DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
NICOLE S. HANLEN, LYNN D. USSERY, JAMES H. JOY, JUNE MARIE MCNEES, KELLY L. MCNEES, KAREN MARQUEZ, MEAGAN GABALDON, and DAVD J. RODENBAUGH, Plaintiffs, v. SCOTT GESSLER, in his official capacity as Colorado Secretary of State, KAREN LONG, in her official capacity as Adams County Clerk and Recorder, JIM F. CANDELARIE, in his official capacity as Clerk and Recorder for the City and County of Broomfield, and FRANCES E. MULLINS, in her official capacity as Designated Election Official for the Adams 12 Five Star School District. Defendants.	▲ **COURT USE ONLY** ▲
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SECRETARY'S BRIEF IN OPPOSITION TO VERIFIED COMPLAINT FOR JUDICAL REVIEW	

Defendant Scott Gessler, in his official capacity as Colorado Secretary of State (the "Secretary'), by and through undersigned counsel, hereby submits his brief in opposition to Plaintiffs' Verified Complaint for Judicial Review Pursuant to C.R.S. § 2404-106(4) and for Order Requiring Substantial Compliance Pursuant by Public Officials with Statutory Requirements Pursuant to C.R.S. § 1-1-113 and Request for Forthwith Hearing ("Complaint").

Plaintiffs' Complaint first challenges the validity of the Secretary's Election Rule 10.7.5, and second, seeks an order requiring the Defendant County Clerks to count votes cast for a candidate who all parties agree is ineligible to hold office. This Court should deny both of these requests. The challenged rule is well grounded in both law and common sense. It is intended to and will have the effect of reducing electoral confusion and preventing the unconscionable result that the Plaintiffs seek: namely, the removal of a fully eligible, properly nominated, and duly elected political candidate from office due to a mistake committed by his *opponent*.

BACKGROUND

The facts appear to be undisputed. Two candidates were certified to the ballot in the non-partisan race for School Board Director in District 4 of the Adams 12 Five Star School District: incumbent Rico Figueroa and challenger Amy Speers. Approximately a week before the election, the school district discovered that Ms. Speers did not reside in 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, C.R.S. (2013) (governing qualifications of candidates for school director). The school district requested that Ms. Speers "submit a notice of withdrawal pursuant to C.R.S. § 1-5-412." *See* Exhibits A, B. Although she acknowledged her ineligibility to hold office, Ms. Speers declined to withdraw. *Id.*

As of the date and time of this filing, the Secretary believes that the Clerk and Recorders for Adams and Broomfield counties, Karen Long and Jim Candelarie (collectively, the "Defendant County Clerks"), have not counted any votes cast for Ms. Speers in the District 4 election,

and the Secretary has no independent knowledge about the number of votes cast for Ms. Speers.

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." C.R.S. § 1-1-104(6.5) (2013). The Uniform Election Code of 1992, § 1-1-101, et seq., C.R.S. (2013) ("Election Code"), "applies to all…school district…elections unless otherwise provided by this code." § 1-1-102(1), C.R.S. (2013). In turn, Article 7.5 of the Election Code contains the Mail Ballot Election Act, § 1-7.5-101, et seq., C.R.S. (2013) ("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, C.R.S. (2013). The Election Code 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), C.R.S. (2013).

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). C.R.S. (2013). 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, C.R.S. (2013).

On the day of the 2013 Coordinated Election, the Secretary promulgated Election Rule 10.7.5 on an emergency basis, which stated: "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." Election Rule 10.7.5 is a rule of general applicability and, as such, the Defendant County Clerks followed the rule in the school district election at issue in this case because, as all parties concede, Ms. Speers was not qualified to run for the District 4 school board seat.[1]

Plaintiffs contend that, rather than requiring the nullification of votes cast for a school board candidate who is not and was never eligible to hold the office in question, Title 22 of Colorado Revised Statutes instead requires that votes for ineligible candidates be counted. If the

[1] Plaintiffs complain that "there appears to have been no adjudication in which Ms. Speers was afforded an opportunity to be a participant[.]" *Complaint* ¶ 23. Ms. Speers is not a party to this case and Plaintiffs do not contest the Designated Election Official's determination that she was ineligible. Accordingly, whether an "adjudication" occurred or even was required by some constitutional, statutory, or administrative provision, are questions that the Plaintiffs in this case lack standing to ask.

ineligible candidate "garnered more votes than her opponent," Plaintiffs assert, the effect of that candidate's ineligibility "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.

Plaintiffs' claims should be rejected for several reasons. First, because their Complaint was improperly asserted under § 1-1-113(4), C.R.S. (2013), which provides a cause of action only for election-related disputes that are alleged to have occurred and capable of being adjudicated "prior to the day of the election." Second, Election Rule 10.7.5 is an appropriate exercise of the Secretary's rulemaking authority. And finally, even crediting Plaintiffs' claims about the scope and applicability of the rule in circumstances not before this Court, its application did not lead to a constitutionally or statutorily problematic outcome here. To the contrary, application of Election Rule 10.7.5

prevented precisely the absurd outcome that Plaintiffs now urge this Court to reach.

ARGUMENT

I. Plaintiffs are not entitled to relief under § 1-1-113 because the challenged rule was not promulgated prior to the day of the 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, C.R.S. (2013) was codified in its current form, it appeared at § 1-1-111 and § 1-1-112, 1B, C.R.S. (1980). *See* **EXHIBIT C**. Neither provision contained temporal limitations as to when a

controversy must have arisen or been 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 § 113 actions to controversies "…that occur[] prior to the day of an election." 1994 Colo. Sess. Laws 1151, a copy attached as **EXHIBIT D**.[2] This amendment evidenced a legislative intent to confine § 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 Rauschenberger v.*

[2] In 1992, the General Assembly combined §§ 1-1-111 and 112, 1B, (1980) into § 1-1-113. 1992 Colo. Sess. Law 635.

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).

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 Election Rule 10.7.5 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 District 4 Director race occurred *after* the election. Thus, while Plaintiffs may challenge the Secretary's Election Rule 10.7.5 under § 24-4-106(7), it is improper for this Court to exercise jurisdiction or grant relief pursuant to § 1-1-113.

Finally, although the Complaint asserted that Plaintiffs' claim under § 1-1-113 is against all other Defendants except the Secretary (*see* ¶ 2), their Second Claim for Relief states, "[p]ursuant C.R.S. §1-1-113, and further pursuant to C.R.S. §24-4-106(7) Plaintiffs are entitled

to an Order directing *all Defendants* to substantially comply with their obligations and perform their statutory duties…" (*see* ¶ 35) (emphasis added). Regardless of whether a claim under § 1-1-113 is asserted against the Secretary, he nonetheless has an interest in a consistent interpretation of this important Election Code provision, and believes this Court lacks jurisdiction to award relief under this provision.

II. Election Rule 10.7.5 does not conflict with the Election Code, and is a reasonable exercise of the Secretary's authority to fill in statutory gaps via administrative rule.

Because Election Rule 10.7.5 does not conflict with any provision of the Election Code, it is an appropriate exercise of the Secretary's rulemaking authority.

A. 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.*

The Secretary adopted Election Rule 10.7.5 on a temporary basis as permitted by § 24-4-103(6), C.R.S. (2013), 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** (administrative rulemaking record for Election Rule 10.7.5).

B. Candidates who have not been "duly nominated" are ineligible to have votes cast for them tabulated, whether or not they appear on the ballot.

It defies common sense to maintain that an election official should count votes cast for a candidate who is ineligible to hold the office to which he or she seeks to be duly elected. In fact, the Election Code incorporates precisely this concept in the context of write-in candidates. *See* § 1-4-1101(2), C.R.S. (2013) (prohibiting write-in candidate who has not filed an affidavit of intent from accumulating votes). Thus, even if the majority of votes cast in an election are for an individual who is not

an eligible write-in candidate, election officials do not count votes cast for an ineligible candidate. While this case involves a less common situation than a write-in vote for "Mickey Mouse" or "Ronald Reagan," similar concepts underlie Election Rule 10.7.5.

The Election Code is silent with respect to the accumulation of votes by a candidate whose name erroneously appears on the ballot. Plaintiffs contend otherwise, suggesting 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. There are two flaws in Plaintiffs' understanding and application of this provision.

First is the fact that nothing in § 1-5-412 suggests that it is exclusive. The statute's plain language does not state that death and withdrawal represent the *only* circumstances in which votes for a candidate shall not be counted. Given that the write-in statute referenced above, § 1-4-1101(2), covers another such situation, this lack of exclusivity is clear. Plaintiffs' second difficulty is that they overlook the fact that § 1-5-412(3) applies only to the withdrawal or death of

"duly nominated" candidates. The statute says nothing about whether votes cast for a candidate who was not "duly nominated," but whose name nonetheless mistakenly appears on the ballot, must or must not be counted. In fact, by its plain terms, the statute would not have permitted Ms. Speers to withdraw in any event. Section 1-5-412(3) contemplates the withdrawal or death only of "duly nominated" candidates. Because Ms. Speers never fell into this category, it is unlikely that she even had a candidacy to withdraw.

The distinction between a "duly nominated" candidate and one who appears on the ballot by mistake is an important one because, as 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 the constitution and statutes of this state on or before the date the term of that office begins." § 1-4-501(1), C.R.S. (2013). The same statute prohibits the designated election official from certifying a prospective candidate to the ballot if that candidate is "unable to provide proof that he or she meets any requirements of the office relating to registration, residence, or property

ownership." *Id.* Analogizing to contract and property law, a run for office by an unqualified candidate 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 cancelled or withdrawn under the right circumstances, but has legal and practical import unless and until that cancellation or withdrawal occurs.

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 this mistaken certification that Ms. Speers was "duly nominated." To the contrary, it is clear that she was not "eligible to be a…candidate" for the contested school board seat in the first place, because she did not satisfy the residency requirement. A candidate must be "eligible" for office in order to be "duly nominated." If the candidate is not eligible, then her run is void *ab initio*, and votes cast in her favor should not be counted or considered. To hold otherwise would

be to throw Colorado's limitations on ballot access into disarray. "Common 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 a 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 processes.'" *Burdick v. Takushi,* 504 U.S. 428, 433 (1992), *quoting Storer v. Brown*, 415 U. S. 724, 730 (1974).

Rules often are necessary to supplement legislative enactments. "Because even detailed statutory standards give partial protection only, statutes should also provide for agency adoption of more specific rules and regulations to limit the exercise of broad discretionary power." *Feeney v. Colorado Limited Gaming Control Commission,* 890 P.2d 173, 177 (Colo. App. 1994). When there exists a gap within a statute administered by an agency and the agency is empowered to enact rules, it is assumed that the agency has the power "to explain and fill in the interstices." *Henderson-Carrera v. Carlson,* 547 F.3d 1237, 1246 (10th Cir. 2008); *see also Elizondo v. State,* 570 P.2d 518 (Colo. 1977).

The statutory silence on this question compelled the Secretary to act to fill a gap that may result in confusion or inconsistent application of the law with respect to candidates who appear on the ballot despite the fact that they have not been "duly nominated." Election Rule 10.7.5 simply spells out the obvious fact that only a true "candidate" may accumulate votes, and that a proper nomination or qualification is a prerequisite to attaining candidate status. A mistake by the designated election official cannot provide the bootstrap for an unqualified individual to accumulate votes and thereby deprive a fully qualified, duly nominated, and duly elected candidate from taking office after winning the election. This Court should uphold Election Rule 10.7.5.

C. No vacancy committee can be appointed because Ms. Speers cannot have been "duly elected" to the office of school board director.

Relying on § 22-31-129(1)(d) and (f), Plaintiffs assert that a vacancy committee must be appointed if Ms. Speers accumulated more votes than Mr. Figueroa. Section 22-31-129(d) provides in pertinent part that an office "shall be deemed to be vacant" if, "prior to the expiration of the term of office…the person who was duly elected or

appointed is or becomes during the term of office a nonresident of the director district which the director represents." Plaintiffs argue that Ms. Speers "is" a nonresident of District 4, and that if she accumulated more votes than Mr. Figueroa, this Court should declare the office vacant and order the appointment of a vacancy committee.

This argument suffers from the same shortcoming as Plaintiffs' complaint about Election Rule 10.7.5 – that is, it assumes that Ms. Speers could have been "duly elected" to the office of school board director despite the fact that she lacked one of the fundamental qualifications for office. This assumption both ignores the plain language of the vacancy statute and renders certain of its terms superfluous, and therefore should be rejected by this Court. 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.* 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).

Specifically, Plaintiffs' assumption glosses over the fact that the word "elected" in the vacancy statute is modified by the word "duly," which means "[i]n a proper manner; in accordance with legal requirements." *Black's Law Dictionary* 407 (7th ed. 2000). In this case, Ms. Speers cannot legally undertake a term of office, which is the necessary first step to creating a vacancy in that office, because 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), C.R.S. (2013), and Ms. Speers cannot legally take the director's oath of office as required by § 22-31-125, C.R.S., (2013). Such actions are not legally permissible because Ms. Speers is not qualified to hold office in District 4 and, therefore, was never a "*duly* nominated" candidate for school board director. Because Ms. Speers was not first a "*duly* nominated" school board candidate, she

is not legally capable of becoming "*duly* elected" to the same office. The vacancy statute therefore simply does not apply.

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 candidate. Again, it is undisputed that Ms. Speers is *not* a resident of District 4.

Plaintiffs rely on the verb "is" in § 22-31-129(1)(d) to establish the occurrence of a vacancy because, as they concede, Ms. Speers "is" currently a nonresident of District 4. This reliance is misplaced and should be rejected by this Court because it renders the residency requirements for school board director candidacy in § 22-31-107(1) meaningless. *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). The more reasonable interpretation of the vacancy statute, specifically § 22-31-129(1)(d), contemplates potential circumstances that may occur *during the term of office of a duly elected* school director that disqualify the officer and thereby create a vacancy. 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, leading to a vacancy and, more absurdly, the potential that school directors are appointed by school boards through the vacancy statute as a matter of course, rather than through the democratic process as required by Colorado law.

CONCLUSION

Election Rule 10.7.5 is intended to prevent precisely the incongruous result that the Plaintiffs urge the Court to reach in this case. It should be practically tautological that votes cast for a candidate who is ineligible to hold office 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 is challenging the Secretary's rule as a party to this proceeding – simply highlights the absurdity of the Plaintiffs' position. Yet that is what Plaintiffs have demanded. This Court should reject Plaintiffs' arguments, affirm the validity of Election Rule 10.7.5, and permit counting and certification of the election results to proceed as scheduled.

DATED: November 17, 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 **SECRETARY'S BRIEF IN OPPOSITION TO VERIFIED COMPLAINT FOR JUDICIAL REVIEW** 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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