

<p>DISTRICT COURT, MESA COUNTY, COLORADO</p> <p>125 N. Spruce St. Grand Junction, CO 81501</p> <p><b>Petitioners:</b> JENA GRISWOLD, in her official capacity as Colorado Secretary of State; HEIDI JEANNE HESS, in her capacity as a Mesa County registered elector,</p> <p>v.</p> <p><b>Respondents:</b> TINA M. PETERS, in her official capacity as the Clerk and Recorder for Mesa County, Colorado; BELINDA KNISLEY, in her official capacity as the Deputy Clerk and Recorder for Mesa County, Colorado,</p> <p>v.</p> <p><b>Intervenor:</b> Board of County Commissioners of Mesa County, Colorado.</p>	<p>DATE FILED: September 22, 2021 11:49 PM FILING ID: CEDFC55A120EE CASE NUMBER: 2021CV30214</p> <p><b>COURT USE ONLY</b></p>
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<p><b>PETITIONERS' JOINT OPENING BRIEF</b></p>	

## INTRODUCTION

Mesa County Clerk Tina Peters and Deputy Clerk Belinda Knisley jeopardized the security of Mesa County's 2021 election. They deliberately violated the Secretary of State's Election Rules and supervisory directives issued pursuant to the Election Code that were designed to ensure the county's voting machines are secure. They also made material misrepresentations to the Secretary of State's staff to conceal their violation of Colorado law. Their cavalier and wrongful acts led directly to confidential information about Mesa County's voting system being posted on the Internet, resulting in 41 voting system components being decommissioned and replaced by the Mesa County Board of County Commissioners (the "Board").

The voters of Mesa County deserve a secure election. Given the seriousness of Respondents' misconduct and their inability to perform their duties in accordance with Colorado law, Petitioners ask that the Court enter an order directing substantial compliance with the Uniform Election Code of 1992 ("Election Code" or "Code"), by declaring (1) that Respondents are absent and/or unable to perform the required duties of the chief designated election official, (2) that former Secretary of State Wayne Williams be appointed as the chief designated election official for the 2021 coordinated election, and (3) that former Mesa County Clerk Sheila Reiner serve as the election supervisor.

## BACKGROUND

Petitioners incorporate the factual allegations from the verified petition and summarize the key facts below.

### **A. Respondents breach their duties in connection with the May 25, 2021 trusted build.**

The Colorado Department of State and the Mesa County Clerk scheduled a “trusted build” for May 25, 2021. Ex. 1, ¶ 6. A trusted build is a software update to the software that operates a county’s voting system equipment. Ex. 2, ¶ 3.

Colorado’s voting systems are prohibited from being connected to the Internet, *see* Rule 20.19.1, 8 CCR 1505-1 (“Election Rules”), which means the trusted build must be done manually and in-person. The Department of State is the custodian of the trusted version of the voting system software. In that capacity, only Department of State staff may possess or install the software on Colorado voting system equipment. The Department of State’s procedures for the 2021 trusted build, which were provided to the counties, stated that “only authorized state staff, county election staff and Dominion staff may be present during trusted build.” Ex. 1A.

Two days before the trusted build, on the evening of Sunday May 23, 2021, an unauthorized image was made of the voting equipment hard drive, including the voting system software and other files stored on the hard drive. Security logs indicate that Respondent Peters accessed the area where the voting system is located throughout the day and into the night when it is believed the image was

taken. Ex. 1C. The security logs show that Gerald Wood, falsely presented as an employee of Mesa County, also entered the elections division area using key-card access that is restricted to county employees. *Id.* Although this area is ordinarily under 24-hour video surveillance, the video surveillance system was turned off prior to May 23 at the direction of Knisley and was not restored until August 2021. Peters has admitted, both publicly and in her court filings, that she “authorized” a non-employee to take this image of the hard drive. *See* Respond. Countercls. ¶ 24.

The trusted build process occurred as scheduled on May 25 and 26, 2021. Ex. 2, ¶ 5. One employee from the Department of State, three employees from the voting system manufacturer, one employee of the Mesa County Clerk and Recorder’s Office (Sandra Brown) and the non-employee Gerald Wood, as well as Respondent Peters were present for the trusted build. *Id.*, ¶ 6.

Before the trusted build, Brown informed the Department of State via email that Gerald Wood was an administrative assistant in the clerk’s office. Ex. 1B. This email was in response to the Department of State’s effort to ensure that only authorized, limited personnel attended the trusted build. *Id.* In fact, Wood was not then and never has been a Mesa County employee. *See* Respond. Ans., ¶ 34. Respondent Knisley was copied on the email and did not correct Brown’s statement that Wood was a Mesa County employee. Ex. 1, ¶ 5. At the trusted build, Peters informed the Secretary of State’s representative that Wood was an administrative assistant with her office who was transitioning from the motor vehicles division to

the elections division. Ex. 2, ¶ 8. That was not true, as Wood was not a Mesa County employee. Nonetheless, Wood used a key-card that provided him with unsupervised access to secure areas in which Mesa County’s voting system and equipment were located throughout the day on May 23 and May 25. Exs. 1C, 1D.

During the May 25 trusted build, photos and videos were surreptitiously made of the process, which included an image of the BIOS (Basic Input/Output System) passwords for Mesa County’s voting equipment, which passwords are securely maintained by the Secretary of State’s staff and outside the county’s possession to further protect the equipment. In her counterclaims, Peters admits that she took a video and photographs of the trusted build process. *See* Respond. Countercls. ¶ 33. The BIOS passwords are required to access the operating system of a voting system—in other words, they are the passwords that must be entered in order to make any changes to the operating system’s settings. Further, Peters has also admitted that, after the trusted build, she “authorized” a non-employee to take another image of the hard drive. Respond. Countercls. ¶ 27. While the Election Rules require the preservation of certain election data, they do not direct counties to image the entire hard drive of a system.

On Monday, August 2, 2021, a video and photograph of the trusted build procedure and the BIOS passwords for Mesa County’s voting system equipment were posted to the social media site, Telegram, and to the blog, The Gateway Pundit. One week later, copies of the hard drive images for Mesa County’s voting

systems were also posted to social media. It is not currently known who released this information to the Internet, though it is currently the subject of state and federal criminal investigations. What is known is that Peters took a video and photographs of the trusted build process without the knowledge or consent of the Department of State; that Peters authorized a non-employee to image the hard drive before and after the trusted build without the knowledge or consent of the Department of State; and that a video and photographs of the trusted build process (including sensitive BIOS passwords), as well as the hard drive images, later appeared on the Internet.

**B. The Secretary issues three election orders to limit the harm caused by the Respondents' breaches.**

Upon learning of these unprecedented security breaches, the Secretary initiated an investigation that culminated in three election orders issued pursuant to her statutory authority. *See* §§ 1-1-107(1)(a), 1-1-110(1), 1-5-621(4), 1-7.5-104, and 1-7.5-106(2), C.R.S. These election orders are attached to the Verified Petition.

On August 9, the Secretary issued Election Order 2021-01, directing Peters to, among other things:

- Grant access to Department of State civil servant employees to reset BIOS passwords on Mesa County's voting machines and inspect those machines for any evidence of tampering;

- Identify individuals with access to Mesa County’s voting systems and produce chain-of-custody logs and video surveillance of voting system components;
- Produce communications relating to the trusted build process;
- Produce documents showing that criminal background checks were performed for all Mesa County staff present at the trusted build; and
- Prohibit any individual from accessing any component of Mesa County’s voting system.

On August 10, six civil servants from the Department of State, accompanied by Mesa County employees, inspected Mesa County’s voting equipment and chain-of-custody logs. Ex. 1, ¶¶ 7-16. Peters was not present on that date and informed Department of State staff that she was not in the state of Colorado. During their inspection, Department of State personnel found that security settings on the voting equipment server had been altered. Ex. 1, ¶ 10.

On August 12, the Secretary issued Election Order 2021-02. In it, the Secretary ordered the decommissioning of 41 voting system components in Mesa County. The Secretary found that the chain-of-custody of the components could not be confirmed, including whether those components were accessed and/or altered after May 25. Chain-of-custody logs showed that several components of the voting system were not sealed until 1-2 days after the trusted build, leaving open the possibility that those components were tampered with or altered following the trusted build. The Colorado County Clerks Association, comprised of Colorado’s

sixty-four republican, democratic, and unaffiliated County Clerks and Recorders, announced its support for the Secretary’s prohibition on the use of Mesa County’s voting equipment. *See Verified Petition ¶ 46; Answer ¶ 46.*

On August 17, the Secretary issued Election Order 2021-03, appointing Sheila Reiner “to supervise all conduct related to elections in Mesa County occurring under the authority of” the Elections Code, and a three-person advisory committee. Reiner is the former clerk and recorder of Mesa County and the current county treasurer. The order required Peters “and staff [to] take any and all lawful direction from Ms. Reiner” and it prohibited Knisley and Brown from “supervising, accessing, or participating in any aspect of all elections occurring under the [Election Code] until otherwise instructed by the Secretary.” The order also noted that the “Mesa County Clerk and Recorder’s office did not produce documents required by” Election Order 2021-01, though “Mesa County provided some of those requested documents.” But the order did not purport to remove, and did not have the effect of removing, Peters as the chief designated election official for the November 2, 2021 coordinated election in Mesa County.

**C. The Mesa County Board of County Commissioners names Wayne Williams as the chief designated election official.**

On August 17, 2021, the Board of County Commissioners passed Resolution 2021-43, which purported to “designate[] former Colorado Secretary of State Wayne Williams as Mesa County’s Designated Election Official for the November 2, 2021,

Mesa County Coordinated Election.” Since that time, Williams has effectively acted as the chief designated election official for Mesa County. He has entered intergovernmental agreements regarding the 2021 election, has worked with the Department of State to prepare Mesa County’s new voting systems for the upcoming election (including overseeing a trusted build of those machines), and has finalized the contents of the ballots and overseen the mailing of those ballots to overseas and military voters as required by federal law, *see* 52 U.S.C. § 20302(a)(1).

Peters has not performed any of these tasks or otherwise undertaken any actions with respect to the 2021 coordinated election since at least August 17, the date the Board passed Resolution 2021-43. Nor has Knisley, who is currently suspended pending the investigation and resolution of an internal complaint. Since being placed on leave, Knisley has also been charged with burglary (§ 18-4-203(1)), a felony, and cybercrime (§ 18-5.5-102(1)(a)), a misdemeanor, in connection with her allegedly accessing Mesa County computers and office space during her suspension. *See People v. Knisley*, 2021CR1312 (Mesa County).

## **LEGAL FRAMEWORK**

**County clerks.** County clerks, “in rendering decisions and interpretations under this code, shall consult with the secretary of state and follow the rules and orders promulgated by the secretary of state” under the Code. § 1-1-110(1). The county clerks also are designated as the “chief designated election official[s] for all coordinated elections,” § 1-1-110(3), unless the clerk is “absen[t]” or “for any reason

is unable to perform the required duties,” § 1-1-110(2). In such a circumstance, the deputy clerk “may” exercise the clerk’s duties, but is not required to. § 1-1-110(2).

**The Secretary of State.** The Secretary of State is the “chief state election official” in Colorado. § 1-1-107(1)(e). As such, the Secretary is responsible for “supervis[ing] the conduct of . . . statewide ballot issue elections,” including the 2021 election (which will contain three statewide ballot issues). § 1-1-107(1)(a); *see also* § 1-7.5-104 (county clerk conducts coordinated elections “under the supervision of, and subject to rules promulgated . . . by, the secretary of state”). The Secretary is also responsible for “enforc[ing] the provisions” of the Election Code.” § 1-1-107(1)(b). The Code also authorizes the Secretary “to enforce the provisions of this code by injunctive action brought by the attorney general in the district court for the judicial district in which any violation occurs.” § 1-1-107(2)(d).

**Section 1-1-113.** In general, § 1-1-113 is the “exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.” § 1-1-113(4). After the filing of a “verified petition” by a registered elector and “notice to the official which includes an opportunity to be heard,” if this Court finds good cause to believe that the respondents “ha[ve] committed a breach of duty or other wrongful act,” it “shall issue an order requiring substantial compliance with the provisions of [the Election Code].” *Id.* Section 1-1-113 proceedings are narrow and may not resolve all claims and counterclaims between parties. Rather, “the remedy available at the end of a

section 1-1-113 proceeding is limited to an order, upon the finding of good cause shown, that the provisions of the Colorado Election Code have been, or must be, substantially complied with.” *Frazier v. Williams*, 2017 CO 85, ¶ 17.

**Voting systems.** Votes may be cast, registered, scanned, and tabulated in all elections held in Colorado by means of an electromechanical or electronic voting system. § 1-5-601(1). A “voting system” is “a process of casting, recording, and tabulating votes using electromechanical or electronic devices or ballot cards and includes, but is not limited to, the procedures for casting and processing votes and the operating manuals, hardware, firmware, printouts, and software necessary to operate the voting system.” § 1-1-104(50.8). A political subdivision’s governing body can adopt an electromechanical or electronic voting system to use to record and tabulate votes as long as the system is certified by the Secretary of State. §§ 1-5-612, -623. The county clerk is the custodian of the voting systems. § 1-5-605.5.

The Secretary of State is required to “adopt rules . . . that establish minimum standards for electronic and electromechanical voting systems,” including “security requirements” for those systems. § 1-5-616(1)(g); *see also* § 1-1-107(2)(a) (Secretary has the “power” to “promulgate, publish, and distribute . . . such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws.”). Those rules are not merely ministerial requirements. Rather, they serve the paramount purpose of securing Colorado’s voting systems from improper access and ensuring that Coloradans’ ballots are accurately counted.

Several rules were violated or are otherwise implicated here,<sup>1</sup> including:

- “Access to where election management software is used is limited to authorized election officials and watchers only.” (Rule 20.5.5.)
- “Access to the . . . lock . . . to ballot storage areas, counting room, location of adjudication, or tabulation workstations is restricted to employees who have successfully passed a criminal background check.” (Rule 20.5.3(a).)
- “The county must maintain and document uninterrupted chain-of-custody for each voting device from the installation of trusted build to the present.” (Rule 20.3.2.)
- Limitations on the users who have electronic access to the voting system. (Rule 20.6.)
- A requirement for video surveillance of voting equipment at certain times in an election cycle. (Rule 20.9)

Following the security breaches, the Secretary promulgated a new Rule 20.5.4, which further clarifies the county clerks’ duty to ensure that only employees who have passed background checks have access to the voting system. In addition to the Secretary’s rulemaking authority in this area, the Secretary also provides “technical assistance to designated election officials” related to the installation and use of electronic and electromechanical voting systems. § 1-5-617(6).

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<sup>1</sup> Additional rules and statutes may be implicated as well, especially in light of the ongoing criminal investigations surrounding the security breaches.

## ARGUMENT

Petitioners and the Board are in agreement as to the relief the Court should order here: finding that the Respondents are both absent and unable to perform their required duties, and that Williams should be appointed as the designated election officer and Reiner as the election supervisor.

**I. Peters and Knisley are absent and unable to perform their required duties in light of their breaches of their duties and the resultant security threat posed to Mesa County's election.**

The Election Code establishes the county clerk is, by default, the “chief designated election official for all coordinated elections.” § 1-1-110(3).<sup>2</sup> But the Code acknowledges that the clerk’s election duties may be exercised by someone other than the clerk if (1) the clerk is absent, or (2) “if the county clerk and recorder *for any reason* is unable to perform the required duties.” § 1-1-110(2) (emphasis added). In such a circumstance, the clerk’s authority “may be exercised by a deputy clerk,” but the Code does not require the powers to devolve to a deputy. *Id.*

**A. Clerk Peters is absent and is unable to perform her duties.**

Peters is absent, both literally and effectively and has proven unable to comply with the laws regarding the administration of the election. She has not been

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<sup>2</sup> The November 2021 election in Mesa County is a coordinated election. A “coordinated election” is “an election where more than one political subdivision with overlapping boundaries or the same electors holds an election on the same day and the eligible electors are all registered electors, and the county clerk and recorder is the coordinated election official for the political subdivisions.” § 1-1-104(6.5).

to the office since August 10. It now sounds as though she will argue that she has been working remotely; if that is true, she has still been absent from performing any election-related duties, including responding to Election Orders or assisting to secure the instant security breach. Instead, Williams has acted as the chief designated election official, certifying the ballot contents, overseeing the preparation of the ballot, supervising the mailing of ballots to military and overseas voters, and entering intergovernmental agreements on behalf of the county related to the 2021 coordinated election.

In addition to being absent, Peters is also unable to perform the required duties of administering the 2021 coordinated election. Despite her duty to “consult with the secretary of state and follow the rules and orders promulgated by the secretary of state,” she instead ignored the rules while misrepresenting to the Department of State that the rules were being followed. Specifically:

- By granting access to Wood to the secure elections area, she violated Rule 20.5.5, which provides: “[a]ccess to where election management software is used is limited to authorized election officials and watchers only.” *See also* Election Rule 11.1.1 (“The designated election official must securely store election setup records. Only persons with the clerk’s written authorization may access the records.”).
- By giving Wood a keycard so he could access this area, she violated Rule 20.5.3(a), which provides: “Access to the . . . lock . . . to ballot

storage areas, counting room, location of adjudication, or tabulation workstations is restricted to employees who have successfully passed a criminal background check.”

- By misrepresenting that Wood was her employee, she concealed from the Department of State that he was not authorized to be present at the trusted build, contrary to the Department’s directive that “only authorized state staff, county election staff and Dominion staff may be present during trusted build.”<sup>3</sup>

She also surreptitiously took photos and video of the trusted build, which contained information that was ultimately leaked to the Internet and exposed the voting equipment server to compromise. This pattern of conduct jeopardized the security of Mesa County’s coordinated election by creating a security vulnerability. She thus failed to “follow the rules and orders promulgated by the Secretary of State,” § 1-1-110(1). Given this gross breach of duty and wrongful act, she should be deemed unable to perform the required duties of her office, which are to ensure that the November 2, 2021 coordinated election in Mesa County is conducted in full compliance with the Election Code and the Secretary of State’s rules and orders.

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<sup>3</sup> Various provisions of Rule 20.6—which establishes internal controls for the voting system—were likely violated as well by the imaging of the server hard drive. *See, e.g.,* Rule 20.6.2 (restricting the use of removable storage devices). These facts are as yet to be determined as the criminal investigation continues.

**B. Deputy Clerk Knisley is also absent and unable to perform her duties.**

The Elections Code does not require that a deputy clerk serve as the chief designated elections officer if the clerk is absent or unable to perform. Instead, the Code merely permits a deputy to exercise the clerk's duties. *See* § 1-1-110(2) ("All powers and authority granted to the county clerk and recorder by this code *may* be exercised by a deputy clerk in the absence of the county clerk and recorder or if the county clerk and recorder for any reason is unable to perform the required duties.") (emphasis added). Accordingly, the Court does not need to find that Knisley is absent or unable to perform her duties before appointing Williams and Reiner.

But even so, Knisley is, in fact, absent or unable to perform her duties. She currently is suspended and cannot be in the office or access county computer systems due to an ongoing administrative investigation, and she is facing criminal charges concerning her alleged attempts to circumvent this administrative suspension. Nor has she performed any election-related duties in the past several weeks, as Williams has been acting functionally as the chief designated election official for Mesa County.

Knisley is also unable to perform her duties. Not only did she improperly facilitate Wood's presence in secure areas of Mesa County's voting system, but she is also literally unable to perform her duties. Her suspension from Mesa County government bars her physical presence and her access to Mesa County computers.

And Election Order 2021-03 specifically bars her “from supervising, accessing, or participating in any aspect of all elections occurring under” the Election Code.

**II. Appointing Williams and Reiner to serve as designated election official and election supervisor constitutes substantial compliance with the Election Code.**

The Election Code provides that when the clerk is absent or unable to perform her duties, the deputy clerk “may” exercise the clerk’s election duties. But the Code is silent as to what should happen when the deputy clerk is also unable to exercise those duties.

Section 113 of the Code permits a district court to enter an order directing “substantial compliance” with the Code. This provision acknowledges that unforeseen circumstances may arise in the course of an election, but that the election must go forward anyway. Section 113 traces its roots back to 1894, when the General Assembly passed an election law in response to an instance where two conventions each purported to represent the same political party. *See People v. Dist. Ct. of Arapahoe Cnty.*, 23 Colo. 150, 154, 46 P. 681, 682 (1896). Section 113 is the flexible remedy adopted by the General Assembly in response to that unforeseen situation. “The intent of the legislature, expressed in the [1894] amendment, in giving the district court jurisdiction, was for the purpose of enforcing by the courts a ‘substantial compliance with the provisions of this act by the parties to such controversy.’” *Id.* at 155, 46 P. at 683.

Mesa County now faces a similarly unanticipated situation. It has a county clerk who is absent and is disqualified from performing her duties as chief designated election official, and a deputy who cannot step in to replace her. The situation cries out for judicial resolution.

The Court should therefore apply a substantial compliance standard to ensure that Mesa County's voters participate in a safe and secure election. "Unless an election regulation expressly declares that strict compliance with its requirements is essential, courts should construe such provisions to be directory in nature and not mandatory." *Bickel v. City of Boulder*, 885 P.2d 215, 226-27 (Colo. 1994) (applying substantial compliance standard to claims under the Taxpayer's Bill of Rights election provisions); *see also Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994) ("[T]he rule of 'substantial compliance' provides the appropriate level of statutory compliance to 'facilitate and secure, rather than subvert or impede, the right to vote.'" (quoting *Meyer v. Lamm*, 846 P.2d 862, 875 (Colo. 1993))).

A measure satisfies the substantial compliance standard if "the spirit and intention of the law is not violated," even if a literal construction of the law would not permit such an action. *See Bickel*, 885 P.2d at 227 (quoting *Meyer*, 846 P.2d at 876). Here, while the Election Code provides the Secretary the authority to supervise an election, it does not directly authorize either the Secretary of State or the Board of County Commissioners to replace a county clerk, even one who has violated her duties as the chief designated election officer. But the "spirit and

intention” of the Election Code supports the Court ordering Williams and Reiner to serve as the chief designated election officer and election supervisor, respectively. The Secretary has broad authority to “supervise” elections; such a power would have little meaning if the Secretary had to sit idly by while an election official compromises the integrity of the election. Here, the Secretary and the Board of County Commissioners are aligned as to how the 2021 coordinated election should be administered: by the trained staff of the Mesa County Clerk’s office, under the direction of Williams as chief designated election officer and Reiner as election supervisor.<sup>4</sup>

**III. The counterclaims by the Board and Respondents, to the extent they are properly maintained here, are without merit.**

**A. The Board does not seek any relief against the Secretary.**

In its pleading styled as an “Answer, Counterclaim and Cross-Claim,” the Board asserts two causes of action that appear to be against the Secretary. However, the Board does not actually seek any relief against the Secretary in either

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<sup>4</sup> The petition seeks identical relief under § 1-1-113 and under the Secretary’s independent authority to obtain injunctive relief to achieve compliance with the Code under § 1-1-107(2)(d). Because both claims “involv[e] a common question of law or fact” and seek the same narrow relief in the form of an Order requiring substantial compliance with the provisions of the Election Code, the Court “may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.” C.R.C.P. 42(a). Petitioners respectfully request that the § 1-1-107(2)(d) cause of action be consolidated with and summarily adjudicated according to the procedures specified for the § 1-1-113 cause of action.

of those claims or in its prayer for relief, and so the Secretary does not need to respond. *See, e.g., Zeke Coffee, Inc. v. Pappas-Alstad Partnership*, 2015 COA 104, ¶ 36 (“[A] court ordinarily will not sua sponte afford a party relief that it has not requested.”) (quotations omitted).

If the Court considers the Board’s claims anyway, they lack merit. In the first claim, the Board asserts that the Secretary “does not have the authority to appoint a designated election official.” Board Countercls. ¶ 23. The Board’s second claim is similar as it contends that the Secretary “effectively removed” Respondents from their positions. *Id* ¶ 26. But the Secretary’s Election Orders neither purported to, nor actually did, remove either Respondent from their positions. If the Secretary had done so, she would not have needed to initiate this § 1-1-113 action, asking the Court to remove Respondents’ election-related duties. Instead, the Secretary appointed Reiner as an election supervisor, which is a valid exercise of the Secretary’s “dut[y] [t]o supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in the state,” as well as her duty “[t]o enforce the provisions of” the Election Code. § 1-1-107(1)(a), (b); *see also* §§ 1-1.5-104(2)(a)(II), 1-7.5-106(2) (Secretary may send observers to examine the conduct of elections under article 1.5 and appoint an agent to carry out her duties under article 7.5). The supervisory power granted to the Secretary is not merely a passive right of observation and does not render the Secretary powerless to prevent future violations of the Election Code. Rather, the power to supervise includes the power to

manage and direct. *See Supervision, Black's Law Dictionary* (11th ed. 2019) (“Supervision” means “the series of acts involved in managing, directing, or overseeing persons or projects.”). Election Order 2021-03 thus allows Peters to continue serving as the chief designated election official under Reiner’s supervision, on behalf of the Secretary. The Secretary did not remove Peters as the chief designated election official of Mesa County for the 2021 coordinated election. That is what Petitioners respectfully ask this Court to do.

**B. This Court lacks jurisdiction over Respondents’ counterclaims against the Secretary of State, which further cannot be heard in this summary proceeding, and in any event are meritless.**

It is well-established that where, “as here, the General Assembly has provided a statutory right of review, such review must be sought in strict compliance with the mandatory provisions of the statute in question, and in the absence of such compliance, the court is without jurisdiction to act.” *Mile High United Way v. Bd. of Assessment Appeals of State of Colo.*, 801 P.2d 3, 5 (Colo. App. 1990), *cert. denied* Dec. 10, 1990 (citing *Barber v. People*, 254 P.2d 431, 434 (Colo. 1953); *see also State v. Borquez*, 751 P.2d 639 (Colo. 1988) (holding that a statute specifying venue is a limitation on the general jurisdiction otherwise conferred upon district courts). Indeed, the decision in *Borquez* hinged on the plain language of C.R.S. § 42-2-122.1(9)(a), which “vests the authority to review administrative [driver’s license] revocations exclusively in the district court of the licensee’s county of residence.” 751 P.2d at 645. Notably, in affirming the trial court’s dismissal for

lack of jurisdiction, the Supreme Court held that “a petition filed by a nonresident must be dismissed, as the court lacks jurisdiction to hear the matter *or to order a change of venue.*” *Id.* (emphasis added).

As the sole grounds for this Court’s jurisdiction over their counterclaims, Respondents assert that “[j]urisdiction is proper under C.R.S. § 1-1-110(1.5),” *see* Respond. Countercls., ¶ 6, which in turn provides: “Pursuant to section 24-4-106(4.7), C.R.S., a county clerk and recorder is authorized to seek judicial review of final action undertaken by the secretary of state arising under this code.” Notably, Respondents’ counterclaims do not assert any grounds for why venue is proper in this Court. Nor could they because C.R.S. § 24-4-106(4.7) expressly limits venue for actions under it and C.R.S. § 1-1-110(1.5) to Denver District Court where it states: “The county clerk and recorder of any county may commence an action under this section *in the Denver district court* for judicial review of any final action issued by the secretary of state arising under the “Uniform Election Code of 1992,” articles 1 to 13 of title 1, C.R.S.” (emphasis added). Thus, plain language of C.R.S. §§ 1-1-110(1.5) and 24-4-106(4.7) establish that this Court lacks jurisdiction over Respondents’ counterclaims and therefore dismissal of all three is required.

Furthermore, “[g]iven the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges . . . prior to election day.” *Frazier*, 2017 CO 85, ¶ 11. Respondents’ counterclaims are not brought under § 1-1-113 and do not seek the sole remedy available under that

section, namely “that the provisions of the Colorado Election Code have been, or must be, substantially complied with.” *Id.* ¶ 17. Accordingly, those claims are not entitled to the summary disposition that Petitioners’ claims are, and they should either be dismissed without prejudice, or bifurcated pursuant to C.R.C.P. 42(b) and transferred to the Denver District Court where venue for an action against the Secretary of State is proper under C.R.C.P. 98(b)(2). *See id.* ¶ 19 (“When a section 1983 claim is brought in a section 1-1-113 proceeding, the district court should dismiss the claim without prejudice with leave to refile it in a separate action[.]”).

To the extent the Court concludes that it has jurisdiction<sup>5</sup> over Respondents’ counterclaims and proceeds to consider their merits, the Court should deny them.

**1. The Secretary of State did not remove Respondents from either their offices or roles as the chief designated election official and potential successor thereto.**

Respondent’s first counterclaim mirrors the Board’s claims against the Secretary. They also fail for the same reason. Because the Secretary did not remove

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<sup>5</sup> The Secretary of State believes that the Supreme Court’s holding in *Borquez* mandates dismissal of Respondents’ counterclaims on jurisdictional grounds, but it is well-established that “the right to have venue changed is waived” if not filed simultaneously with any motion asserting defenses “permitted by Rule 12.” C.R.C.P. 98(e). Although the Secretary of State has not yet filed a C.R.C.P. 12 motion to dismiss Respondents’ counterclaims, and hereby expressly reserves the right to do so on or before the responsive pleading deadline, this *Joint Opening Brief* in support of her *Verified Petition for Relief Under C.R.S. § 1-1-113* advances arguments in support of dismissing Respondents’ counterclaims that are akin to Rule 12 defenses. Accordingly, in an abundance of caution and to avoid waiver, the Secretary is simultaneously filing a motion to transfer venue pursuant to C.R.C.P. 98(b)(2).

Respondents from their positions, and because the actions the Secretary took in Election Order 2021-03 are permitted by her supervisory powers, the Secretary did not wrongfully remove Respondents.

**2. The Administrative Procedures Act claim fails as a matter of law.**

Peters' challenge to Rule 20.5.4 under the Administrative Procedures Act cannot be decided on the same expedited basis as the Petitioners' claims under § 1-1-113 concerning who will administer the election occurring in less than six weeks. This claim facially lacks merit given the Secretary's broad rulemaking authority under the Code and the deference courts owe to rulemaking agencies. *See* § 1-1-107(2)(a) (Secretary has power "to promulgate . . . such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws"); § 1-5-616 (authorizing Secretary to promulgate rules governing electronic and electromechanical voting systems); § 1-1.5-104(1)(e); § 1-5-608.5(3)(b); § 1-5-623(4); *see also Gessler v. Grossman*, 2015 COA 62, ¶ 12 ("[A] reviewing court must give deference to the reasonable interpretations of the administrative agency that is authorized to administer and enforce the statute at issue.").

**3. Peters' claim of destruction of election records is a desperate attempt to shift the focus from her own misconduct and is entirely without merit.**

Peters' final counterclaim boldly alleges that the Secretary of State is responsible for the destruction of election records. There is nothing further from the truth. Despite making the audacious claim that the Secretary is responsible for

destroying election records, nowhere in Peters' counterclaims or in the 80-page "report" attached to her counterclaims does she cite the definition of "election records."<sup>6</sup> A cursory review of that definition makes clear that the purported "evidence" she obtained in violation of the Election Code and Rules did not consist of "election records" required to be maintained by § 1-7-802. Therefore, no violation has occurred.

The Election Code provides: "Election records' includes accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, voter applications, other voter lists and records, mail ballot return envelopes, voted ballots, unused ballots, spoiled ballots, and replacement ballots." § 1-1-104(11). County clerks do, uniformly, under the supervision of the Secretary of State's Office, maintain these records. There is not a single allegation in the counterclaims or anything in the "report" attached to the counterclaims showing that any such record was destroyed during the trusted build, or that any record similar in kind to those listed in the statute was destroyed. As acknowledged in the "report" itself, some deletion is expected. In fact, the only specific allegation is about

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<sup>6</sup> The "report" is unauthenticated hearsay and contains no verification of the chain of custody of the hard drive images it purports to analyze. In addition, the "report" purports to be generated from improperly obtained hard drive images Peters admits she directed to be made. Petitioners thus object to the "report" being admitted into the record for this proceeding because it analyzed hard drive images that were obtained outside the chain-of-custody and therefore cannot be authenticated. But if the "report" is admitted over this objection, the rest of this brief addresses some of the many reasons why its substance lacks merit.

log files—computer-generated files that show certain activities within a system—do not constitute election records. *See* § 1-1-104(11).

Three other items bear mentioning. First, while Peters fails to identify in her counterclaims what data she believes was stored in the log files that should have been preserved, Mesa County is already required to preserve much of the data that may be stored in log files. *See, e.g.*, Election Rule 1.1.24 & 11.1.1 (requiring county to maintain electronic databases as election setup records); 20.19.2 (requiring county to keep access logs for voting systems). Second, if Peters was actually concerned that these computer-generated log files contained critical information that is not available elsewhere, she should have included a plan to store those log files in Mesa County’s security plan. *See* § 1-5-616(5). The county clerk is required to “consult with the secretary of state” when “rendering decisions and interpretations under [the] Code,” § 1-1-110(1), but Peters never contacted the Department of State about backing up the log files. The Secretary would have no objection to a county backing up its log files for its voting systems—in fact, Larimer County requested to backup their log files prior to a trusted build, and the Department of State helped Larimer County perform such a backup. *See* Ex. 1, ¶ 18. Instead, Peters made copies of the entire hard drive, exposing the security of the entire election system when those copies were posted on the Internet. Third, this case shows exactly why access to voting systems must be strictly controlled, and why the Secretary’s election security rules must be followed to the letter. Peters

here disregarded those rules and compromised the security of Mesa County's voting system.

Finally, Peters does not even have standing to bring this claim in any context. "It is well established that as a general rule, neither a county officer nor a subordinate agency has any standing or legal authority to question or obtain judicial review of an action taken by a superior state agency." *Lamm v. Barber*, 192 Colo. 511, 519, 565 P.2d 538, 544 (1977). The Election Code establishes the Secretary of State as the superior state agency charged with "supervis[ing]" the conduct of elections, *see* § 1-1-107(1)(a), § 1-7.5-106(1), and requires county clerks to "consult with the secretary of state and follow the rules and orders promulgated by the secretary of state," § 1-1-110(1); *see also* § 1-7.5-104(1) (county clerks "shall conduct any election for the political subdivision by mail ballot under the supervision of the secretary of state and shall be subject to rules which shall be promulgated by the secretary of state"). Peters is thus without standing to assert that the Secretary has violated § 1-7-802.

Peters' final counterclaim falls far short of showing any misconduct on the part of state officials. But it does establish one thing beyond a reasonable doubt: Peters directed the creation of the images of the hard drive, which was not authorized by law and which directly led to the decommissioning of Mesa County's voting systems, facilitating the leak of sensitive data and exposed the county's voting system to compromise. This is why she cannot be permitted to have access to

Mesa's newly acquired systems, and why a new chief designated election official is needed for the 2021 coordinated election.

### CONCLUSION

As a result of their own actions and choices, Respondents Peters and Knisley are absent and unable to perform their duties with respect to the 2021 coordinated election. The Court should therefore apply a substantial compliance standard to the Election Code and appoint Wayne Williams as the chief designated election official and acknowledge Sheila Reiner as the election supervisor.

Respectfully submitted this 22nd day of September, 2021.

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## CERTIFICATE OF SERVICE

This is to certify that on September 22, 2021, I duly served the foregoing **PETITIONERS' JOINT OPENING BRIEF** electronically via the Colorado Courts E-Filing System on all counsel of record listed below:

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