

<p>SUPREME COURT STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	
<p>Application for review pursuant to § 1-1-113(3), C.R.S., Denver District Court Case No. 2013CV34991</p>	<p style="text-align: center;"><b>^ COURT USE ONLY ^</b></p> <p>Case No. 2013SC_____</p>
<p>SCOTT GESSLER, in his official capacity as Colorado Secretary of State</p> <p>Petitioner,</p> <p>v.</p> <p>NICOLE HANLEN, LYNN D. USSERY, JAMES H. JOY, JUNE MARIE MCNEES, KELLY L. MCNEES, KAREN MARQUEZ, MEAGAN GALBADON, and DAVID J. RODENBAUGH,</p> <p>Respondents.</p>	
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<p><b>APPLICATION FOR REVIEW PURSUANT TO § 1-1-113(3), C.R.S.</b></p>	

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Petitioner Scott Gessler, in his official capacity as Colorado Secretary of State (“the Secretary”), by and through undersigned counsel, respectfully appeals the decision of the Denver District Court pursuant to § 1-1-113(3), C.R.S. (2013).<sup>1</sup>

The Secretary promulgated Election Rule 10.7.5 (the “Rule”) in order to fill a gap in existing law and ensure that votes for an individual who was ineligible to be a candidate for office, but was mistakenly certified to appear on the ballot, will not be counted if the error was discovered either prior to election day or the date on which the election results must be certified. Although the Rule is one of general applicability, it was issued on an emergency and temporary basis on November 5, 2013, after the Secretary first became aware of the gap in existing law due to the discovery that a candidate for school district director in the Adams 12 Five Star School District had been mistakenly certified to the ballot by the designated election official, ballots could

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<sup>1</sup> All citations are to the 2013 version of the Colorado Revised Statutes, unless otherwise indicated.

not be corrected before the election, and it was possible that votes cast for the ineligible candidate would be counted.

Because the county clerk and recorders must follow the Secretary's rules, *see* C.R.S. §§ 1-1-110(1) and 1-7.5-104, votes in the school district director race had not been counted before the district court proceedings were initiated. Registered electors of the school district successfully challenged the Secretary's authority to promulgate the Rule in district court, and the court ordered the clerks to count all votes cast for the ineligible candidate. The district court agreed with the Plaintiffs below that, if the ineligible candidate garnered the most votes in the election, the ineligible candidate was "duly elected" and, therefore, the office should be deemed vacant and filled through the statutory vacancy committee appointment process. *See* § 22-31-129(1). The Secretary appeals the district court's ruling.

**I. Identity of the Petitioner and Respondents.**

The Secretary was one of four official capacity defendants named in the district court action, along with: Karen Long, the Clerk and Recorder for Adams County; Jim F. Candelarie, the Clerk and Recorder

for the City and County of Broomfield; and Frances E. Mullen, the designated election official for the Adams 12 Five Star School District. Defendants Long and Candelarie will be referred to collectively as the “Defendant County Clerks,” and Frances E. Mullen will be referred to as the “Designated Election Official.”

The respondents are the Plaintiffs below – Nicole S. Hanlen, Lynne D. Ussery, James H. Joy, June Marie McNeese, Kelly L. McNeese, Karen Marquez, Meagan Gabaldon, and David J. Rodenbaugh – who are registered electors of Adams 12 Five Star School District. For clarity, the Secretary will continue to refer to them as Plaintiffs.

## **II. Identity of the court and the proceedings below.**

### **A. Facts leading to the district court proceedings.**

The facts are undisputed. Two candidates were certified to the ballot in the non-partisan race for school board director in director district 4 of the Adams 12 Five Star School District: incumbent Rico Figueroa (“Mr. Figueroa”) and challenger Amy Speers (“Ms. Speers”). Approximately a week before the election, the Designated Election

Official discovered that Ms. Speers does not currently reside in director district 4 and had not resided there at the time that she was certified to the ballot, and was thus ineligible to hold the office for which she was running. *See* § 22-31-107 (governing qualifications of candidates for school district director).

Ms. Speers had sought to be appointed to the office of director for district 4 when a vacancy occurred in 2011 and, although she was not selected for the office, she was a resident of district 4 at the time she became a candidate for appointment. Then, in May 2012 the district redrew its boundaries for school board members and Ms. Speers was redistricted out of district 4. Thus, at the time she petitioned on to the 2013 Coordinated Election ballot and signed the affidavit of candidacy affirming that she met all of the qualifications for office, Ms. Speers was not, in fact, a resident of district 4. Ms. Speers' error appears to have been made in good faith, and during the district court proceedings counsel for the Designated Election Official conceded that her client neglected to confirm that Ms. Speers actually was a resident of district 4 at the time she certified Ms. Speers as a candidate to the ballot.

Once Ms. Speers' disqualification and the error in certification of her candidacy were discovered, the school district, as the Designated Election Official, requested that Ms. Speers "submit a notice of withdrawal pursuant to C.R.S. § 1-5-412." See Exhibits A and B to *Brief in Opposition* (letters from school district to Ms. Speers). Although she acknowledged her ineligibility to hold office, Ms. Speers declined to withdraw from the race.

The November 5, 2013 election was a "coordinated election," which occurs when "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). The Uniform Election Code of 1992, § 1-1-101, *et seq.* ("Election Code"), "applies to all...school district...elections unless otherwise provided by this code." § 1-1-102(1). In turn, the Election Code contains the Mail Ballot Election Act, § 1-7.5-101, *et seq.* ("Mail Ballot Act"), which requires that "[f]or all...odd-year, coordinated...elections conducted on or after July 1, 2013,...the county

clerk and recorder or designated election official for the political subdivision, as applicable, shall conduct the election by mail ballot under the supervision of, and subject to rules promulgated in accordance with article 4 of title 24, C.R.S., by, the secretary of state.” § 1-7.5-104. The Election Code further provides that “county clerk and recorder[s], in rendering decisions under this code, shall consult with the secretary of state and follow the rules and orders promulgated by the secretary of state pursuant to this code.” § 1-1-110(1).

The Secretary has the duty to enforce the provisions of the Election Code, and is vested with the following general discretionary enforcement powers: (1) “[t]o promulgate...such rules as [he] finds necessary for the proper administration of enforcement of the election laws...; (2) “[t]o inspect...and review the practices and procedures of county clerk and recorder...in the conduct of the...registration of electors in this state; and (3) “[t]o 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(1)(b), (2)(a)-(b), (d). Although the Secretary also has specific duties and

powers under the Mail Ballot Act, none expressly relate to enforcement of the Act. See § 1-7.5-106.

On the day of the 2013 Coordinated Election, the Secretary promulgated Rule 10.7.5 on an emergency basis. The rule provides: “If the designated election official determines, after ballots are printed, that an individual whose name appears on the ballot is not qualified for office, the votes cast for that individual are invalid and must not be counted.” Rule 10.7.5 is a rule of general applicability. Consistent with the Rule, and because Ms. Speers was not qualified to be a candidate for or take the office of school director for the district 4 seat, the Defendant County Clerks did not count any votes cast for her in the election.

Transcript at 35:20-23.

**B. The district court’s proceedings and ruling.**

On Thursday, November 14, 2013, Plaintiffs filed suit in Denver District Court pursuant to §§ 1-1-113 and 24-4-106(7), seeking to invalidate Rule 10.7.5 and requesting substantial compliance by the Defendant County Clerks and Designated Election Official to complete

the vote count for the Adams 12 Five Star School District director district 4 race, certify the official votes cast, and provide the notification and certification of the election results as required by the Election Code. *Complaint* at ¶¶ 33 and 35. Ms. Speers was not a party to the district court action, and there is no evidence that Ms. Speers contests the Designated Election Official's determination that she was ineligible to become a candidate and, therefore, ineligible to take office as a school director for district 4 due to her non-residency in that district at the time she became a candidate.

In their Verified Complaint for Judicial Review ("Complaint"), the Plaintiffs asserted that the effect of Ms. Speers' ineligibility due to non-residency in director district 4 effectively "would be to create an immediate vacancy, subject to the board vacancy appointment process established and mandated by C.R.S. §22-31-129." *Complaint* ¶ 20. The Complaint alleged that "[t]he effect of the Secretary's Temporary Rule is to directly circumvent the statutorily mandated vacancy appointment process made explicitly applicable to precisely the circumstances posed" here. *Id.* ¶ 24.

Because the facts were undisputed, the district court considered only the verified complaint, briefing by the parties, and oral argument.

The Plaintiffs essentially argued the following:

- The Rule was invalid because the only instances under the Election Code that a county clerk may not count votes is in the event the candidate withdraws or dies pursuant to § 1-5-412(3). *Complaint* at ¶¶ 17 and 33.
- The vacancy and appointment provision for school district board elections found in § 22-31-129(1)(d) and (f), provides that if a person who is duly elected or appointed “is or becomes a nonresident of the director district which the director represents” or if a court of competent jurisdiction voids an officer’s election “for any cause whatsoever” the director office is deemed vacant and triggers an appointment procedure. *Complaint* at ¶ 18.
- If Ms. Speers garnered more votes than Mr. Figueroa, then, “the effect of her nonresidency in District Director 4 upon commencement of her term of office, or the effect of her disqualification as a candidate from that office, would be to create an immediate vacancy” pursuant to § 22-31-129. *Complaint* at ¶ 20.
- The Rule circumvents “the statutorily mandated vacancy appointment process” in § 22-31-129, and expands “the very limited bases for declining to conduct a vote count established by C.R.S. §1-5-412(3). *Complaint* at ¶ 24.

The Secretary argued the following:

- The district court could not properly exercise jurisdiction under § 1-1-113(4), as such provision is the “exclusive remedy” to initiate and adjudicate controversies prior to the day of an election. *Brief in Opposition* at 8.
- The Secretary’s Rule does not conflict with the Election Code because:
  - The plain language of § 1-5-412(3) does not contemplate that withdrawal or death are the only circumstances in which an election official may not count votes cast for a candidate. *Brief in Opposition* at 13.
  - The Election Code is silent with respect to the counting of votes for an individual who is mistakenly certified to appear on the ballot and who did not satisfy the qualifications for office at the time he or she became a candidate. *Brief in Opposition* at 14.
  - A person cannot be a “duly nominated” candidate or a “duly elected” officer if the individual does not meet the qualifications for office. *Brief in Opposition* at 15.
  - The vacancy statute in § 22-31-129(1) is inapplicable to this situation because Ms. Speers cannot legally be certified as the winning candidate, has not been “duly elected” for the director district 4 seat, and cannot initiate a valid term of office by swearing the oath of office because she did not meet the mandatory qualifications to become a candidate for office as set forth in § 22-31-107(1) at the time she became a candidate. *Brief in Opposition* at 18-20.

The district court made the following findings:

- It had jurisdiction to hear the action pursuant to §§ 1-1-113 and 24-4-106(7). Transcript at 46:24-25, 47:1-4.
- Venue was proper in the district court for the City and County of Denver under § 24-4-106(4) and C.R.C.P. 98(b)(2) and (c)(1). *Id.* at 47:5-13.
- The Rule was contrary to § 1-5-412(3) and circumvented the plain and unambiguous language in the vacancy statute in § 22-31-129(1). *Id.* at
- The Rule did not meet the standards for emergency rulemaking under § 24-4-103, because the Rule was contrary to law. *Id.* at 51:1-25, 52:1-17.

Based upon these findings, the district court issued the following order:

- The district court invalidated the Rule. *Id.*
- The district court ordered that any votes cast for Ms. Speers be counted and that the election results be finalized and certified in accordance with applicable statutory procedures. *Id.* at 53:15-25, 54:1.

Following the district court's ruling, the Defendant County Clerks began counting votes cast for Ms. Speers. While the election results are not final and have not been certified, upon information and belief it appears very likely that Ms. Speers garnered more votes than Mr. Figueroa in the director district 4 race. Therefore, because the very

circumstance that the Secretary’s now judicially invalidated Rule sought to prevent – the counting of votes cast for a candidate who mistakenly appeared on the ballot – is likely to occur, the Secretary appeals the decision of the district court. Specifically, the Secretary requests that this Court reverse the district court’s ruling in this matter, and avoid the absurd result that an ineligible individual who was mistakenly certified to appear on the ballot may be deemed “duly elected” for purposes of § 22-31-129(1)(d), thereby triggering the vacancy and appointment process under that same statute.<sup>2</sup>

### **III. The rulings at issue and the relief sought.**

The Secretary requests review of the following issues:

1. Whether § 1-1-113 allows for review of controversies arising from an alleged breach of duty or other wrongful act that occurs on or after the day of the election.

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<sup>2</sup> The final count of the votes, certification of the election results, and notification to the individual garnering the most votes that are required by the Election Code likely will not be completed until after this appeal is due. If Ms. Speers does not, in fact, garner more votes than Mr. Figueroa, as it now appears likely that she will, the Secretary will notify the Court immediately.

2. Whether Rule 10.7.5 is contrary to and in conflict with existing election statutes.

**IV. Reasons why this Court should hear this appeal.**

The Secretary brings this expedited appeal pursuant to § 1-1-113(3). Review by this Court is discretionary, but this case involves more than the mere application of election law to a particular set of facts. The Secretary's valid exercise of his administrative authority to promulgate an emergency and temporary rule to fill the gap where the existing law is silent is not arbitrary, capricious, in excess of, or contrary to law. The district court's invalidation of the Rule is currently permitting votes to be counted for an ineligible individual whose name was mistakenly certified to the ballot and, therefore, cannot be either a "duly nominated" candidate for office or a "duly elected" officer.

Without this Court's reversal of the district court ruling, Ms. Speers is likely to be erroneously deemed "duly elected" to an office for which she undisputedly did not meet the required qualifications at the time she became a candidate. This determination essentially nullifies the mandatory qualification requirements set forth by the General

Assembly for elected offices generally, and for the school director office found in § 22-31-107(1) specifically. It also provides an opening for improper ballot access for other mistakenly (or underhandedly) certified individuals to be elected to office. Because an individual can be and, as this case perfectly illustrates, sometimes is mistakenly certified as a candidate and then appears on the ballot, this situation is likely to recur in future elections.

The issues addressed in this appeal affect the state's ability to protect the integrity of elections on the front-end, rather than sitting back and hoping that interested parties take judicial action in an uncertain attempt to deal with mistakes that have occurred on the back-end. It should be practically tautological that votes cast for an individual who did not satisfy the qualifications for office at the time he or she became a candidate should not be counted. It should be even more obvious that votes cast for an ineligible candidate – even if tabulated for some reason – should not have any effect on the outcome of the election. They should particularly not be counted in a way that deprives the “duly elected” winner of an election from assuming his or

her seat. That in this case the ineligibility is the fault of the opposing candidate – who neither contested her disqualification nor challenged the Secretary’s Rule as a party to this proceeding – simply highlights the absurdity of the Plaintiffs’ position and the district court’s ruling. Yet that is what Plaintiffs have demanded – and what the district court, in error, awarded.

Allowing the district court’s decision to stand leads to the absurd result that anyone can become a “duly nominated” candidate for elected office in Colorado even if he or she does not satisfy all of the qualifications for office at the time he or she becomes a candidate, can then become “duly elected” to an office that he or she is ineligible to assume, and that such events create a vacancy in office that must be filled in accordance with the applicable statutory vacancy appointment process. In this case, the district court’s decision allowed Plaintiffs to circumvent the democratic process for the election of school board officers as required by Colorado law, and deprived the only eligible candidate for district 4 director of rightfully being “duly elected” to that office.

**V. Arguments and points of authority as to why the Court should hear the appeal and the ruling it should issue.**

**A. The district court erred as a matter of law by exercising jurisdiction over this action under § 1-1-113(4).**

In his Brief in Opposition to the Complaint, the Secretary argued that § 1-1-113(4) only governs actions that are initiated and adjudicated prior the day of an election. *Brief in Opposition* at 8. Plaintiffs countered, and the district court agreed, that there is nothing in § 113(4) that states the section is “exclusively applicable” to controversies arising prior to the day of election, that they are not aware of any court that has accepted the Secretary’s position, as it would allow a host of improprieties occurring on or after the election to go unaddressed by the courts. *Reply* at 2; Transcript at 47:14-25, 48:1-9. The district court proceeded to exercise jurisdiction over this action – and over all Defendants, including the Secretary – under § 1-1-113.

**1. Standard of review.**

Statutory interpretations are questions of law that are reviewed *de novo*. *Klinger v. Adams Cnty. Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006).

**2. Section 1-1-113(4) only governs actions that are brought and adjudicated prior to the day of an election.**

Section 1-1-113 provides a swift and effective procedure for state courts to adjudicate alleged violations of the Election Code if they occur prior to the day of an election. Section 1-1-113(4), states, “[e]xcept as otherwise provided in this part 1, the procedure specified in *this section* [referring to § 113] *shall be the exclusive method for the adjudication of controversies* arising from a breach or neglect of duty or other wrongful act that *occurs prior to the day of an election.*” (emphasis added). That § 1-1-113 governs disputes arising prior to the day of an election – and, thus, capable of adjudication before the election occurs – is consistent with the legislative amendments to this provision.

Before § 1-1-113 was codified in its current form, it appeared at § 1-1-111 and § 1-1-112, 1B, C.R.S. (1980). *See* Exhibit C attached to *Brief in Opposition*. Neither provision contained temporal limitations

when a controversy must arise or be adjudicated. In *Meyer v. Lamm*, 846 P.2d 862, 871 (Colo. 1993), then Secretary of State Natalie Meyer argued that § 1-1-112, C.R.S. (1980), was limited to pre-election controversies only. In rejecting Secretary Meyer’s argument, the Colorado Supreme Court held, “...there is nothing in the written text of section 1-1-112 which would limit the statute’s application to pre-election controversies only[.]” *Id.*

The *Meyer* case was decided on February 22, 1993. During the 1994 legislative session following *Meyer*, the General Assembly added subsection (4) to § 1-1-113, which explicitly limits § 1-1-113 actions to controversies “...that occur[] prior to the day of an election.” *See Exhibit D to Brief in Opposition* (1994 Colo. Sess. Laws 1151).<sup>3</sup> This amendment evidenced a legislative intent to confine § 1-1-113 actions to pre-election controversies. The General Assembly is presumed to be aware of existing case law precedent in the area in which it legislates. *Vigil v. Franklin*, 103 P.3d 322, 327-28 (Colo. 2004); *see also*

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<sup>3</sup> In 1992, the General Assembly combined §§ 1-1-111 and 112, 1B, (1980) into § 1-1-113. 1992 Colo. Sess. Law 635.

*Rauschenberger v. Radetsky*, 745 P.2d 640, 643 (Colo. 1987) (when a statute is amended, the judicial construction previously placed upon the statute is deemed approved by the General Assembly to the extent the provision remains unchanged).

To interpret § 1-1-113(4) as limiting the district court's jurisdiction to the adjudication of only pre-election disputes in no way prevents interested parties from seeking or obtaining judicial intercession in disputes arising on or after an election by initiating some other cause of action. Indeed, there is nothing to prevent an individual from bringing an action seeking relief under C.R.C.P. 65 in a court of proper jurisdiction on the day of the election, and the Election Code expressly contemplates post-election dispute remedies such as election contests as authorized in part 2, article 11 of title 1, C.R.S.

The ability to bring an action under § 1-1-113 related to a dispute that arises on or after the date of an election has the potential to create conflict with the procedures for post-election judicial relief expressly authorized by the General Assembly. The election contest provisions govern challenges that may occur on or after election day. *See generally*

§ 1-11-201 (provisions governing bases to challenge an election). The jurisdiction of the election contest depends on the district of the candidate, location of the political subdivision, or whether the contest involves a statewide officer or state representative or senator. *See generally* §§ 1-11-203 (the supreme court has original jurisdiction for contests arising from a primary election for statewide offices); §§ 1-11-205 and 208 (the General Assembly shall hear election contests for statewide office and state representatives and senators); §§ 1-11-211 and 212 (contests for district attorney and county and nonpartisan officers are held in the district court where the district attorney, county, or nonpartisan officer is located). The election contest provisions also are specific with respect to how proceedings are to be conducted. *See, e.g.,* § 1-11-205 through 210 (rules governing the proceedings in the General Assembly to challenge statewide officers and state representatives and senators); §§ 1-11-213, 214, and 216 (rules governing contests heard in district court, timelines for appeal to the supreme court, and the relief a district court may enter). As such, limiting § 1-1-113 proceedings to the adjudication of pre-election

disputes avoids potential conflicts with the statutory framework for addressing post-election disputes.

Here, Plaintiffs' Complaint alleged violations of a breach or neglect of duty or other wrongful act that either occurred *on or after* the day of the coordinated election that took place on November 5, 2013. The Secretary's Rule was promulgated *on* election day and Plaintiffs' dispute with the Secretary and Defendant County Clerks and request that the votes be counted in the Adams 12 director district 4 race occurred *after* the election. The district court failed to correctly interpret the plain language of § 1-1-113(4), and either failed to take into account or erroneously disregarded the significance of the legislative addition of subsection (4) in 1994, which evidenced an intent on the part of the General Assembly to limit such actions and adjudications to pre-election controversies. This Court should reverse the district court's exercise of jurisdiction under § 1-1-113, which required all Defendants to substantially comply with the Election Code by counting the votes for Ms. Speers, and including the number of votes cast for her in their certified election results.

**B. The Rule was a valid exercise of the Secretary's administrative authority to supplement or fill in gaps where the Election Code is silent on a particular matter.**

The district court erred in determining that the Rule conflicted with or was contrary to §§ 1-5-412(3) and 22-31-129. Because the Election Code is silent as to how the particular circumstances presented by this case should be handled, it was an appropriate exercise of the Secretary's rulemaking authority to promulgate the Rule on an emergency basis. The district court failed to defer either to the Secretary's interpretation of the Election Code, to his determination that the Rule was necessary in light of the circumstances that arose on November 5, 2013, or to his determination that the Rule was necessary given that similar circumstances can (and likely will) occur again in future elections.

**1. Standard of review.**

When reviewing a challenge to an agency rule, the court must presume the rule is valid if it was adopted pursuant to the applicable rulemaking proceedings. *Colorado Consumer Health Initiative v.*

*Colorado Board of Health*, 240 P.3d 525, 528 (Colo. App. 2010). The challenging party “has the burden to establish the rule’s invalidity by demonstrating that it is ‘arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes or limitations, not in accord with the procedures or procedural limitations of [the Colorado Administrative Procedure Act (APA)] or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law.’ §24-4-106(7), C.R.S. 2009.” *Id.*

“A rule may not modify or contravene an existing statute, and any rule inconsistent with or contrary to a statute is void.” *Id.* Upon review of a rule, courts must give deference to the agency’s construction of its rules and enabling legislation unless its interpretation is not in accordance with law. *Id.* “Courts should also give deference to a statute’s construction given by the administrative agency charged with its enforcement or administration, unless that interpretation is

inconsistent with the statute’s clear language or legislative intent.” *Id.*  
A court will “invalidate administrative rules that conflict with the  
statute’s design.” *Id.*

If a “statute is silent or ambiguous with respect to the *specific issue*, the question for the court is whether the agency’s answer is based on a *permissible construction* of the statute . . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,” or, in this case, the Secretary. *Wine & Spirits Wholesalers v. Colo. Dep’t of Revenue*, 919 P.2d 894, 897 (Colo. App. 1996) (emphasis added). Further, judicial deference to agency rulemaking precludes “second-guessing” the wisdom of a rule or whether, in the court’s view, a different rule might be more effective or more desirable. *See Citizens for Free Enter. v. Dep’t of Revenue*, 649 P.2d 1054, 1063 (Colo. 1982).

The Secretary adopted the Rule on a temporary basis as permitted by § 24-4-103(6), after concluding that “adoption and immediate effect of the amendments to existing election rules is imperatively necessary to comply with state and federal law and to promote public interests.” *See*

Exhibit E to *Brief in Opposition* (administrative rulemaking record for Election Rule 10.7.5).

**2. The district court erred in ignoring other portions of the Election Code to analyze the terms “duly nominated” and “duly elected.”**

The district court erred when it determined that Ms. Speers, an individual mistakenly certified to appear as a candidate on the ballot, could be either a “duly nominated” candidate or “duly elected” to an office for which she was ineligible due to non-residency. By making this determination, the district court further erred by ostensibly triggering the vacancy appointment process in § 22-31-129(1) if, as it seems likely, Ms. Speers garners more votes than Mr. Figueroa. Such a result is contrary to the notion of what it means to be “duly nominated” or “duly elected” under the Election Code and should be reversed by this Court.

States retain the power to regulate their own elections, as “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘ as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if *some sort of order, rather than*

*chaos, is to accompany the democratic process.” Burdick v. Takuski, 504 U.S. 428, 433 (1992), quoting Storer v. Brown, 415 U.S. 724, 730 (1974) (emphasis added). In turn, Colorado’s ballot access statute provides: “No person is eligible to be a designee or candidate for office unless that person fully meets the qualifications of that office as stated in constitution and statutes of this state on or before the date of the term of that office begins.” § 1-4-501(1) (emphasis added). The same statute prohibits the designated election official from certifying a prospective candidate to the ballot if the candidate is “unable to provide proof that he or she meets any requirements of the office relating to registration, residence, or property ownership.” *Id.* (emphasis added).*

In § 1-5-406, which governs the content of ballots for nonpartisan elections such as the one at issue in this case, the Election Code further mandates that: “Every ballot shall contain the names of all *duly* nominated candidates for offices to be voted for at that election, except those who have died or withdrawn, and the ballot shall contain no other names.” (Emphasis added). Although the code does not define the term “duly nominated,” the word “duly,” which means “[i]n a proper manner;

in accordance with legal requirements.” *Black’s Law Dictionary* 407 (7th ed. 2000). The school district election statute, in turn, expressly provides that an individual must satisfy all of the qualifications for office at the time he or she becomes a candidate: “If the school district has a director district plan of representation..., the *candidate shall be a resident of the director district that will be represented[.]*” § 22-31-107(1) (emphasis added). In this case, then, Ms. Speers must have been a resident of district 4 at the time she became a *candidate* in order to have been “duly nominated” in accordance with the requirements of Colorado law.

Here, there is no dispute that Ms. Speers was unable to provide the required proof of her residence: she was mistakenly certified. But it does not follow from her mistaken certification that Ms. Speers was a “duly nominated” candidate. Borrowing from contract and property law, a run for office by an unqualified individual is void rather than voidable. It should be considered “a nullity, invalid *ab initio*, or from the beginning, for any purpose.” *Delsas v. Centex Home Equity Co.*, 186 P.3d 141, 144 (Colo. App. 2008). A run for office by a “duly nominated”

candidate, on the other hand, is similar to a voidable contract or deed. It may be canceled or withdrawn under certain circumstances, but has legal and practical import unless or until the cancellation or withdrawal occurs. In short, an individual must be “eligible” – that is, qualified – in the first instance in order to be a “duly nominated” candidate. If an individual is not eligible for office at the time he or she becomes a candidate, then the candidacy is void *ab initio*, and any votes cast for the invalid candidate should not be counted or considered.

To hold otherwise would throw Colorado’s traditional limitations on ballot access into disarray and create absurd results like those in this case. The district court’s legal conclusion glossed over the fact that the word “elected” in the vacancy statute in § 22-31-129(1) is modified by the word “duly,” which again means “[i]n a proper manner; in accordance with legal requirements.” *Black’s Law Dictionary* 407 (7th ed. 2000). Instead, the district court relied on the Black’s Law Dictionary definition of “duly” to hold that “in accordance with legal requirements” means that the individual must garner the most votes in

a properly conducted election, the vacancy statute must then be applied, and its requirements must be satisfied. Transcript at 53:1-4.

But, again, this incorrectly presumes that Ms. Speers can somehow legally undertake a term of office to which she is ineligible, which is the necessary first step to creating a vacancy in that office. Indeed, the plain language of the vacancy statute expressly contemplates that a fully qualified individual – i.e., a “duly nominated” candidate who has been “duly elected” – has *first* undertaken a term of office as a director, and then later “the director is or becomes *during the term of office* a nonresident of the director district which the director represents[.]” § 22-31-129(1)(d) (emphasis added). The introduction to the vacancy statute further reinforces that a vacancy may occur only *after* a valid term of office has been undertaken where it states: “A school director *office* shall be deemed to be vacant upon the occurrence of any one of the following events *prior to the expiration of the term of office*[.]” § 22-31-129(1) (emphasis added).

In this case, the Defendant County Clerks cannot legally provide Ms. Speers with a “certificate of election” to “notify the candidate[] of

[her] election to office” as required by § 1-11-103(1), and Ms. Speers cannot legally take the director’s oath of office as required by § 22-31-125. Such actions are not legally permissible because Ms. Speers did not satisfy the residency requirement to hold office in director district 4 at the time she became a candidate and, therefore, she cannot legally be a “*duly* nominated” candidate for that office. See § 22-31-107(1) (“[T]he candidate shall be a resident of the director district that will be represented[.]”). It logically follows that because Ms. Speers was not first a “*duly* nominated” school board candidate, she is unable to legally become “*duly* elected” to the same office. The vacancy statute in § 22-31-129, therefore, simply does not apply.

**3. The district court erred in finding that Rule 10.7.5 is in conflict with §1-5-412(3).**

The Election Code is silent with respect to the counting of votes for an individual whose name mistakenly was certified to the ballot, despite the fact that the person did not satisfy the qualifications for office at the time he or she was certified to the ballot as a candidate.

The district court agreed with Plaintiffs that § 1-4-512(3), which directs an election official not to count votes for a deceased or withdrawn candidate, establishes “the only circumstance in which votes for a candidate are not to be counted.” *Complaint* ¶ 17; Transcript at 51:1-25, 52:1-17. This constitutes reversible error by the district court.

First, the district court failed to analyze other portions of the Election Code in determining whether the Secretary’s Rule was a valid exercise of his administrative authority to supplement and fill in a gap in the Election Code. Specifically, the Secretary cited to § 1-4-1101(2), which prohibits write-in candidates who have not filed an affidavit of intent from accumulating votes. This provision not only belies Plaintiffs’ contention – and the finding by the district court – that withdrawal or death of a candidate in § 1-5-412(3) are the exclusive circumstances in which votes may not be counted, but also underscores the fact that the General Assembly has not contemplated all of the myriad scenarios in which votes may not be counted under the Election Code.

Further, and more importantly, § 1-4-1101(2) is a specific and undisputed instance in which the General Assembly has mandated that the satisfaction of any qualifications for office is a condition precedent to being a “duly nominated,” or valid, candidate for that office. In the instance of an individual who failed to submit the legally required affidavit of intent to run as a write-in candidate, the failure disqualifies the individual from being a “duly nominated” candidate and results in any write-in votes for that person being discounted. The Secretary’s Rule simply extends the same underlying legal principles codified by the General Assembly in § 1-4-1101(2) to other instances in which an individual similarly fails to meet the qualifications for office at the time he or she becomes a candidate but has mistakenly appeared on the ballot and accumulated votes. For this reason, the Rule does not conflict with, but rather is consistent with, the intent of the General Assembly in enacting and enforcing qualifications for office that must be satisfied at the time an individual becomes a candidate.

The district court also failed to take into consideration that § 1-5-412(3) applies only to the withdrawal or death of “duly nominated”

candidates. By its plain terms, the provision would not have permitted Ms. Speers to withdraw in any event. Rather, it contemplates the withdrawal or death only of “duly nominated” candidates. For the reasons set forth above, Ms. Speers was *not* a “duly nominated” candidate. Because Ms. Speers was not a resident of district 4 at the time she became a candidate, her candidacy was void *ab initio* and, therefore, did not even need to be withdrawn. Additionally, § 1-5-412(3) simply does not address whether votes cast for an individual who was not a “duly nominated” candidate, and who the Designated Election Official determined to be disqualified, and whose name nonetheless mistakenly appeared on the ballot, must or must not be counted. Accordingly, a gap existed in the Election Code that was properly addressed by the Secretary’s exercise of his rulemaking authority to promulgate Rule 10.7.5.

4. **The district court erred in looking at the vacancy statute in § 22-31-129(1) in isolation without resolving the conflict between the mandatory requirements for eligibility for office in § 22-31-107(1) with the circumstances when a vacancy may occur.**

The district court erred when it failed to resolve the conflict between the mandatory qualification requirements for school director in § 22-31-107(1) with the language in the vacancy statute in § 22-31-129(1).

The goal of construing a statute is to give effect to the legislative intent of the General Assembly. *In re Crow v. Penrose-St. Francis Healthcare Sys.*, 169 P.3d 158, 165 (Colo. 2007). The starting point for statutory construction is the plain language of the statute. *State Bd. Of Equalization v. Am. Airlines*, 773 P.2d 1033, 1040 (Colo. 1989). If “the statutory language is clear and certain, the statute should be construed as written, since the function of the court in such a case is to enforce the statute according to its terms.” *Id.* If the statute is ambiguous or conflicts with another provision, the court will resort to other tools of statutory construction. *O’Donnell v. State Farm Mut. Auto Ins. Co.*, 186 P.3d 46, 49-50 (Colo. 2013). Statutes are construed so as to give effect to every word, and a construction that renders any term superfluous should not be adopted. *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 790 P.2d 827, 830 (Colo. 1990). All parts of the statutory

scheme should be read as a whole, giving consistent, harmonious, and sensible effect to all parts. *O'Donnell*, 186 P.3d at 50.

Section 22-31-107(1) states that a school director *candidate* “shall be” a registered elector of the school district for at least twelve consecutive months prior to the election, and “shall be” a resident of the director district that will be represented. When the legislature uses the term “shall” in a statute, the generally accepted meaning of that word indicates the term is mandatory. *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986) As such, one must have proper residency at the outset in order to be a qualified and, thus, “duly nominated” candidate.

Plaintiffs and the district court relied heavily on the verb “is” in § 22-31-129(1)(d) to establish the occurrence of a vacancy, because it is undisputed Ms. Speers “is” a nonresident of director district 4. The district court’s reliance and emphasis on the word “is” in the vacancy statute should be rejected, because it renders the residency requirements for school board director candidacy in § 22-31-107(1) meaningless and fails to give harmonious and sensible effect to the ballot access requirements in the Election Code. *Pierson v. Black*

*Canyon Aggregates, Inc.*, 48 P.3d 1215, 1221-22 (Colo. 2002) (the courts have a duty to avoid interpretations that render language of statute meaningless or absurd); *see also O'Donnell*, 186 P.3d at 50. The district court erred when it failed to harmoniously construe the two statutes, and instead looked only at the vacancy statute in § 22-31-129(1) while ignoring the eligibility requirements in § 22-31-107(1).

The more reasonable, sensible, and harmonious interpretation of the vacancy statute – or rather to resolve the conflict between § 22-31-107's residency requirements for a candidacy and the “is or becomes” a non-resident language in § 22-31-129(1)(d) – is to read the potential circumstances that might result in a vacancy to occur *during the term of office of a duly elected* school director. This interpretation is not only reasonable in light of what it means to be “duly nominated” or “duly elected,” as discussed above, but also does not render meaningless the residency requirement for a valid *candidacy* in § 22-31-107(1). To interpret the vacancy statute otherwise would lead to the absurd result that anyone can become a “duly nominated” candidate for school director, even if he or she is not a resident of the school district or the

director district to be represented. More absurdly, the district court's interpretation of the vacancy statute in § 22-31-129(1) would allow a candidate to be simultaneously unqualified to hold office and at the same time "duly elected" to that office. This simply cannot be considered a harmonious and sensible interpretation of §§ 22-31-107 and 22-31-129.

Plaintiffs, and apparently the district court, assume that Ms. Spears will simply resign or withdraw from the director district 4 seat if she garnered more votes than Mr. Figueroa. Apart from the absurdity of the underlying presumption that a void candidate can somehow "resign" or "withdraw" from an office at all, Ms. Speers was not a party to this action, nor was evidence admitted in the district court proceedings that she is or will be willing to resign or withdraw. What course of action she may or may not take now that votes are counted and she ostensibly appears to have garnered more votes than Mr. Figueroa – the only qualified individual and "duly nominated" candidate – is entirely uncertain. Likewise, it presently is unknown what, if any, action Mr. Figueroa may take now that votes are being

counted for an opponent who was not qualified to take office in the first instance. While the district court held that this situation is not “absurd” and the vacancy statute specifically contemplated this scenario, there can be no doubt that the district court’s ruling created chaos and the potential for even greater future chaos which had been forestalled by the Secretary’s Rule.

**5. The district court erred when it determined the Secretary failed to satisfy the standards for issuance of an emergency rule pursuant to § 24-4-103(6).**

The district court erred when it held that the Secretary failed to meet the standards for issuance of an emergency rule pursuant to § 24-4-103(6). Section 24-4-103(6) provides, in relevant part, that a temporary or emergency rule may be adopted without notice if “the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare[.]” The district court’s findings that the emergency standards in § 24-4-103(6) were not

satisfied are tied to his findings that the Secretary's Rule 10.7.5 is contrary to or circumvents state law. Transcript at 51:1-25, 52:1-17.

As discussed in the sections above, the Secretary's Rule 10.7.5 does not conflict with, nor is it contrary to existing state law. The rule does nothing more than supplement or fill in the gap in the Election Code on a point in which current law is silent. If this Court reverses the district court's invalidity of Rule 10.7.5 on grounds it was a valid exercise of the Secretary's rulemaking authority, this Court should also determine that the Secretary's finding of an emergency are proper.

## **CONCLUSION**

For the foregoing reasons, the Secretary respectfully requests that this Court take this appeal, and determine that the district court erred by exercising jurisdiction under § 1-1-113(4) for adjudication of for breach or neglect of duty under the Election Code occurring on or after the election. Further, the district court erred in invalidating the Secretary's Rule 10.7.5 for being in conflict with or contrary to existing law, as it simply supplements or fills in a gap where the existing law is

silent on whether to count votes of a person who is mistakenly certified on the ballot but ineligible to take office. In this case, because there is no dispute that Ms. Speers is not qualified for the school director district 4 seat – and she has not contested this determination by the Designated Election Official or challenged the impropriety of the Secretary’s Rule 10.7.5 – it is proper to review this matter in order to give finality to a school director race that simply should not be at issue in the first instance.

DATED: November 21, 2013.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 17, 2013, a true and correct copy of the foregoing **APPLICATION FOR REVIEW PURSUANT TO § 1-1-113(3), C.R.S. WITH DOCUMENTS 1-5** was filed and served upon the following individuals via the Integrated Colorado Courts E-Filing System and, where indicated below, was served via email only:

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