Peters and Ms. Wilson. On Thursday, July 28<sup>th</sup>, Ms. Peters and Ms. Wilson submitted certified funds to the Department of State sufficient to cover the cost to recount their respective races, with those funds to be held in escrow in accordance with section 1-10.5-106 (2) C.R.S.

### Order

1. As required by section 1-10.5-102 (1) C.R.S. I hereby order a recount of Secretary of State and Senate District 9 races on the Republican Party ballot for the 2022 Primary Election.
2. The recount for each may begin in each county on Friday, July 29<sup>th</sup>, and must begin in each county no later than Monday, August 1<sup>st</sup>.
3. Every county must complete their recanvass of results for these races no later than Thursday, August 4<sup>th</sup>.
4. In accordance with Rule 10.9.3, the interested parties who requested the recounts are deemed to have provided certified funds to cover the cost of a rescan of all ballots. I therefore order all counties that conducted their initial tabulation using tabulation machines to rescan ballots in accordance with section 1-10.5-102(2), C.R.S. and Rule 10.13.1. This method affords the most rigorous recount permitted by law.

Dated this 28th day of July, 2022

  
\_\_\_\_\_  
Jena M Griswold  
Colorado Secretary of State



<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p><b>Exhibit 7 - Summary of Colorado's Recount Procedures July 2022</b></p>	



## Summary of Colorado's Recount Procedures

July 2022

The following is a summary of the laws and rules governing recounts. While you should use this document as a guide, you should also review Article 10.5 of Title 1 and Election Rule 10 as you prepare for any recounts.

### 1. Cost of a recount

- **Mandatory recount costs: 1-10.5-101 (2), C.R.S.** The entity that certified the candidate or ballot measure to the ballot must pay the costs incurred by the county in conducting a mandatory recount. Costs incurred are collected following the recount in this circumstance.
- **Requested recount costs: 1-10.5-106 (2), C.R.S.** The interested party must pay the costs incurred by the county in conducting a requested recount.
  - One day after receiving notice of a requested recount, the designated election official (county or state, based on who certified candidate or issue to the ballot) must prepare a cost estimate and provide that estimate to the requesting interested party.
    - Counties must use the SOS approved recount cost estimate form for this purpose. The form can be found under “canvass” on the SOS approved forms page.
  - The interested party must pay the full cost, based on the estimate, within one day after receiving the estimate. If payment is not received timely, then the recount does not move forward.
  - If received, the payment must be placed in escrow until the recount has been completed.
    - If the recount does not bring the final tally to within the automatic recount range, then the county keeps the funds (or funds are distributed to counties if recount is for a state candidate).
    - If the final tally does fall within automatic recount range, or changes the results, then the county must refund the cost to the interested party.
- **Rule 10.10.1** Counties conducting a recount for a mandatory state certified race must submit a request for reimbursement using the Secretary of State form.
  - Meals, normal overhead costs, and regular employee compensation are not coverable costs in a mandatory recount.
  - Pay for election judges, temporary staff, canvass board, and overtime for staff is coverable.
  - Costs for mailing and notices as well as copies and other office expenses directly related to the recount are also coverable.

## 2. Recount notice

- **1-10.5-105, C.R.S.** Counties must notify candidates, petition representatives, any relevant governing body, or any relevant issue committee of the recount before it begins by email, telephone, fax, or personal service. If the recount is for a state-certified race, the Secretary of State will provide notice, and counties are not required to provide their own individual notices.

## 3. Timing of the recount

- **1-10.5-102, 1-10.5-103 C.R.S.** A recount may begin:
  - after the county canvass is complete; or
  - after the Secretary of State orders, if for a state certified race.
- **1-10.5-102 (2), 1-10.5-103, 1-10.5-106 (2), C.R.S.** Counties must complete a mandatory recount no later than the thirty fifth day after the election and a requested recount no later than the thirty seventh day after the election. For the June primary, the thirty fifth day is August 2, and the thirty seventh day is August 4.
- **Rule 10.9.4** If there is a recount for a state certified race, county clerks must coordinate the scheduling of the recount through the Secretary of State's Office.
- **Rule 10.9.5** If there is a local recount that spans multiple counties, then the controlling county defined by Rule 4.2.2 must coordinate the scheduling of the recount.

## 4. Cancelling a mandatory recount

- **1-10.5-103** A political subdivision who referred a ballot issue or question to a county may waive an automatic recount by giving the clerk written notice by the 23<sup>rd</sup> day after the election. In 2021, the deadline is November 26.
- **Rule 10.9.6** Losing candidates may submit a letter of withdrawal in accordance with section 1-4-1001, C.R.S. to the candidate's DEO before a recount begins. If a withdrawal is submitted the county clerk need not conduct a recount for that candidate's race.

## 5. Canvass board's role and duties generally

- **1-10.5-107 (1), C.R.S.** The canvass board that officiated in the original certification conducts the recount. Canvass board members unable to serve in the recount may be replaced in accordance with Section 1-10-101, C.R.S.
- **1-10.5-107 (2), C.R.S.** The canvass board may employ assistants and clerks as necessary.

- **1-10.5-107 (3), C.R.S.** The canvass board may require the production of documentary evidence regarding votes cast or counted and may amend the abstract based on its findings.
- **Rule 10.9.1** The purpose of a recount is to re-tabulate the ballots.
- **Rules 10.3.2 (d) and 10.11** The canvass board's role in a recount includes selecting ballots for the random test, observing the recount of ballots, and certifying the results.

## 6. Role of watchers

- **Rule 8.10.2** Watchers must have access that allows them personal visual access to read documents, writings or electronic screens.
- **Rule 8.8** The number of watchers permitted is dependent on the process, the number of judges, and is subject to local safety codes.
- **Rule 8.1** Watchers must be qualified and sworn in. Candidates, and proponents or opponents of issues involved in the recount may appoint one or more watchers. A candidate involved in a recount may not appoint himself or herself, or a member of the candidate's family by blood, marriage, or civil union, as a watcher for the recount.
- **Rule 8.6.1** Watchers are subject to removal under the same standards that apply during regular election activities.

## 7. Testing Prior to Recount

### a. Generally

- **1-10.5-102 (3) (a) and (b), C.R.S. and Rules 10.12.2, 10.13.1** The canvass board must, prior to any recount in which scanners will be used, randomly choose and test voting devices used in the original race. The canvass board must compare a manual count of the paper test ballots against the machine count of the randomly selected scanners or voting devices. If the results of the comparison are identical, or if any discrepancy can be attributed to voter or ballot marking error, the county must conduct the recount in the same manner as the original count.
- **Rule 10.13.1** If there are unresolvable discrepancies in the test, the recount must be conducted as a hand count in that county under Rule 10.13.4.
- **Rule 10.12.2 (b)** A bipartisan team of judges or clerk staff must hand tally the recount contest on the test ballots to verify there are no discrepancies on the voting devices chosen.
- **Rule 10.12.2(c)** The test is limited to the race or measure being recounted.

### b. Equipment tested

- **Rule 10.12.1** The canvass board must review the post-election audit before selecting the equipment to be tested.

- **Rule 10.12.2** The clerk must test all ballot scanners that will be used in the recount.

*c. Test Deck*

- **Rule 10.12.2** The county recount test deck must include:
  - Every ballot style and precinct style (when applicable) containing the recounted contest.
  - Enough ballots to mark every vote position and every possible combination of vote positions in the recounted contest, including overvotes, undervotes, blank voted contests, and write-in votes, to the extent applicable
    - **Secretary of State Guidance:** The county test deck for the recount should also include each type of ballot stock that the county used in the election: ballots printed from ballot marking devices, ballots printed on demand, and commercially printed ballots.
  - For a required recount, an additional 10 test ballots each for two canvass board members of different affiliations marked by those board members.
  - For requested recounts, the person or organization requesting the recount and any other candidate or organization directly involved in the recount may also mark 10 ballots.
    - **Secretary of State Guidance:** allow the watcher appointed by a candidate to mark up to 10 ballots if the candidate themselves is not present.
- **Secretary of State Guidance** The canvass board may opt to use the county’s test deck from the original pre-election LAT, or create another test deck especially for the recount that satisfies the above requirements. Also, once the recount LAT is completed, the county should:
  - Generate a summary results report in paper format for the canvass board to verify against their hand tally of the test ballots. The canvass board members should sign and date the LAT summary results report, and state the political party with which they are affiliated.
  - Backup the recount election project or database containing the test results
  - If desired, export a recount LAT results file and CVR file
  - Ask the canvass board to observe the voting system operator clear all test results from the recount project or database
  - Generate a zero report to document that all test results have been cleared from the recount project or database before any original counting batches are rescanned. The canvass board members should date, sign, and state their party affiliations on the zero report too.

## 8. Counting ballots

*a. Generally*

- **Rule 10.9.2; 10.9.3:**

- A county that successfully completed a risk limiting audit and reported no discrepancies in the recount contest (whether or not that contest was the target of the RLA) is not required to rescan ballots during a recount.
  - However, the losing candidate or interested party in a recount may request that counties rescan ballots regardless.
    - This request is due no later than the 28<sup>th</sup> day after the election for required recounts and 29<sup>th</sup> day for requested recounts.
    - For the 2022 primary, these dates are:
      - July 26 for required recount
      - July 27 for requested recount
  - **Rule 10.13.2** If a rescan is conducted, the county clerk and canvass board must maintain a clear audit trail throughout the recount, including a log of original transfer case or ballot box seal numbers and the corresponding replacement seal numbers.
  - **Rule 10.13.5** The re-tabulation process must be precise and controlled. Each container of ballots must be re-tabulated and resealed before the next container is opened for scanning on a particular tabulator.
    - Secretary of State Guidance: This protocol does not prohibit a county from using multiple teams of counting judges on different scanning stations. Each scanning team should rescan all ballots in a storage container and re-seal the storage container before opening the next storage container, but multiple teams may follow the same process simultaneously.
  - **Rule 10.13.6** The county clerk and recorder must ensure that the number of ballots counted according to the final results for that race or measure must be available during the recount for comparison purposes.
  - **Rule 10.13.4** Counties who conducted a hand count during initial tabulation must conduct the recount by hand count.
  - **Secretary of State Guidance:** For recounts in which the county rescans all ballots:
    - We strongly recommend that the county scan the original counting batches on the same tabulators and in the same order as the initial count. This practice makes identifying differences between the initial count and recount much easier and efficient, should that be necessary.
    - If rescanning the original counting batches on the same tabulators and in the same order, remember to return the ballots randomly selected for the RLA to their original batches and positions within the batch, if your county's business process is to store RLA materials in their own containers after the RLA is completed.
- b. Reviewing ballots for voter intent*
- **Rule 10.13.3** Ballots subject to adjudication must be reviewed for voter intent using the standards in Rule 18 and the voter intent guide.



- **Rule 10.13.3 (a) and (b).** In contrast to the regular election, election judges must review for voter intent all ballots with overvotes, undervotes, and blank votes in the recount race for voter intent. This requirement means the county must add undervotes and blank voted contests in the recount contest only to the adjudication conditions used in the recount according to the provider's recommendations. Counties must use the same voter intent guidelines as the regular election (but the review need not necessarily yield the same result).
- **Secretary of State Guidance** Election judges may only review voter intent on the races involved in the recount.

*c. Documents the canvass board may review*

- **1-10.5-107 (3)** The canvass board may require the production of any documentary evidence regarding any vote cast or counted.
- **Rule 10.11** The canvass board's role in conducting a recount includes selecting ballots for the test, observing the recounting of ballots, and certifying the results.
- **Secretary of State Guidance**
  - The canvass board may only review the documents it needs to complete the re-tabulation. This includes original ballots, accounting forms, and duplication logs.
  - A decision by the canvass board should be made by a majority of the board.
  - The canvass board may not review signatures on ballot return ballot envelopes.

*d. Reporting recount results*

- **1-10.5-107 (4), C.R.S.** After the recount, the canvass board must make the returns to the county clerk and recorder and to all who received the notice of recount. The canvass board must also meet and issue an amended abstract of votes cast, if necessary, for the recounted race or races and deliver it to the county clerk and recorder.
- **1-10.5-107 (5), C.R.S.** The county clerk and recorder must notify the governing body of the recount results.
- **Rule 10.14.1** The clerk must report the totals in summary form as follows:
  - Summary results report of votes cast for all candidates or voting choices in the recounted contest only, showing cards counted, overvotes, undervotes, blank voted contests, and valid votes for eligible write-in candidates, to the extent applicable..
  - The summary results report should report results in the same manner (by ballot style or district) as the initial results.
- **Secretary of State Guidance**
  - Canvass board members should be clear that they are to amend and recertify the abstract, not redo the entire abstract.
  - Before exiting the voting system, the county should backup the voting system project or database used to conduct the recount. In addition, the county may also export recount results and CVR files if the county desires to retain records of the recount in

both digital and paper formats. Note: Unlike the initial count, the results and CVR files will not be uploaded to ENR or the RLA software. The recount results export and CVR files will contain un-adjudicated results for all contests except the recounted race or ballot measure, and those un-adjudicated results will not match the original certified, fully adjudicated results. Counties following this practice should be prepared to explain the variances between the original and recount results and CVR files.

- When the canvass board certifies an amended abstract of votes cast showing the changed vote totals following the recount, the county will also need to update ENR to reflect the changed vote totals in the recounted contests. When you are ready to update ENR, please contact the Voting Systems team at 877-436-5677 for appropriate instructions.

## 9. Challenges to the recount

### *a. State races*

- **1-10.5-109(1) (a), C.R.S.** Any interested party to a recount that has reasonable grounds to believe that the recount is not being conducted in a fair, impartial, and uniform manner may apply to the Denver District Court for an order requiring a county clerk to stop the recount and requiring the Secretary of State to conduct the recount. The county clerk will be an official observer to any recount.

### *b. Local races*

- **1-10.5-109 (1) (b), C.R.S.** Any candidate in a race subject to a recount or representative or opponent to an issue that is the subject of a recount who has reasonable grounds to believe that the canvass board or county is not conducting the recount in a fair, impartial, or uniform manner may apply to the district court for the political subdivision for an order requiring the designated election official to stop the recount, give the appropriate official all election records used in conducting the recount, and require the appropriate official to conduct the recount. If the county clerk and recorder is not the designated election official, then the county clerk and recorder is the appropriate official to conduct the recount. If the county clerk and recorder is the designated election official, then the Secretary of State is the appropriate official to conduct the recount. The designated election official will be an official observer to any recount.

If you have any questions, please contact Caleb Thornton at [caleb.thornton@coloradosos.gov](mailto:caleb.thornton@coloradosos.gov) or 303-894-2200 ext. 6386 or Dwight Shellman at [dwight.shellman@coloradosos.gov](mailto:dwight.shellman@coloradosos.gov) or 303-860-6927.

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p align="center"><b>Exhibit 8 - Election Order 2022-14</b></p>	



# Jena M Griswold

Colorado Secretary of State

## Election Order 2022-14

**Re: 2022 General Election 3rd Congressional District Recount**

**Date: November 30, 2022**

### Operative Facts

The General Election was held on November 8, 2022. Adam Frisch and Lauren Boebert were the two certified major party (or “named”) candidates in Colorado Congressional District 3 (“CD 3”) for a seat in the 118<sup>th</sup> United States Congress. At the conclusion of tabulation of all 27 counties making up CD 3, Adam Frisch received 49.92% of the overall vote total (163,292 votes) while Lauren Boebert received 50.08% (163,842 votes). Pursuant to Colorado law, the percentage difference of vote totals between the two candidates requires the Secretary of State to order a recount. 1-10.5-101, C.R.S.

### Order

In accordance with the authority provided under 1-1-107(2)(a), 1-1.5-104(1)(e), 1-10.5-101, and 1-10.5-102, C.R.S., I hereby order as follows:

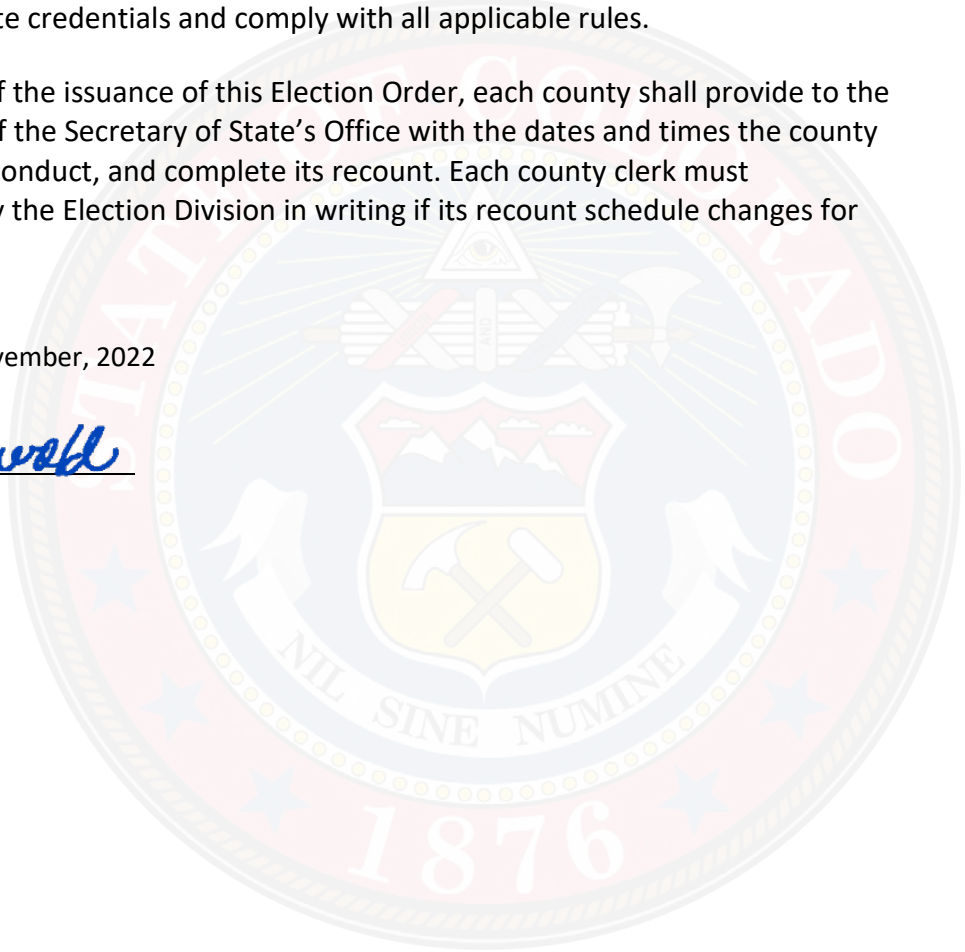
1. The following counties shall conduct a recount of the Congressional race in CD 3:

Alamosa	Hinsdale	Otero
Archuleta	Huerfano	Ouray
Conejos	La Plata	Pitkin
Costilla	Las Animas	Pueblo
Delta	Mesa	Rio Blanco
Dolores	Mineral	Rio Grande
Eagle	Moffat	Saguache
Garfield	Montezuma	San Juan
Gunnison	Montrose	San Miguel

2. The recount shall be conducted in accordance with statute as stated in the applicable sections of 1-10.5-102, C.R.S. and Election Rule 10, as well as any further instruction provided by the Election Division of the Office of the Secretary of State.
3. Pursuant to Election Rule 10.9.3, Candidate Frisch has requested that the recount be conducted by means of a re-scan of the ballots cast in the CD-3 race. As a result, all counties that used a certified voting system for the initial tabulation must re-scan all ballot cards counted during the initial tabulation. <sup>1</sup>
4. The recount shall be completed by December 13, 2022, as required by 1-10.5-102(2), C.R.S.
5. In addition to watchers appointed by major party county chairpersons, all counties must admit observers from the Secretary of State's Office, the U.S. House of Representatives, and the U.S. Department of Justice. All watchers and observers must present appropriate credentials and comply with all applicable rules.
6. **Within 24 hours** of the issuance of this Election Order, each county shall provide to the Election Division of the Secretary of State's Office with the dates and times the county expects to begin, conduct, and complete its recount. Each county clerk must immediately notify the Election Division in writing if its recount schedule changes for any reason.

Dated this 30<sup>th</sup> day of November, 2022

  
\_\_\_\_\_  
Jena M Griswold  
Colorado Secretary of State



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<sup>1</sup> San Juan County, which manually counted the election results initially, is exempt from the requirement to re-scan the ballots and should conduct the recount by the same means used to tabulate the initial result.

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
<p>GORDON CARLETON, SHERYL HARMON,  DEANNA JANCKILA, and  YOLANDA MELENDEZ,   Petitioners,   vs.   JENA GRISWOLD, in her official capacity as  Secretary of State for the State of Colorado,   Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p><b>Exhibit 9 - Summary of Colorado's Recount Procedures November 2022</b></p>	



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## Summary of Colorado's Recount Procedures

November 2022

The following is a summary of the laws and rules governing recounts. While you should use this document as a guide, you should also review Article 10.5 of Title 1 and Election Rule 10 as you prepare for any recounts.

### 1. Cost of a recount

- **Mandatory recount costs: 1-10.5-101 (2), C.R.S.** The entity that certified the candidate or ballot measure to the ballot must pay the costs incurred by the county in conducting a mandatory recount. Costs incurred are collected following the recount in this circumstance.
- **Requested recount costs: 1-10.5-106 (2), C.R.S.** The interested party must pay the costs incurred by the county in conducting a requested recount.
  - One day after receiving notice of a requested recount, the designated election official (county or state, based on who certified candidate or issue to the ballot) must prepare a cost estimate and provide that estimate to the requesting interested party.
    - Counties must use the SOS approved recount cost estimate form for this purpose. The form can be found under “canvass” on the SOS approved forms page.
  - The interested party must pay the full cost, based on the estimate, within one day after receiving the estimate. If payment is not received timely, then the recount does not move forward.
  - If received, the payment must be placed in escrow until the recount has been completed.
    - If the recount does not bring the final tally to within the automatic recount range, then the county keeps the funds (or funds are distributed to counties if recount is for a state candidate).
    - If the final tally does fall within automatic recount range, or changes the results, then the county must refund the cost to the interested party.
- **Rule 10.10.1** Counties conducting a recount for a mandatory state certified race must submit a request for reimbursement using the Secretary of State form.
  - Meals, normal overhead costs, and regular employee compensation are not coverable costs in a mandatory recount.
  - Pay for election judges, temporary staff, canvass board, and overtime for staff is coverable.
  - Costs for mailing and notices as well as copies and other office expenses directly related to the recount are also coverable.

## 2. Recount notice

- **1-10.5-105, C.R.S.** Counties must notify candidates, petition representatives, any relevant governing body, or any relevant issue committee of the recount before it begins by email, telephone, fax, or personal service. If the recount is for a state-certified race, the Secretary of State will provide notice, and counties are not required to provide their own individual notices.

## 3. Timing of the recount

- **1-10.5-102, 1-10.5-103 C.R.S.** A recount may begin:
  - after the county canvass is complete; or
  - after the Secretary of State orders, if for a state certified race.
- **1-10.5-102 (2), 1-10.5-103, 1-10.5-106 (2), C.R.S.** Counties must complete a mandatory recount no later than the thirty fifth day after the election and a requested recount no later than the thirty seventh day after the election.
- **Rule 10.9.4** If there is a recount for a state certified race, county clerks must coordinate the scheduling of the recount through the Secretary of State's Office.
- **Rule 10.9.5** If there is a local recount that spans multiple counties, then the controlling county defined by Rule 4.2.2 must coordinate the scheduling of the recount.

## 4. Cancelling a mandatory recount

- **1-10.5-103** A political subdivision who referred a ballot issue or question to a county may waive an automatic recount by giving the clerk written notice by the 23<sup>rd</sup> day after the election.
- **Rule 10.9.6** Losing candidates may submit a letter of withdrawal in accordance with section 1-4-1001, C.R.S. to the candidate's DEO before a recount begins. If a withdrawal is submitted the county clerk need not conduct a recount for that candidate's race.

## 5. Canvass board's role and duties generally

- **1-10.5-107 (1), C.R.S.** The canvass board that officiated in the original certification conducts the recount. Canvass board members unable to serve in the recount may be replaced in accordance with Section 1-10-101, C.R.S.
- **1-10.5-107 (2), C.R.S.** The canvass board may employ assistants and clerks as necessary.



- **1-10.5-107 (3), C.R.S.** The canvass board may require the production of documentary evidence regarding votes cast or counted and may amend the abstract based on its findings.
- **Rule 10.9.1** The purpose of a recount is to re-tabulate the ballots.
- **Rules 10.3.2 (d) and 10.11** The canvass board's role in a recount includes selecting ballots for the random test, observing the recount of ballots, and certifying the results.

## 6. Role of watchers

- **Rule 8.10.2** Watchers must have access that allows them personal visual access to read documents, writings or electronic screens.
- **Rule 8.8** The number of watchers permitted is dependent on the process, the number of judges, and is subject to local safety codes.
- **Rule 8.1** Watchers must be qualified and sworn in. In a general election, watchers may be appointed by county chairperson of the party, or by an unaffiliated candidate. A candidate involved in a recount, or a member of the candidate's family by blood, marriage, or civil union, may not be personally appointed as a watcher for the recount.
- **Rule 8.6.1** Watchers are subject to removal under the same standards that apply during regular election activities.

## 7. Testing Prior to Recount

### a. Generally

- **1-10.5-102 (3) (a) and (b), C.R.S. and Rules 10.12.2, 10.13.1** The canvass board must, prior to any recount in which scanners will be used, randomly choose and test voting devices used in the original race. The canvass board must compare a manual count of the paper test ballots against the machine count of the randomly selected scanners or voting devices. If the results of the comparison are identical, or if any discrepancy can be attributed to voter or ballot marking error, the county must conduct the recount in the same manner as the original count.
- **Rule 10.13.1** If there are unresolvable discrepancies in the test, the recount must be conducted as a hand count in that county under Rule 10.13.4.
- **Rule 10.12.2 (b)** A bipartisan team of judges or clerk staff must hand tally the recount contest on the test ballots to verify there are no discrepancies on the voting devices chosen.
- **Rule 10.12.2(c)** The test is limited to the race or measure being recounted.

### b. Equipment tested

- **Rule 10.12.1** The canvass board must review the post-election audit before selecting the equipment to be tested.

- **Rule 10.12.2** The clerk must test all ballot scanners that will be used in the recount.

c. *Test Deck*

- **Rule 10.12.2** The county recount test deck must include:
  - Every ballot style and precinct style (when applicable) containing the recounted contest.
  - Enough ballots to mark every vote position and every possible combination of vote positions in the recounted contest, including overvotes, undervotes, blank voted contests, and write-in votes, to the extent applicable
    - **Secretary of State Guidance:** The county test deck for the recount should also include each type of ballot stock that the county used in the election: ballots printed from ballot marking devices, ballots printed on demand, and commercially printed ballots.
  - For a required recount, an additional 10 test ballots each for two canvass board members of different affiliations marked by those board members.
  - For requested recounts, the person or organization requesting the recount and any other candidate or organization directly involved in the recount may also mark 10 ballots.
    - **Secretary of State Guidance:** in a requested recount, allow the watcher appointed by a candidate to mark up to 10 ballots if the candidate themselves is not present.
- **Secretary of State Guidance** The canvass board may opt to use the county’s test deck from the original pre-election LAT, or create another test deck especially for the recount that satisfies the above requirements. Also, once the recount LAT is completed, the county should:
  - Generate a summary results report in paper format for the canvass board to verify against their hand tally of the test ballots. The canvass board members should sign and date the LAT summary results report, and state the political party with which they are affiliated.
  - Backup the recount election project or database containing the test results
  - If desired, export a recount LAT results file and CVR file
  - Ask the canvass board to observe the voting system operator clear all test results from the recount project or database
  - Generate a zero report to document that all test results have been cleared from the recount project or database before any original counting batches are rescanned. The canvass board members should date, sign, and state their party affiliations on the zero report too.

## 8. Counting ballots

a. *Generally*

- **Rule 10.9.2; 10.9.3:**

- A county that successfully completed a risk limiting audit and reported no discrepancies in the recount contest (whether or not that contest was the target of the RLA) is not required to rescan ballots during a recount.
  - However, the losing candidate or interested party in a recount may request that counties rescan ballots regardless.
    - This request is due no later than the 28<sup>th</sup> day after the election for required recounts and 29<sup>th</sup> day for requested recounts.
    - For the 2022 primary, these dates are:
      - July 26 for required recount
      - July 27 for requested recount
  - **Rule 10.13.2** If a rescan is conducted, the county clerk and canvass board must maintain a clear audit trail throughout the recount, including a log of original transfer case or ballot box seal numbers and the corresponding replacement seal numbers.
  - **Rule 10.13.5** The re-tabulation process must be precise and controlled. Each container of ballots must be re-tabulated and resealed before the next container is opened for scanning on a particular tabulator.
    - Secretary of State Guidance: This protocol does not prohibit a county from using multiple teams of counting judges on different scanning stations. Each scanning team should rescan all ballots in a storage container and re-seal the storage container before opening the next storage container, but multiple teams may follow the same process simultaneously.
  - **Rule 10.13.6** The county clerk and recorder must ensure that the number of ballots counted according to the final results for that race or measure must be available during the recount for comparison purposes.
  - **Rule 10.13.4** Counties who conducted a hand count during initial tabulation must conduct the recount by hand count.
  - **Secretary of State Guidance:** For recounts in which the county rescans all ballots:
    - We strongly recommend that the county scan the original counting batches on the same tabulators and in the same order as the initial count. This practice makes identifying differences between the initial count and recount much easier and efficient, should that be necessary.
    - If rescanning the original counting batches on the same tabulators and in the same order, remember to return the ballots randomly selected for the RLA to their original batches and positions within the batch, if your county's business process is to store RLA materials in their own containers after the RLA is completed.
- b. Reviewing ballots for voter intent*
- **Rule 10.13.3** Ballots subject to adjudication must be reviewed for voter intent using the standards in Rule 18 and the voter intent guide.

- **Rule 10.13.3 (a) and (b).** In contrast to the regular election, election judges must review for voter intent all ballots with overvotes, undervotes, and blank votes in the recount race for voter intent. This requirement means the county must add undervotes and blank voted contests in the recount contest only to the adjudication conditions used in the recount according to the provider's recommendations. Counties must use the same voter intent guidelines as the regular election (but the review need not necessarily yield the same result).
- **Secretary of State Guidance** Election judges may only review voter intent on the races involved in the recount.

*c. Documents the canvass board may review*

- **1-10.5-107 (3)** The canvass board may require the production of any documentary evidence regarding any vote cast or counted.
- **Rule 10.11** The canvass board's role in conducting a recount includes selecting ballots for the test, observing the recounting of ballots, and certifying the results.
- **Secretary of State Guidance**
  - The canvass board may only review the documents it needs to complete the re-tabulation. This includes original ballots, accounting forms, and duplication logs.
  - A decision by the canvass board should be made by a majority of the board.
  - The canvass board may not review signatures on ballot return ballot envelopes.

*d. Reporting recount results*

- **1-10.5-107 (4), C.R.S.** After the recount, the canvass board must make the returns to the county clerk and recorder and to all who received the notice of recount. The canvass board must also meet and issue an amended abstract of votes cast, if necessary, for the recounted race or races and deliver it to the county clerk and recorder.
- **1-10.5-107 (5), C.R.S.** The county clerk and recorder must notify the governing body of the recount results.
- **Rule 10.14.1** The clerk must report the totals in summary form as follows:
  - Summary results report of votes cast for all candidates or voting choices in the recounted contest only, showing cards counted, overvotes, undervotes, blank voted contests, and valid votes for eligible write-in candidates, to the extent applicable..
  - The summary results report should report results in the same manner (by ballot style or district) as the initial results.
- **Secretary of State Guidance**
  - Canvass board members should be clear that they are to amend and recertify the abstract, not redo the entire abstract.
  - Before exiting the voting system, the county should backup the voting system project or database used to conduct the recount. In addition, the county may also export recount results and CVR files if the county desires to retain records of the recount in

both digital and paper formats. Note: Unlike the initial count, the results and CVR files will not be uploaded to ENR or the RLA software. The recount results export and CVR files will contain un-adjudicated results for all contests except the recounted race or ballot measure, and those un-adjudicated results will not match the original certified, fully adjudicated results. Counties following this practice should be prepared to explain the variances between the original and recount results and CVR files.

- When the canvass board certifies an amended abstract of votes cast showing the changed vote totals following the recount, the county will also need to update ENR to reflect the changed vote totals in the recounted contests. When you are ready to update ENR, please contact the Voting Systems team at 877-436-5677 for appropriate instructions.

## 9. Challenges to the recount

### *a. State races*

- **1-10.5-109(1) (a), C.R.S.** Any interested party to a recount that has reasonable grounds to believe that the recount is not being conducted in a fair, impartial, and uniform manner may apply to the Denver District Court for an order requiring a county clerk to stop the recount and requiring the Secretary of State to conduct the recount. The county clerk will be an official observer to any recount.

### *b. Local races*

- **1-10.5-109 (1) (b), C.R.S.** Any candidate in a race subject to a recount or representative or opponent to an issue that is the subject of a recount who has reasonable grounds to believe that the canvass board or county is not conducting the recount in a fair, impartial, or uniform manner may apply to the district court for the political subdivision for an order requiring the designated election official to stop the recount, give the appropriate official all election records used in conducting the recount, and require the appropriate official to conduct the recount. If the county clerk and recorder is not the designated election official, then the county clerk and recorder is the appropriate official to conduct the recount. If the county clerk and recorder is the designated election official, then the Secretary of State is the appropriate official to conduct the recount. The designated election official will be an official observer to any recount.

If you have any questions, please contact Caleb Thornton at [caleb.thornton@coloradosos.gov](mailto:caleb.thornton@coloradosos.gov) or 303-894-2200 ext. 6386 or Dwight Shellman at [dwight.shellman@coloradosos.gov](mailto:dwight.shellman@coloradosos.gov) or 303-860-6927.

<p>Colorado Supreme Court  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: December 6, 2022 2:55 PM  FILING ID: F5A34114FDAA3  CASE NUMBER: 2022SA393</p>
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<p><b>Counsel for Petitioners:</b>  Gary D. Fielder, Esq., #19757  1435 Stuart St.  Denver, CO 80204  (303) 650-1505  gary@fielderlaw.net</p>	<p>Case No. 2022SA_____</p>
<p><b>Exhibit 10 - Email from Cody Davis regarding C.R.S. § 1-10.5-102(3)(a)</b></p>	

## Fw: Fwd: Recount more Cody responses I must be getting under his skin

---

From Linda Opines <LindaLaughs@protonmail.com>

To jimger89@protonmail.com

Date Tuesday, December 6th, 2022 at 12:16 PM

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Linda Bissett

[www.COFightForFreedom.com](http://www.COFightForFreedom.com)

720-219-3053

----- Original Message -----

On Tuesday, December 6th, 2022 at 11:58 AM, Karen Seibold <ksdvm86@reagan.com> wrote:

Sent from my iPad

Begin forwarded message:

**From:** Cody Davis <cody.davis@mesacounty.us>

**Date:** December 6, 2022 at 11:40:45 AM MST

**To:** Karen Seibold <ksdvm86@reagan.com>

**Cc:** Janet Rowland <janet.rowland@mesacounty.us>, Scott McInnis <scott.mcinnis@mesacounty.us>, Bobbie Daniel <Bobbie.Daniel@mesacounty.us>

**Subject: Re: Recount**

Karen,

Your original point (or that made by Save Colorado Project that you parroted) makes a legal argument based on current state statute which requires one to parse definitions. You can't shake your head at actual definitions if you're trying to make a legal and cogent argument. If you view the facts and legal definitions of words as condescending, that's unfortunate. Would love to hear how you think I'm wrong on the definition of "voting devices" and what the implications of a defunct statute is. And thank you, the 2021 election was very transparent and proves the system works. My colleagues and I are very proud of that.

Best,

**Cody Davis**

**Mesa County Commissioner**



544 Rood Ave  
 Grand Junction, CO 81501

**Office:** 970-244-1605

**Cell:** 970-640-4330

**Email:** [cody.davis@mesacounty.us](mailto:cody.davis@mesacounty.us)

[www.mesacounty.us](http://www.mesacounty.us)

**We are Team Mesa**



On Tue, Dec 6, 2022 at 9:34 AM Karen Seibold <[ksdvm86@reagan.com](mailto:ksdvm86@reagan.com)> wrote:

Please Cody:

We use machines you can parse words- voting devices - tabulators ect.... Whatever- they print a ballot - you put in a machine to be counted the machine is vulnerable as is any electronic devices - SMH

The school board election was the most transparent as the hand count was done with the machine - why not do the same easy fix to prove to the people of Mesa that you actually are listening to their concerns - your attitude just continues the divide - but maybe that is how you like it felling superior - your condescending response is fitting for someone that has no regard for the people that put you in that position.

This is actually not about Tina anymore- so you can quit with that excuse- she has been your fall guy for 2 years now UGH

K

Sent from my iPad

On Dec 6, 2022, at 8:53 AM, Cody Davis <[cody.davis@mesacounty.us](mailto:cody.davis@mesacounty.us)> wrote:

Karen,

Your comments that, "the means by which the SOS is dictating the recount is contrary to Colorado statue" is woefully misleading. It's the same ignorant argument that Tina made during her recount. The letter from the Save Colorado Project states that CRS 1-10.5-102 (3)(a) has been violated because the "voting devices" have not been used in the testing regimen. Did you know we don't use "voting devices" anymore (as defined by the state statute)? We use paper ballots only. As Dwight Shellman has stated, "1-10.5-



102(3), C.R.S. thus prescribes an equipment test for voting systems and components no longer used in this state, such as precinct optical scanners and direct recording electronic (DRE) touchscreen devices." How are clerks supposed to compare something to "voting devices" when the "voting devices" no longer exist? Not one single county uses "voting devices" anymore---only paper ballots! Hence the promulgation of election rules for testing the machines without "voting devices." I assume you're confusing the legal term "voting device" with what you understand as the tabulation machine. Please correct me if I am wrong.

Have a great day!

**Cody Davis**  
**Mesa County Commissioner**



544 Rood Ave  
Grand Junction, CO 81501

**Office:** 970-244-1605

**Cell:** 970-640-4330

**Email:** [cody.davis@mesacounty.us](mailto:cody.davis@mesacounty.us)

[www.mesacounty.us](http://www.mesacounty.us)

**We are Team Mesa**



On Tue, Dec 6, 2022 at 8:39 AM Karen Seibold <[ksdvm86@reagan.com](mailto:ksdvm86@reagan.com)> wrote:

As you are aware the recount for the congressional seat begins tomorrow. It has been pointed out that the means by which the SOS is dictating the recount is contrary to Colorado statute.

Please consider the following letter and request that the Clerks office follow Colorado law - which supersedes the SOS. The present clerks office must know that they have the support of the commissioners and the community to uphold the law regardless of the dictates of the SOS.

December 5, 2022

Dear Clerk,

Please be aware that the Secretary of State's Order for recount does not comply with Colorado Statute. You swore an oath to uphold the Constitution and Laws of Colorado. Your duty is to the people and the law, not to blindly take orders from the Secretary of State or the head of an NGO such as the Clerk's Association.

"2. The recount shall be conducted in accordance with statute as stated in the *applicable* sections of 1-10.5-102, C.R.S.

and Election Rule 10, as well as any further instruction provided by the Election Division of the Office of the Secretary of State.

3. Pursuant to Election Rule 10.9.3, Candidate Frisch has requested that the recount be conducted by means of a re-scan of the ballots cast in the CD-3 race. As a result, all counties that used a certified voting system for the initial tabulation must re-scan all ballot cards counted during the initial tabulation."

All three section of CRS 1-10.5-102 are *applicable*. Election Rules are subordinate to Statute as rules must be in compliance with statute.

Though Candidate Frisch has requested a *rescan*, the law requires a *recount*. The law sets forth how the recount shall be conducted which includes a comparison of the manual count of the voter-verified paper records.

C.R.S. § 1-10.5-102 (3)(a) states: **Prior to any recount**, the canvass board shall choose at random and test voting devices used in the candidate race, ballot issue, or ballot question that is the subject of the recount. **The board shall use the voting devices it has selected to conduct a comparison of the machine count of the ballots counted on each such voting device for the candidate race, ballot issue, or ballot question to the corresponding manual count of the voter-verified paper records.**

C.R.S. § 1-10.5-102 (3)(b) states: **If the results of the comparison of the machine count and the manual count** in accordance with the requirements of subsection (3)(a) of this section **are identical**, or if any discrepancy is able to be accounted for by voter error, **then the recount may be conducted in the same manner as the original ballot count.** *If the results of the comparison of the machine count and the manual count* in accordance with the requirements of subsection (3)(a) of this section *are not identical*, or if any discrepancy is not able to be accounted for by voter error, *a presumption is created that the voter-verified paper records will be used for a final determination*

The Secretary's Order is in conflict with Colorado Law. I ask that you take your oath seriously and follow Colorado Law. This can be done by adhering to CRS§1-10.5-102 along with the guidance set by the Secretary. You can hand count the paper ballots to reconcile with one tabulator's count, perform a Logic and Accuracy Test, and other actions the Secretary has ordered. You will not be disobeying the Secretary's Order by omitting an action, you will be following the law by performing the comparison *in addition* to the Secretary's Orders. You will be in compliance with the law should any legal actions be filed. You will be honoring your duty by performing a transparent recount to alleviate any concerns the people of Colorado may have.

Respectfully

Karen Seibold