

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED November 5, 2024 1:49 PM CASE NUMBER: 2024CV33363
LIBERTARIAN PARTY OF COLORADO, a Colorado minor political party, by and through, HANNAH GOODMAN, as Party Chair; and, JAMES WILEY, Congressional Candidate for Colorado's 3 rd District, Petitioners, v. JENA GRISWOLD, in her official capacity as Secretary of State of Colorado; and, CHRISTOPHER P. BEALL, in his official capacity as Deputy Secretary of State of Colorado, Respondents.	▲ COURT USE ONLY ▲
	Case No. 24CV33363 Courtroom 275
ORDER RE: VERIFIED PETITION PURSUANT TO C.R.S. § 1-1-113	

THIS MATTER is before the Court on Petitioners' Verified Petition Pursuant To C.R.S. § 1-1-113 filed on November 1, 2024. Respondents filed a Hearing Brief with Exhibits A-C on November 4, 2024. The Court conducted a forthwith, multi-hour evidentiary hearing on November 4, 2024.

The Court, having reviewed the briefing, the court's file, applicable case law, receiving evidence and argument, and being otherwise advised, hereby finds and orders as follows: ¹

I. PROCEDURAL BACKGROUND

This election action was filed by Petitioners on November 1, 2024. Petitioners seek relief pursuant to C.R.S. § 1-1-113 based upon the disclosure of BIOS passwords on the Colorado Secretary of

¹ The Court is mindful that it should be hesitant to interfere with aspects of an election at this late hour. See, *Purcell v Gonzalez*, 549 U.S. 1, 5-6 (2006).

State's website.² It is undisputed that the relief sought by Petitioners is both extraordinary and unprecedented. Specifically, Petitioners seek the following relief:

VI. PRAYER FOR RELIEF

Wherefore, the Petitioners hereby request that this Honorable Court issue orders, pursuant to C.R.S. § 1-1-113, that:

- 1) Petitioners serve the Offices of the Secretary of State and Attorney General by no later than 11:00 a.m. on this day of Friday, November 1, 2024;
- 2) Upon service, Respondents answer this complaint by the close of business (midnight), Friday, November 1, 2024;
- 3) A hearing be held on Monday, November 4, 2024;
- 4) The Attorney General conduct a full and fair investigation of this matter;
- 5) Every voting system component in the state of Colorado that are associated with the published BIOS passwords be immediately decommissioned;
- 6) All of the ballots submitted by Colorado voters be hand counted by the respective counties of the state;
- 7) Temporary Rule 8 CCR 1505-1, Rule 20.5.2(c)(12) is void;
- 8) Respondents desist from promulgating any new rules or regulations concerning this matter, until it resolved;
- 9) Respondents pay for the attorney fees and costs of Petitioners; and,
- 10) For any such further relief that may be deemed just and proper.

Verified Pet., p. 14.

Respondents argue that the requested relief should be denied on three bases: (1) the action is improperly brought under C.R.S. § 1-1-113; (2) a request to invalidate a rule may only be brought under the Colorado Administrative Procedures Act; and (3) if standing is found, Petitioners are unable to satisfy their burden of proof under C.R.S. § 1-1-113. Resp't Hr'g Br., *generally*.

² As the Colorado supreme court has stated "[g]iven the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day. Both parties agree that such proceedings generally move at a breakneck pace." *Frazier v. Williams*, 401 P.3d 541, 544 (Colo. 2017).

Proposed Intervenor David Justice filed an Emergency Motion to Intervene just prior to the calling of the case at the November 4, 2024 hearing. Petitioners and Respondents were then given the opportunity to review the pleading before the Court heard argument on the Emergency Motion to Intervene. The Court made an oral record, incorporated herein by this reference, and denied the Emergency Motion to Intervene. *See*, C.R.C.P. 24(b).

At the conclusion of the November 4, 2024 evidentiary hearing, Petitioners asked the Court to find that the Colorado Secretary of State (hereinafter, “Secretary of State”) knowingly caused to be published passwords, in violation of C.R.S. § 1-13-708(2). Petitioners pointed out that the Secretary of State handled the instant situation differently than a 2021 Mesa County, Colorado event. Petitioners argue that because the Respondent Secretary breached her duties, section 113 applies and the affected electronic voting machines should not be used for the November 5, 2024 election, to avoid a risk of the improper reporting of votes. Petitioners ask the Court to order that the Secretary of State’s Office not interact with the counties in Colorado and also require that each county hand count the ballots cast in their county.

Respondents acknowledged that the mistake of the BIOS passwords being available on the Colorado Secretary of State’s website was serious. Respondents then asked the Court to compare the Respondent Secretary’s handling of a 2021 event in Mesa County, Colorado to the handling of the instant breach of BIOS password, noting that in both instances an orderly informed process was undertaken by the Secretary of State to remedy the situation in a timely fashion. Respondents also asked the Court to apply the presumption of regularity³ to the actions of the Secretary of State. Finally, Respondents argue that Petitioners have failed to meet their burden of proof as to the violation of C.R.S. § 1-13-708(2), in particular the element of “knowingly.” Respondents ask the Court to deny the relief requested.

II. FINDINGS OF FACT⁴

1. Petitioners are a political party and individuals who are Libertarian candidates currently seeking office in the November 5, 2024 election. Test. Goodman.
2. Respondents are the Colorado Secretary of State and Deputy Secretary of State, named in their official capacities.

³ The “presumption of regularity” holds that “[i]t is well established that courts presume the validity and regularity of official acts of public officials and entities.” *Crested Butte S. Metro. Dist. v. Hoffman*, 790 P.2d 327, 329 (Colo. 1990), citing to *City of Colorado Springs v. District Court*, 519 P.2d 325, 327 (Colo. 1974) and *Town of Frisco v. Brower*, 467 P.2d 801, 803 (Colo. 1970) (“courts presume that public officials discharge their duties properly and in compliance with the law”). Petitioners argue that the “presumption of regularity” has been overcome through the presentation of evidence in this case.

⁴ The Court received sworn testimony from the following individuals: Hannah Goodman, Christopher Beall, Shawn Smith, Clay Parikh, Hilary Rudy, and Ben Edelen.
The Court received into evidence the following exhibits: Petitioners’ Exhibits 2, 3, 5, 9, 10, and 11. Respondents’ Exhibit A
Petitioners’ Exhibits 9-11 relate to the Colorado Secretary of State’s orders directed to conduct in 2021 in Mesa County during a year where no election was pending. Test. Beall.

3. The Court has jurisdiction to hear this action pursuant to C.R.S. § 1-1-113.
4. Venue is proper in the district court for the City and County of Denver under C.R.C.P. 98(b)(2) and (c)(1).
5. On or about October 24, 2024, Respondent Griswold learned that an Excel spreadsheet on the Colorado Secretary of State website contained a worksheet that listed BIOS⁵ passwords (hereinafter, “subject worksheet”). Test. Smith; Resp’t Hr’g Br., p. 4.
6. Specifically, the “VotingSystemInventory.xlsx” file, when unhid and viewed contained passwords for some listed components for Dominion Voting System and ClearBallot Group Clear Vote voting system. Ex. 2; Test. Smith.
7. The subject Excel spreadsheet was on the Colorado Secretary of State’s website from approximately June 21, 2024 through October 24, 2024. Test. Beall; Ex. 2 ¶2.
8. On or about October 24, 2024 the subject worksheet was removed from the Colorado Secretary of State’s website. Resp’t Hr’g Br., p. 4.
9. Over 600 voting system components were identified as still in use at the time of the discovery of the disclosed BIOS passwords. Test. Smith; Resp’t Hr’g Br., p. 4.
10. Starting on or about October 25, 2024, the Colorado Secretary of State’s Office identified Colorado counties potentially impacted by the disclosed BIOS passwords. Resp’t Hr’g Br., p. 5.
11. On or about October 29, 2024, Respondent Griswold received a communication from the Colorado GOP bringing to her attention the removal of a publicly accessible spreadsheet file from the Colorado Secretary of State’s website that contained BIOS passwords for election systems in Colorado. Resp’t Hr’g Br., Ex. A.
12. On or about October 31, 2024, the Deputy Secretary of State adopted Temporary Election Rule 20.5.2(c)(12), which permitted an employee or designee of the Secretary of State to access the voting system component to forthwith change the password(s) and take actions to investigate the voting system, after passing a background check in accordance with Rule 20. Ex. 5; Test. Beall.
13. Respondents ultimately identified 34 Colorado counties (from a total of 64 counties) with affected components in voting systems where a BIOS password would be needed. Test. Beall.
14. Between October 25, 2024 and October 31, 2024, the affected passwords throughout the State of Colorado were changed and proper settings were also verified on 255 components. Test. Beall.

⁵ BIOS stands for Basic Input Output System.

15. Remediation efforts undertaken by the Colorado Secretary of State between October 24, 2024 and October 31, 2024 included the change of BIOS password(s), a review of the configuration of BIOS password(s), running a check in the affected counties' operating system, and review of access logs. Test. Edelen; Test. Beall; Test. Rudy.
16. The Secretary of State currently utilizes several layers of election security, including key cards, a 24-hour video surveillance system of equipment rooms and drop boxes, lock and accuracy tests, tamper resistant seals on equipment, and access logs. Test. Beall, Test. Rudy.
17. The State of Colorado Secretary of State utilizes a two-passcode system; specifically, the Colorado Secretary of State has sole possession of the BIOS passwords, and each county administrator has sole possession of a separate password. To access the voting system, both passwords are needed. Test. Rudy.
18. As a general practice, paper ballots are utilized by Colorado voters. Test. Rudy.
19. Pursuant to Colorado law, starting in 2017, after any election, each county is required to conduct a post-election audit, known as an RLA (Risk Limit Audit), designed to confirm the results between the paper ballots cast and the electronic voting system. Test. Rudy.
20. There is no evidence that the disclosed BIOS passwords were actually used. Test. Goodman, Test. Smith, Test. Beall, Test. Rudy.
21. There is no evidence of compromised voting system components. Test. Smith, Test. Beall, Test. Rudy.

III. LEGAL AUTHORITY AND ANALYSIS

A. STANDING

Generally, the state Administrative Procedure Act (APA) serves as a gap-filler, and its provisions apply to agency actions unless they conflict with a specific provision of the agency's statute, or another statutory provision preempts the provisions of the APA. *Marks v. Gessler*, 350 P.3d 883, 892 (Colo. App. 2013), *cert. granted* 2014 WL 2815824, *cert. dismissed*.

Courts require parties to pursue statutory remedies before seeking relief in district court through the exhaustion of remedies doctrine. *Colorado Dept. of Public Health and Environment v. Bethell*, 60 P.3d 779, 783 (Colo. App. 2002); *Thomas v. F.D.I.C.*, 255 P.3d 1073, 1077 (Colo. 2011). This doctrine allows an agency to correct errors on matters within its expertise and to compile a record adequate for judicial review. *Bethell*, 60 P.3d at 784. It serves the additional purpose of protecting against premature interference by the courts and conserving judicial resources. *Id.*

Ultimately, the exhaustion of remedies doctrine was created to promote several important policy interests that include allowing agencies to utilize their expertise to develop the necessary factual record for decisions and subsequent courts to review; preventing the interruption and

fragmentation of the administrative process; allowing the agency the opportunity to correct its own errors; and conserving judicial resources by insuring that courts intervene only if the administrative process fails to provide adequate remedies. *City and County of Denver v. United Airlines, Inc.*, 8 P.3d 1206, 1212-13 (Colo. 2000); *Bethell*, 60 P.3d at 784.

Importantly, the Colorado Revised Statutes specifically authorize the Secretary of State “without limitation, the power and duty to: ... (c) establish a uniform administrative complaint procedure.” C.R.S. § 1-1.5-104(1)(c).

If a party seeks judicial review before exhausting these administrative remedies, the court lacks subject matter jurisdiction to hear the matter. *Thomas*, 255 P.3d at 1077 (citing *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998)).

1. C.R.S. § 1-1-113

Petitioners argue that pursuant to the authority granted in C.R.S. § 1-1-113, they have properly initiated this action to demand that the Colorado Secretary of State substantially comply with Colorado law. Respondents counter that Petitioners must first seek administrative relief under a more recent and specific statute that governs complaints against Colorado’s voting systems; specifically, C.R.S. § 1-5-621, which reads in relevant part:

(1) Notwithstanding any provision of law to the contrary, upon filing of a complaint, the secretary of state shall investigate the complaint and may review or inspect the electronic or electromechanical voting system of a political subdivision at any time, including election day, to determine whether the system complies with the applicable requirements of this part 6 or deviates from a certified system.

C.R.S. § 1-5-621(1).

Respondents argue that C.R.S. § 1-5-621 provides the proper relief to the Petitioners’ claims, including the remedies available if there is a finding that a voting system does not comply with the applicable standards. These remedies include fixing the defect of the voting system at issue, prohibiting the use, limiting the use, or decertifying the electronic voting system altogether. *See*, C.R.S. § 1-5-621(4).

The Court finds that adequate remedies are available under C.R.S. § 1-5-621, prior to the institution of a section 113 action. Accordingly, Petitioners are required to exhaust administrative remedies before instituting an action in district court.

2. Rule-Making Authority

The Secretary of State is charged by statute with supervising the conduct of elections within the state and enforcing provisions of the election code. *See*, C.R.S. § 1-1-107. Among these duties the

Secretary may exercise powers and perform such duties “as reasonably necessary to ensure that the state is compliant with all requirements imposed upon it pursuant to HAVA [Help American Vote Act of 2002].” C.R.S. § 1-1.5-104(1). Included within the non-exhaustive list of powers and duties is a duty to “[p]romulgate rules in accordance with the requirements of article 4 of title 24, C.R.S., as the secretary finds necessary for the proper administration, implementation, and enforcement of HAVA and of this article.” C.R.S. § 1-1.5-104(1)(e).

Under article 4 of title 24, the Secretary may promulgate a rule on a temporary or emergency basis where

circumstances imperatively require, without notice, ... immediate adoption of the rule is imperatively necessary to comply with a state of federal law or federal regulation or for the preservation of public health, safety or welfare and compliance with the requirements of this section would be contrary to the public interest and make such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule.

C.R.S. § 24-4-103(6)(a); *Hanlen v. Gessler*, 2014 CO 24.

On or about October 31, 2024, the Secretary in a Statement of Justification and Reasons for Adoption of Temporary Rules stated “[t]he adoption of new Rule 20.5.2(c)(12) on a temporary basis is necessary given the quickly approaching General Election on November 5, 2024. This rule is necessary to avoid delay in addressing the changing of certain passwords. Delay in authorizing employees or designees of the Secretary of State with the tasks outlined in Rule 20.5.2(c)(12) would be contrary to the public interest.” Resp’t Hr’g Br., Ex. B, p. 3.

Finally, by law, the Secretary of State may delegate “full authority” to the Deputy Secretary to act on all things relating to the office. C.R.S. § 24-21-105.

The state Administrative Procedure Act (APA) controls judicial review of agency rulemaking, including temporary emergency rules. C.R.S. § 24-4-106. Here, Petitioners did not file a complaint under the APA, electing instead to bring the instant suit under C.R.S. § 1-1-113.

Moreover, Colorado courts have found that parties may not adjudicate other matters in a section 113 proceeding. *Frazier v. Williams*, 401 P.3d 541, 544-545 (Colo. 2017) (a § 1983 claim cannot be brought in a section 113 adjudication); *Kuhn v. Williams*, 418 P.3d 478, 488-489 (Colo. 2018) (challenge to sufficiency of signatures for a candidate being placed ballot was not a proper use of section 113).

Here, Petitioners seek to have the temporary election rule contained in subsection (c)(12) of Rule 20.5.2 declared void.⁶

⁶ 8 CCR Rule 1505-1 Rule 20.5.2(c).

As previously articulated, attempts to void a properly promulgated rule must be heard through the framework of the APA rather than through the limited scope of a section 113 proceeding. Therefore, the Court is without authority to void the promulgated temporary agency rule as requested by Petitioners.

B. RELIEF UNDER C.R.S. § 1-1-113 *via* C.R.S. § 1-13-708

Should the appellate courts conclude that Petitioners have standing to bring this action outside of the APA (*e.g.*, C.R.S. § 1-5-621 does not provide adequate remedy), the Court now addresses the merits of the relief sought pursuant to C.R.S. § 1-1-113.

C.R.S. § 1-1-113 states in relevant part

When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party ... files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed ... a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code.

C.R.S. § 1-1-113(1).

By statute, Petitioners must establish that an officer has committed a breach, neglect of duty, or wrongful act and after notice, including the opportunity to be heard, if the court finds good cause, the trial court shall issue an order requiring substantial compliance with the Colorado Revised Statutes.⁷ More particularly, Petitioners argue that the Secretary of State violated C.R.S. § 1-13-708. That statute provides, as argued by Petitioners, that

(2) Any person who **knowingly ... causes to be published** passwords or other confidential information relating to a voting system shall immediately have their authorized access revoked and is guilty of a class 5 felony.

⁷ “In the voting rights context we have held that the rule of ‘substantial compliance’ provides the appropriate level of statutory compliance to ‘facilitate and secure, rather than subvert or impede, the right to vote.’” *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994). The factors to be considered are: (1) the extent of the non-compliance in the particular issue before the court, that is, a court should distinguish between isolated examples of oversight and what is more properly viewed as systematic disregard for requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the noncompliance, and (3) whether it can reasonably be inferred that the official made a good faith effort to comply or whether the noncompliance is more properly viewed as the product of an intent to mislead the electorate. *Id.*

C.R.S. § 1-13-708(2) (emphasis placed by Petitioners during closing argument).

Here, it is not disputed that passwords were present on the Colorado Secretary of State’s website for a period of several months in the Summer/Fall 2024.

The question then becomes if this conduct was knowingly completed, as required by C.R.S. § 1-13-708(2). “Knowingly” is defined as “a person acts ‘knowingly’ ... with respect to conduct or to a circumstance described by a statute defining an offense when he [she] is aware that his [her] conduct is of such nature or that such a circumstance exists. A person acts ‘knowingly’ ... with respect to a result of his [her] conduct, when he [she] is aware that his [her] conduct is practically certain to cause the result.” See, C.R.S. § 18-1-501(6).⁸

The record before the Court lacks any evidence that the conduct related to the BIOS passwords on the Secretary of State’s website was done “knowingly.” Additionally, no witness testified, nor was evidence presented that the affected counties’ voting systems were compromised or altered even with the BIOS password disclosure.

Finally, C.R.S. § 1-1-113 requires the court, upon a finding of good cause, to direct said official to (1) perform the duty or (2) desist from the wrongful act. In response to notice of the disclosed BIOS passwords, Respondents took down the subject worksheet and put into place a remediation protocol, after an investigation was conducted as to the disclosure of the BIOS passwords. The remediation protocol was implemented and within seven days, the BIOS passwords on the affected voting systems were changed and the affected equipment was examined and verified that it was not compromised.

Even if Petitioners could meet their burden to show that C.R.S. § 1-13-708(2) was violated, the Colorado Secretary of State independently acted to correct the wrongful act before the instant litigation was filed. The presumption of regularity is granted to Respondents in this case, given the efforts undertaken to resolve the public disclosure of BIOS passwords. The Colorado Secretary of State removed public access to the BIOS passwords and immediately commenced remediation protocol which included new BIOS passwords, verification of affected voting system equipment, and checking voting system equipment against the affected counties’ operating systems.

In analyzing the *Loonan* factors, based upon the evidence presented, the Court finds that: (1) this disclosure is an isolated example of oversight, contrasted with a systematic disregard for requirements, (2) the purpose of C.R.S. § 1-13-708(2) is substantially achieved by issuing new BIOS passwords, and (3) it is reasonable to infer that Respondent made a good faith effort to comply with the two-step password verification protocol by changing the BIOS passwords which are the only passwords Respondent Secretary is authorized to control. Therefore, any relief required by section 113 has been accomplished independent of and prior to the filing of the instant case. Stated differently, the Secretary of State substantially complied with correcting the BIOS password breach and has verified that no affected voting systems were compromised. Thus, any

⁸ The Court elects to use the definition found in the criminal code given that C.R.S. § 1-13-708 addresses the consequences, including the possibility of a class 5 felony conviction.

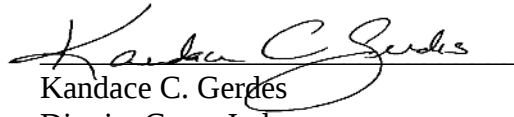
order requiring the Secretary of State to substantially comply with correcting the public disclosure of BIOS passwords is unnecessary.

IV. CONCLUSION

Accordingly, for the reasons set forth above, the Verified Petition is DENIED. With the imminence of the election and short time period within which to seek review in our Supreme Court, the Division Clerk has on this date also notified counsel *via* electronic mail of this Order being issued.

SO ORDERED this 5th day of November, 2024.

BY THE COURT:


Kandace C. Gerdes
District Court Judge

cc: all parties