SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Application for review under § 1-1-113(3), C.R.S., Denver District Court No. 20CV31077 Hon. Christopher J. Baumann JENA GRISWOLD, in her official capacity as Colorado Secretary of State, Petitioner, v. MICHELLE FERRIGNO WARREN, Respondents.	▲ **COURT USE ONLY** ▲
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APPLICATION FOR REVIEW PURSUANT TO § 1-1-113(3), C.R.S. AND OPENING BRIEF

CERTIFICATE OF COMPLIANCE

This brief serves as the petition for writ of certiorari and the opening brief of Appellant. I hereby certify that this brief complies with the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53, including all formatting requirements set forth in these rules, as follows. Specifically, the undersigned certifies that:

The brief complies with the content requirements set forth in C.A.R. 53. The brief does not comply with the word limits of C.A.R. 53 because this document acts as the petition for writ of certiorari and the opening brief of Appellant. It exceeds the word and/or page limit of C.A.R. 53.

The brief complies with the word limits set forth in C.A.R. 28(g).

☒It contains 8,025 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32 or C.A.R. 53.

/s/ Emily Buckley
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Petitioner Jena Griswold, in her official capacity as Colorado Secretary of State ("the Secretary"), asks this Court to review the Denver District Court's decision under § 1-1-113, C.R.S.[1] ("Section 113").

INTRODUCTION

The Court should accept jurisdiction over this appeal and reverse the district court's decision ordering the Secretary to place Michelle Ferrigno Warren's name on the June 2020 primary election ballot as a Democratic candidate for U.S. Senate. Ms. Ferrigno Warren filed a Section 113 action challenging the Secretary's determination that she failed to meet the valid signature threshold and distribution requirements under the Election Code.[2] The district court found Ms. Ferrigno Warren's signature gathering efforts were adversely impacted by the COVID-19 epidemic and concluded that she satisfied this Court's three-part substantial compliance test because she made a good faith

[1] All citations are to the 2019 version of the Colorado Revised Statutes, unless otherwise indicated.
[2] Uniform Election Code of 1992, § 1-1-101, *et seq*., C.R.S. (2019) ("Election Code").

effort to comply with Colorado's longstanding ballot access laws. In doing so, the district court erred as a matter of law by focusing on the good faith effort factor to the exclusion of the factors requiring a court to measure both the extent of noncompliance and determine whether the purpose of the valid signature threshold and distribution requirements was substantially achieved despite the noncompliance.

Here, the extent of Ms. Ferrigno Warren's noncompliance with the Election Code is significant: she failed to obtain 1,500 valid signatures in six of seven congressional districts, collected only 21 to 39% of the 1,500 valid signatures needed in four of seven congressional districts, and collected just over half of the total 10,500 valid signatures needed statewide. Due to these serious shortfalls, the purpose of the Election Code's valid signature threshold and distribution requirements—which is to ensure that each candidate who appears on the primary ballot for an important federal office—has a significant modicum of statewide support, has not been substantially achieved. Under this Court's precedent, these factors should have been dispositive, especially where, as here, the candidate's plan to fully comply with those requirements

was speculative and flawed in its assumptions even absent the specter of COVID-19.

By elevating a candidate's subjective intent to comply with the law above her actual and significant degree of noncompliance with the law, the district court's decision disrupts well-established substantial compliance precedent in the important ballot access context. And stretching the substantial compliance standard so far as to allow a candidate who fell so short of the mark to access the primary election ballot is unfair to candidates who earned such access through full compliance with the Election Code, as well as those who fell short but chose not to pursue litigation to circumvent Colorado's ballot access requirements. Because most Section 113 actions are finally settled by district courts, if this decision stands uncorrected, it could confuse ballot access cases for years to come.

ISSUE PRESENTED

Whether a major party candidate may petition onto the primary ballot for U.S. Senate under a substantial compliance standard if she failed to obtain 1,500 valid signatures in six of seven congressional districts, collected only 21 to 39% of the 1,500 valid signatures needed in four of seven congressional districts, and collected just over half of the total 10,500 valid signatures needed statewide.

DECISION BELOW

The Secretary seeks review of the district court's April 21, 2020 decision in *Ferrigno Warren v. Griswold*, Denver District Court No. 20CV31077. *App. H.*

JURISDICTION

This Court has jurisdiction under Section 113(3), which permits a party to seek review of a district court's decision under Section 113(1) "within three days after the district court proceedings are terminated[.]" § 1-1-113(3). If this Court declines to accept jurisdiction, "the decision of the district court shall be final and not subject to further appellate review." *Id.* The district court issued its decision on April 21, 2020; this

application is timely filed within three days after the district court proceedings terminated.

EXISTENCE OF OTHER CASES

There are no other pending cases in which this Court has granted certiorari review on the same legal issue. The Secretary is aware of a pending district court case, *Bray v. Griswold*, Denver District Court No. 2020CV195 (Baumann J., presiding), involving a different Democratic candidate for U.S. Senate and the same legal questions. Although not yet filed as of the date and time of this filing, the Secretary understands that a third unsuccessful Democratic candidate for U.S. Senate, Lorena Garcia, will be filing a Section 113 action.

STATEMENT OF THE CASE

I. Legal framework for primary ballot access

A. Major party candidates

In Colorado, major party candidates may qualify for the primary ballot through the traditional party caucus and assembly process, § 1-4-601, C.R.S., or by gathering signatures of electors on a petition. § 1-4-801, C.R.S. To secure a nomination for the primary ballot for U.S.

Senate as a member of a major political party by petition, a candidate must collect at least 1,500 valid signatures of registered electors who share the same party affiliation from each of Colorado's seven congressional districts, for a total of 10,500 valid signatures. § 1-4-801(2)(c)(II), C.R.S. These are referred to throughout as the "threshold" and "distribution" requirements. "[N]o petition is legal that does not contain the requisite number of names of eligible electors[.]" § 1-4-902(1), C.R.S.

Only eligible electors may sign candidate petitions. § 1-4-904(1), C.R.S. To be eligible, an elector must be a registered elector and affiliated with the major political party named in the petition. § 1-1-104(16), C.R.S. In signing a petition, the elector must affirm he or she has been affiliated with such party for at least twenty-nine days and has not signed any other candidate petition for the same office. § 1-4-904(2)(a), C.R.S.

Candidates for statewide office must file their petition sections with the Secretary. § 1-4-907, C.R.S. Upon receiving a candidate petition, the Secretary "review[s] all petition information and verif[ies]

the information against the registration records[.]" § 1-4-908(1), C.R.S. The Secretary must notify the candidate of any errors or insufficiencies regarding circulator affidavits; a candidate then has five days to cure the errors and insufficiencies described in the notice. § 1-4-912, C.R.S. When verifying individual petition entries, the Secretary's staff or designee checks each entry against the information in the statewide voter registration database, known as "SCORE," and either accepts or rejects petition entries according to the specific procedures set forth in the Secretary's Election Rule 15.1. *See* 8 C.C.R. 1505-1, Rule 15.1.4; *see also* § 1-4-908(1.5)(a), C.R.S. The Secretary also compares each signature on a statewide candidate's petition "with the signature of the eligible elector stored in the statewide voter registration system," and "may use a signature verification device" to do so. § 1-4-908(1.5)(a), C.R.S.

If the Secretary determines "that the signature on the petition does not match the signature of the eligible elector stored in [SCORE]," a second review must be undertaken by a member of her staff or her designee who is trained in signature verification. § 1-4-908(1.5)(b)(I),

C.R.S. The Secretary must provide the candidate with notice of and an opportunity to cure within three days any signatures determined to be non-matching after this second review. § 1-4-908(1.5)(b)(I) and (II), C.R.S.

After completing her review of a candidate petition, the Secretary must notify the candidate of the number of valid signatures and whether the candidate appears to be sufficient or insufficient. § 1-4-908(3), C.R.S. Along with this statement regarding sufficiency, the Secretary provides each candidate with the master record of each accepted and rejected entry, along with the reason code for each rejected entry—which lists the date on which each signature was collected—that her staff is required to create and maintain as part of the review process. 8 C.C.R. 1505-1, Rule 15.1.4(b).

The deadline for major party candidates to file their petitions with the Secretary was March 17, 2020. § 1-4-801(5)(a), C.R.S. ("[P]etitions must be filed no later than the third Tuesday in March"). The Secretary must deliver the June 30 Primary Election ballot order and content to county clerks by May 7, 2020. § 1-5-203(1)(c)(I), C.R.S. The county

clerks must transmit ballots to military and overseas voters by May 16 for the June 30 Primary Election. § 1-8.3-110(1), C.R.S. This deadline is driven by the federal Military and Overseas Voter Empowerment Act, 52 U.S.C. § 20302(a)(8)(A), and is not flexible. Between May 7 and 16, Colorado's county clerks will work, often with sophisticated ballot printers, on a near-round-the-clock basis to print and mail thousands of ballots to achieve compliance with deadlines under state and federal law.

B. House Bill 20-1359

In response to the COVID-19 pandemic, the General Assembly passed House Bill 20-1359, titled "An Act Concerning Modifications to Party Candidate Designation Requirements to Accommodate Public Health Concerns," which the Governor signed into law on March 16, 2020. *See App. B*, EX B (H.B. 20-1359, 73rd Gen. Assemb., 1st Leg. Sess. (Colo. 2020)). While an earlier version of the bill would have extended the deadline for filing major party candidate petitions by 14 days "due to public health concerns," *App. B*, EX C, the legislature voted down the amendment in question and that provision was not included

in the final version of the bill. *App. B*, EX B. Instead, the enacted version of H.B. 20-1359 provides that, in 2020, the Secretary of State may extend the filing deadline for a petition only if she "is unable to accept the filing because of closures or restrictions due to public health concerns" except that "a signature gathered after the third Tuesday in March[, the statutory deadline for candidate petitions,] is invalid and shall not be counted." *Id.*

C. Section 113 petitions and the substantial compliance standard

If the Secretary "determines that a petition is insufficient, the candidate named in the petition may petition the district court within five days for a review of the determination pursuant to section 1-1-113." § 1-4-909(1.5), C.R.S. Section 113 is the "exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4), C.R.S. Under Section 113, the reviewing trial court may only consider claims that "a person charged with a duty under [the Election Code] has committed or is about to commit a breach or neglect of duty or other wrongful act[.]" § 1-1-113(1), C.R.S. After "notice to the official

which includes an opportunity to be heard," if the district court finds good cause to conclude that the Secretary "has committed or is about to commit a breach or neglect of duty or other wrongful act," then it "shall issue an order requiring substantial compliance with the provisions of [the Election Code]." *Id.*

The Secretary must adhere to a technical compliance standard when carrying out her duties under the Election Code, which in the candidate petition context means that she cannot lower the total threshold signature amount, cannot waive the distribution requirement, and cannot count any invalid signatures toward either requirement. But a reviewing court with jurisdiction under Section 113 is authorized to apply a less rigorous "substantial compliance" standard under which it may liberally construe the Election Code in favor of ballot access. § 1-1-103(1) & (3), C.R.S. ("[s]ubstantial compliance with the provisions *or intent* of [the Election Code] shall be all that is required") (emphasis added)). A court considers the following nonexclusive list of factors in determining whether a party has substantially complied with statutory requirements:

> (1) the extent of noncompliance; (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the noncompliance; and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate.

Fabec v. Beck, 922 P.2d 330, 341 (Colo. 1996) (citing *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994)). These are referred to herein as the *Loonan* factors.

II. Facts and procedural history

A. Ms. Ferrigno Warren's candidate petition

Ms. Ferrigno Warren is a candidate for U.S. Senate who sought nomination by petition to the Democratic primary election ballot. *App. H*, p 5. Ms. Ferrigno Warren notified the Colorado Secretary of State of her decision to seek access to the primary election ballot via the petition process on January 5, 2020. *Id*. Under the Election Code, candidates seeking nomination by petition to the 2020 primary ballot had 57 days (from January 21, 2020 until March 17, 2020) to gather petition signatures. *See* § 1-4-801(5)(a), C.R.S. (2020), and H.B. 20-1359. *App H.*, p 6.

Ms. Ferrigno Warren and approximately 100 volunteer circulators began gathering signatures on the first day of the nearly two-month collection window. *Id.* at 6; *see also App. F.* Volunteer circulator efforts focused on the 1st, 2nd, and 6th congressional districts. *App. G*, TR 4/16/2020, p 17:4–10. She retained a political petition circulation firm, Ground Organizing for Latinos, to use paid circulators to gather one-half of the required signatures between March 5, 2020 and the deadline of March 17, 2020. *App. H*, p 6; *App. G*, TR 4/16/2020, pp 45:23–46:1. To that end, her campaign entered into a $40,000 contract for the firm a total of 10,000 signatures with the apparent assumption that these signatures would account for at least half of the total 10,500 valid signatures needed statewide. *Ex. H*, p 6. Paid circulators planned to collect signatures from 3rd, 4th, 5th, and 7th congressional districts between March 5 and 17. *Id.*; *App. G*, TR 4/16/2020, p 69:13–17.

John Edward Soto, the owner of Ground Organizing for Latinos, advised Ms. Ferrigno Warren, that based on past experience, he expected the process to follow a "hockey stick" model: collection would start at a slow pace in the first two months and then increase

significantly during the final two weeks before the filing deadline. *App. H*, p 6. Mr. Soto's model was based, in part, on the fact that signature collection in colder months like January and February can be hampered by the weather and fewer potential electors being outdoors. *App. H*, pp 6–7. In addition, Mr. Soto was unable to hire a large number of circulators until after "Super Tuesday" (March 3, 2020) because many campaign staff in the state were working for other better-funded campaigns and being paid three to four times the average rate of pay. *Appx. H*, p 7. He admitted that 2020 was the first year in which Colorado participated in Super Tuesday, App. G, TR 4/16/2020, p 67:23–25, so its effect on signature collection efforts was unpredictable. This uncertainty existed regardless of COVID-19.

As the district court found, Ms. Ferrigno Warren also admitted that there were risks unrelated to the COVID-19 pandemic in waiting until the last two weeks to gather half of her signatures and submit her petition for review on the last day of the collection period. *App. H*, p 7. These risks included collecting signatures from registered electors who were ineligible to sign her petition due to having signed another

candidate's petition for the same office (which under Rule 15.1.4 would be invalidated on her petition even if it was signed first in time if it was turned-in for review after the other candidate's petition), or events like a blizzard that could impede travel and keep potential signers indoors. See *App. H*, p 7; *App. G*, TR 4/16/2020, pp 45:23–47:13.

Further, there is additional evidence in the record, not cited by the district court opinion, that Ms. Ferrigno Warren's strategy was highly speculative. She testified that she retained Mr. Soto's firm to gather half the number of valid signatures needed between March 5 and 17, see App. G, TR 4/16/2020, pp 77:4–10, 45:23–46:1, based on her assumption that she would have succeeded in collecting the other half using volunteer circulators before March 5. But the record reflects that her campaign, in fact, had collected under one-third of the 10,500 total valid signatures needed statewide before March 5. *App. B* (showing only 3,134 valid signatures collected through March 4, 2020); *see also App. G*, TR 4/16/2020, p 99:25–100:6. Even if Ms. Ferrigno Warren's plan to collect 5,250 valid signatures between March 5 and 17 had come

to fruition, she still would have fallen short of the 10,500 threshold needed to secure placement on the ballot.

On March 5, 2020, Mr. Soto's paid circulators began working for Ms. Ferrigno Warren's campaign to collect signatures. *App. H*, p 3. As the district court found, Ms. Ferrigno Warren asserts that starting the weekend of March 7 and accelerating after Governor Jared Polis's declaration of a State of Emergency on March 10, multiple circulators (both paid and volunteer) quit her campaign and a few volunteers who had collected signatures said they refused to turn them into the campaign for fear of exposure. *App. H*, p 4. In addition, Ms. Ferrigno Warren asserts some of her volunteers and staff began to exhibit symptoms or had family members with symptoms of COVID-19. *Id.* Ms. Ferrigno Warren thus began to scale back her circulation efforts on March 13th and 14th. *Id.* Ms. Ferrigno Warren maintains she also reduced her circulation efforts due, in part, to being informed on or about March 12 by the Secretary and the Colorado Democratic Party of pending legislation in the Colorado General Assembly that might include a remedy to allow petitioning candidates additional time for

signature collection. App. G, TR 4/16/2020, pp 31:15–41:17; App. H, pp 8–9. As a separate issue, Mr. Soto testified that prior to March 8, the paid circulation was proceeding well, but that beginning on March 8, several paid circulators stopped circulating petitions due to concerns about exposure to COVID-19, and those that continued circulating found it more difficult to gather signatures because potential electors were not inclined to open their doors or engage with circulators. *App. H,* p 8.

Ms. Ferrigno Warren ultimately decided to suspend circulation on the afternoon of March 14 even though she had gathered less than the required number of signatures. *Id.* at 9.

B. The Secretary's Statement of Insufficiency

Ms. Ferrigno Warren submitted her petition to the Secretary for review on March 17, 2020. *App. E.* The Secretary determined Ms. Ferrigno Warren submitted 8,378 reviewable signature lines. *Id.* After the Secretary completed the required petition review, the Secretary issued a Statement of Insufficiency, on April 15, 2020, finding Ms. Ferrigno Warren submitted only 5,383 valid signatures. *Id.* This

represents only 51.2% of the total number of valid signatures required statewide by § 1-4-801(2)(c)(II), C.R.S. *App. H*, p 9. As demonstrated below, Ms. Ferrigno Warren collected much less than 51.2% of the signatures required on a district-by-district basis in four of seven congressional districts.

In addition, the Secretary provided Ms. Ferrigno Warren with the master record of each accepted and rejected signature entry. *App. F.* The master record contains the reason code for each rejected entry and the date on which the signature was collected. *See id.*

The Statement of Insufficiency includes a breakdown of the valid signatures gathered from each congressional district. The statement demonstrates that Ms. Ferrigno Warren gathered:

- 1st congressional district: 1,036 valid signatures or 69% of the required number of valid signatures;
- 2nd congressional district: 1,502 valid signatures, satisfying the required number of signatures;
- 3rd congressional district: 315 valid signatures, or 21% of the required number of valid signatures;

- 4th congressional district: 313 valid signatures, or 20.8% of the required number of valid signatures;
- 5th congressional district 490 valid signatures, or 32.6% of the required number of valid signatures;
- 6th congressional district: 1,139 valid signatures, or 75.9% of the required number of valid signatures; and
- 7th congressional district 588 valid signatures, or 39.2% of the required number of valid signatures.

App. H, p 10; *App. E*. Ms. Ferrigno Warren submitted less than 1,500 valid signatures in six of seven congressional districts. *App. H*, p 10; *App. E*. Under the Election Code, a candidate must gather at least 1,500 valid signatures in each congressional district to access the primary election ballot. §§ 1-4-801(2)(c)(II) and -902(1).

C. The district court proceedings and order placing Ms. Ferrigno Warren on the ballot

Ms. Ferrigno Warren's Section 113 petition: The same day she submitted her candidate petition sections to the Secretary, Ms. Ferrigno Warren filed a petition under §§ 1-4-909 and 1-1-113, C.R.S., alleging that the COVID-19 pandemic and the resulting State of Emergency

declared by the Governor of Colorado prevented her from gathering sufficient signatures to be placed on the ballot. *App. A.* She asked the Court to order the Secretary to do so under a substantial compliance theory.[3] *Id.* Upon receiving the petition, the district court ordered pre-hearing briefing and conducted an evidentiary hearing on April 16, 2020. *App. G.*

The proposed discount-rate formula: In the Secretary's hearing brief and at the hearing, she urged the district court to utilize a mathematical formula that is capable of being applied neutrally and consistently to Ms. Ferrigno Warren's and other candidate petitions that may have been impacted by the COVID-19 pandemic to determine whether the substantial compliance standard has been met. *App. B,* p 10–14. Specifically, the Secretary argued the court should calculate and apply a discount-rate to determine whether a candidate substantially complied based on the following factors:

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[3] Ms. Ferrigno Warren's Section 113 petition also asked for additional time to collect signatures after the State of Emergency ends and asserted an equal protection claim. These issues are not before the Court on appeal.

a. *The 10,500 signatures and 1,500 signatures per congressional district requirements*: Ms. Ferrigno Warren was required to gather at least 1,500 valid signatures from each of Colorado's seven congressional district, for a total of at least 10,500 valid signatures. § 1-4-801(2)(c)(II).

b. *The 57-day statutory period for signature gathering*: Under the Election Code, candidates had 57 days, beginning January 21, 2020 through and including March 17, 2020, to gather petition signatures. § 1-4-801(5)(a) (2020); H.B. 20-1359.

c. *Time period during which COVID-19 obstructed signature collection*: The court should make a factual finding as to the date on which Ms. Ferrigno Warren's ability to collect signatures was limited by COVID-19.

d. *The requirement that only eligible (i.e., registered) electors may sign a candidate petition.* § 1-4-904(1).

See App. B, p 11.

The Secretary proposed that the court then calculate a discount-rate using the following three-step formula:[4] (1) divide the total amount of valid signatures required (10,500) by the total number of days permitted for signature collection (57) to determine the per-day average number of valid signatures to be collected statewide (185); (2) then divide that number by seven to determine the per-day average

[4] Rounding up to whole numbers.

number of valid signatures to be collected in each congressional district (27); and (3) then multiply that number by the total number of calendar days on which the Court finds that COVID-19 obstructed the signature collection process. *Id.* at 11–12. That total is the discount-rate to be subtracted from the 1,500 valid signatures required from each congressional district as a substantial compliance allowance. *Id.* at 12. As set forth in the Secretary's brief, and discussed in detail below at pp 39–44, this discount-rate formula is consistent with the *Loonan* substantial compliance factors.

The district court's opinion:

At the April 16, 2020 evidentiary hearing, Ms. Ferrigno Warren presented her own testimony and testimony by Mr. Soto, the owner of Ground Organizing for Latinos. App. G. The Secretary presented testimony by Joel Albin, Ballot Access Manager for the Secretary. *Id.*

The district court issued a decision on April 21, 2020 holding that Ms. Ferrigno Warren substantially complied with the signature threshold and distribution requirements of the Election Code finding

each factor of *Loonan*, 882 P.2d 1380 (Colo. 1994), weighs in favor of allowing Ms. Ferrigno Warren ballot access. *App. H*, pp 24–29.

The district court declined to adopt the Secretary's proposed discount-rate formula, concluding it did not account for Ms. Ferrigno Warren's "hockey stick" model of signature collection which focused on the last twelve days of the signature gathering window. *Id.* at 26. Concluding that Ms. Ferrigno Warren substantially complied with the Election Code's signature threshold, distribution, and validity requirements, the Court ordered the Secretary of State to place Ms. Ferrigno Warren on the 2020 Democratic primary ballot as a candidate for United States Senate. *Id.* at 28. The Secretary now seeks review and reversal of the district court's decision.

ARGUMENT

I. Standard of review and preservation

In reviewing a district court's order, this Court defers to a district court's findings of fact if they are supported by the record and reviews the district court's legal determinations de novo. *Kuhn v. Williams*, 418 P.3d 478, 483 (Colo. 2018) (citing *Jones v. Samora*, 318 P.3d 462, 467

(Colo. 2014); *Hanlen v. Gessler*, 333 P.3d 41, 48 (Colo. 2014)). "Whether a statute requires strict or substantial compliance is a question of statutory construction ... which [the Court] review[s] de novo." *Colorow Health Care, LLC v. Fischer*, 420 P.3d 259, 261–62 (Colo. 2018) (citing *Finnie v. Jefferson Cty. Sch. Dist. R–1*, 79 P.3d 1253, 1255–58 (Colo. 2003); *Lewis v. Taylor*, 375 P.3d 1205, 1208 (Colo. 2016)). Where "the trial court rules sua sponte on an issue, the merits of its ruling are subject to review on appeal, whether timely objections were made or not." *Rinker v. Colina-Lee*, 452 P.3d 161, 168 (Colo. App. 2019).

The issues presented herein were preserved below. *See App. B*, p 10–14; *App. G*, TR 4/16/2020, pp 98:6–107:25; *App. H*, p 21–29.

II. The Court must determine whether the substantial compliance standard applies here.

Although the Secretary is bound by a technical compliance standard, in a Section 113 proceeding, a court "upon a finding of good cause … shall issue an order requiring substantial compliance with the provisions of this code." § 1-1-113(1). Further, the Election Code provides it is to be "liberally construed" and "[s]ubstantial compliance

with the provisions or intent of [the Election Code] shall be all that is required for the proper conduct of an election[.]" § 1-1-103(1), (3).

However, the Secretary recognizes that under this Court's precedent, a substantial compliance analysis does not apply to every requirement under the Election Code. Most recently in *Kuhn*, 418 P.3d at 488 n.4, the Court held "residency is not a mere technical requirement that is subject to substantial compliance…. A person either is a resident for purposes of the Election Code or he is not." *See also Loonan*, 882 P.2d at 1385 (applying substantial compliance analysis but holding that proponents could not substantially comply with 1993 law where petition sections failed include circulator affidavit required by 1993 amendments). Similarly, even where the legislature provides that substantial compliance applies, strict compliance may apply to mandatory or jurisdictional components of a statute. *See E. Lakewood Sanitation Dist. v. Dist. Ct. In and For County of Jefferson*, 842 P.2d 233, 235-36 (Colo. 1992) (substantial compliance analysis applies to contents of claimants' notice but strict compliance applies to statute's jurisdictional requirement that such notice be filed within 180 days).

This Court recently held that "[t]he key question we must answer in deciding between strict and substantial compliance is which standard better effectuates the General Assembly's purpose." *Colorow*, 420 P.3d at 264.

In light of the legislative intent stated in § 1-1-103(1) and (3), the Secretary agrees that a substantial compliance standard applies to a candidate whose ability to comply with the requirements of §§ 1-4-801(2)(c)(II) and -902(1) were negatively impacted by COVID-19. But to the extent this Court disagrees, it may reverse the district court on the alternate grounds that strict compliance with §§ 1-4-801(2)(c)(II) and -902(1) is required here. *See* C.A.R. 1(d) (an appellate "court may in its discretion notice any error appearing of record" whether or not it was raised below).

III. Because Ms. Ferrigno Warren's petition does not substantially comply with the threshold and distribution requirements of § 1-4-801(2)(c)(II), the district court order conflicts with this Court's precedent.

A good faith effort alone does not amount to substantial compliance. By crediting a candidate's subjective efforts to comply with

the law, to the exclusion other substantial compliance factors requiring a court to measure both the extent of noncompliance and determine whether the purpose of the law was substantially achieved despite the noncompliance, the district court's order conflicts with this Court's precedent on substantial compliance. Because the extent of Ms. Ferrigno Warren's noncompliance was significant and the purpose of Election Code's signature threshold and distribution requirements were not substantially achieved, the district court erred in concluding that Ms. Ferringo Warren substantially complied with the Election Code.

A. Ms. Ferrigno Warren's noncompliance is extensive.

The district court erred by failing to properly assess the extent of Ms. Ferrigno Warren's noncompliance. That failure led the district court to misapply *Loonan's* first factor, which supports reversal.

In assessing the extent of non-compliance, courts should distinguish between "isolated examples of … oversight and what is more properly viewed as systematic disregard of [a statute's] requirements[.]" *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994). This Court has characterized compliance as substantial when it

is "*considerably* more than minimal, but less than absolute." *Woodsmall v. Regl. Transp. Dist.*, 800 P.2d 63, 68 (Colo. 1990) (emphasis added). "Substantial" is defined as "[c]onsiderable in extent, amount, or value; large in volume or number," BLACK'S LAW DICTIONARY 1728 (11th ed. 2019), and as "…to a large degree or in the main" and "of or relating to the main part of something," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002). In short, to substantially comply, a candidate must comply in large part.

Under § 1-4-801(2)(c)(II), Ms. Ferrigno Warren was required to collect a total of 10,500 valid signatures. The statute is very specific about the composition of those 10,500 signatures: they must include at least 1,500 valid signatures of registered electors who share the same party affiliation from each of Colorado's seven congressional districts. § 1-4-801(2)(c)(II), C.R.S. In examining the extent of non-compliance, the district court determined Ms. Ferrigno Warren gathered 51.2% of the total number of valid signatures required by section 1-4-801(2)(c)(II). *App. H*, p 24. The district court found she collected significantly less than 50% of the required signatures in four of the

seven districts: 21% in the 3rd congressional district; 20.8% in the 4th congressional district; 32.6% in the 5th congressional district; and 39.2% in the 7th congressional district. *Id.* But the district court minimized the significance of her shortfall in these four districts, reasoning that Ms. Ferrigno Warren had a "well planned strategy to use paid circulators during the final twelve days of the collection window to gather signatures" in those districts. *Id.* In so reasoning, the district court improperly discounted the severity of her non-compliance.

Ms. Ferrigno Warren's noncompliance with the valid signature threshold and distribution requirements is significant. The fact that she gathered just over half of the 10,500 valid signatures needed statewide is closer to a "systematic disregard" of § 1-4-801(2)(c)(II)'s requirements rather than an "isolated example[ ] of … oversight[.]" *Bickel*, 885 P.2d at 227. Likewise, her collection only 21%–39% of the 1,500 signatures required from each district demonstrates a fundamental failure to comply with the distribution requirement.

The district court discounted the severity of this failure based on the extrapolation that, had Ms. Ferrigno Warren's chosen strategy of

waiting until the last two weeks of the nearly two-month collection period to gather fully half of the 10,500 valid signatures needed statewide gone as planned, she would have collected the 1,500 valid signatures needed in each district. *App. H*, p 26. This guesswork must be rejected, as must the district court's improper crediting of her ability to shoot closer to the mark in three districts over her significant undershooting in the four remaining districts. To allow this flawed reasoning to stand is inconsistent with § 1-4-801(2)(c)(II)'s requirement that candidates gather 1,500 signatures from *each* district. The district court's reasoning is further flawed because while Ms. Ferrigno Warren's good faith is relevant to the third *Loonan* factor, it is not grounds for minimizing the extent of her noncompliance under the first factor. By downplaying the high degree of her noncompliance in that way, the district court misapplied this Court's *Loonan* test.

Ms. Ferrigno Warren's noncompliance with § 1-4-801(2)(c)(II) is significant and weighs strongly against a conclusion of substantial compliance here. Her failure to gather more than 21%–39% of the required number of signatures in four of seven congressional districts,

and just over half of the total signatures needed statewide, cannot be characterized as compliance in large part with the Election Code's signature and distribution requirements. In short, 50% does not achieve substantial compliance, and 20% is not even close.

B. Ms. Ferrigno Warren's petition fails to substantially achieve the purpose of Colorado's ballot access laws.

Loonan's second factor examines the purpose of the applicable statutory provision and determines whether that purpose is substantially achieved despite noncompliance. *Loonan*, 882 P.2d at 1384. Here, the purpose of the valid signature threshold and distribution requirements is two-fold: (1) to ensure that a candidate appearing on the primary ballot has a "significant modicum of support," *Utah Republican Party v. Cox*, 892 F.3d 1066, 1089 (10th Cir. 2018) (quotations omitted); and (2) that such support exists throughout the *entire* State. Indeed, the district-by-district distribution requirement provides the yardstick by which that modicum of statewide support is measured. The second *Loonan* factor requires these purposes to be substantially achieved despite Ms. Ferrigno Warren's failure to fully comply, which is fatal to her Section 113 action.

Colorado is not the only State that requires the gathering of signatures throughout the State to make the ballot. In the initiative context, half of the states with initiatives imposed a geographic distribution requirement on petition signatures as of 2012. *Angle v. Miller*, 673 F.3d 1122, 1135 (9th Cir. 2012). Geographic distribution requirements like Colorado's "reflect[ ] the view that '[such requirements] … are important because they force initiative proponents to demonstrate that their proposal has support statewide, not just among the citizens of the state's most populous region.'" *Id.* (quoting a 2010 National Conference of State Legislatures webpage)[5]; *see also Mass. Pub. Interest Research Group v. Secretary of Commonwealth*, 375 N.E.2d 1175, 1183 (Mass. 1978) (suggesting that a geographic distribution requirement "guard[ed] against the proliferation of ballot questions that are essentially local in effect"); *Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) (identifying "[t]he state's interest in managing

[5] The webpage quoted by *Angle* is no longer available, but a version updated in 2012 is available at https://www.ncsl.org/research/elections-and-campaigns/signature-requirements.aspx (last visited April 23, 2020).

the ballot size and ensuring statewide support for candidates" as the basis for a geographic distribution requirement).

Candidates for the U.S. Senate, like Ms. Ferrigno Warren, seek to represent not two or three of Colorado's congressional districts, but all seven of them. This reality underscores the importance of carefully crafting the substantial compliance standard here to achieve the two-fold purpose of the signature threshold and distribution requirements. Here, the district court concluded that "a 50% threshold [of the total 10,500 signatures required] is a reasonable line to draw" to determine substantial compliance. *App. H,* p 25. But this 50% threshold is not carefully crafted because it is contrary to the plain meaning of the word "substantial." Indeed, complying halfway with any numeric threshold is not compliance "to a large degree or in the main." WEBSTER'S, at 2280.

Additionally, the district court did not apply its own standard consistently. Rather, it applied the 50% threshold only to the total number of signatures Ms. Ferrigno Warren must obtain *statewide*, but not to the number of signatures she was required to obtain in *each district*. When examining Ms. Ferrigno Warren's signature collection

district-by-district, the court below emphasized her "honest effort to collect signatures in every congressional district." *Id.* at 26. But as with the first *Loonan* factor, Ms. Ferrigno Warren's "honest effort" cannot serve to minimize her petition's failure to substantially achieve the purpose of the signature threshold and distribution requirements.

Further, Ms. Ferrigno Warren satisfied the district court's 50% threshold in only three of seven districts, which comprise far less than half of Colorado. She also obtained less than 40% of the required signatures in the remaining four districts and fell as low as 21% in two of those four districts. When the district court's 50% threshold is applied consistently, Ms. Ferrigno Warren's petition falls well short of substantially achieving the district-by-district purpose of Colorado's distribution requirement.

Where, as here, the statutory requirement "directly and clearly" addresses the issue and Ms. Ferrigno Warren failed to even approach compliance, the second *Loonan* factor is "dispositive." *See Bickel*, 885 P.2d at 236–37. Here, the purpose of the applicable statutory requirements is clearly and directly stated: a candidate must collect

enough signatures to demonstrate a significant modicum of support in *every* congressional district. Because Ms. Ferrigno Warren's petition failed achieve this purpose both as a whole and within every district, the district court erred in concluding that she substantially complied with the Election Code.

C. The district court improperly weighted the third *Loonan* factor; good faith effort alone is insufficient.

The district court improperly elevated the third *Loonan* factor above the first and second in concluding that a good faith strategy to comply constitutes substantial compliance. This holding conflicts with this Court's established precedent under which a good faith effort alone is insufficient. *See Bickel*, 885 P.2d at 236–37 (holding that second *Loonan* factor was "dispositive" despite finding that city acted in "good faith"). If not reversed, the district court's holding could greatly confuse other Colorado courts regarding proper application of the *Loonan* factors.

Under the third *Loonan* factor, a court considers "whether it can reasonably be inferred that the [party] made a good faith effort to comply or whether the [party's] noncompliance is more properly viewed

as the product of an intent to mislead the electorate." *Loonan*, 882 P.2d at 1384 (quotations and citations omitted). This Court has never held that a showing of "good faith" alone is sufficient to demonstrate substantial compliance where the first two factors weigh heavily against a such a conclusion. Instead, this Court has held on numerous occasions that a party acting in good faith *failed* to substantially comply, either due to the extent of non-compliance or because the statutory purpose was not achieved despite the non-compliance. *See Bickel*, 885 P.2d at 236-37 (holding that second *Loonan* factor was "dispositive" despite finding that city acted in "good faith"); *Erickson v. Blair*, 670 P.2d 749, 752, 757 (Colo. 1983) (holding contradictory and deficient absentee voter affidavits did not substantially comply with Election Code, although "no person involved in the election had engaged in fraud or other wrongdoing"); *see also Buckley v. Chilcutt*, 968 P.2d 112, 114 (Colo. 1998) (reversing district court's placement of initiative on ballot and directing the Secretary to conduct a line-by-line review of signatures, notwithstanding Secretary's good faith efforts to comply with law). As the Supreme Court of Texas held, "it is clear that

a person's good faith is not enough for substantial compliance when essential statutory requirements ... are not met." *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 403 (Tex. 2009).

Indeed, this Court has only given more weight to the third factor when the trial court record reflects that a party intentionally violated the law or engaged in fraud. *See Loonan,* 882 P.2d at 1386 (holding that the second factor was dispositive, but also holding that the third factor weighed against substantial compliance where party "disregarded" and "did not read [controlling] laws much less understand them"); *see also Erickson,* 670 P.2d at 753–54 (indicating "substantial compliance" standard not appropriate where a showing of "fraud, undue influence, or intentional wrongdoing" is made). This Court's precedent indicates that while a finding of fraud might be dispositive of the substantial compliance analysis, a finding of good faith alone is not.

Contrary to this settled precedent, the district court here allowed its finding of Ms. Ferrigno Warren's good-faith intent to direct its ultimate holding that her petition substantially complied with the Election Code. The district court improperly applied a "good faith"

overlay to the first two *Loonan* factors, elevating the third factor above the first two. Despite finding that Ms. Ferrigno Warren gathered only between 20% and 39% of the 1,500 needed signatures in a majority of congressional districts and just over half of the 10,500 total signatures needed statewide, the district court discounted the severity of the noncompliance because Ms. Ferrigno had a "well-planned strategy" to gather those signatures absent COVID-19. And with regard to the second factor, the district court emphasized Ms. Ferrigno Warren's "honest effort" to comply with the law, avoiding the conclusion dictated by its factual findings that the purpose of § 1-4-801(2)(c)(II) was not substantially achieved despite the extent of noncompliance.[6] *App. H*, p 24-25. Because the district court's decision conflates a sound signature-collecting strategy with substantial compliance, it must be reversed. Good faith alone does not amount to substantial compliance.

[6] As explained in the Statement of the Case above, Ms. Ferrigno Warren failed to collect half of the required signatures by March 5, despite her plan to do so and prediction that she would. So even absent COVID-19, her chosen strategy was unlikely to have been successful.

D. The Secretary's formula provides the best means of assessing substantial compliance.

Colorado has been in a declared state of disaster emergency since March 10, 2020 due to the COVID-19 pandemic. But notably, other candidates—including at least one other Democratic candidate for U.S. Senate—have successfully petitioned onto the primary ballot through strict compliance with the Election Code's signature threshold, distribution, and validity requirements. As a result, the COVID-19 pandemic alone does not justify granting blanket ballot access to others who tried and failed to do the same. If the signature threshold can be satisfied using substantial instead of strict compliance, the district court's inconsistently-applied 50% threshold is not the best standard because it is contrary to the plain meaning of the word "substantial" and fails to comport with this Court's settled precedent. In contrast, the Secretary's discount-rate formula provides the best yardstick by which this and other courts measure substantial compliance during the COVID-19 outbreak.

The substantial compliance standard applied here should promote fairness and meaningful compliance with the Election Code. Colorado

candidates rely on the clear requirements in the Election Code when they determine, for example, whether to seek qualification for the primary ballot through the party assembly process or through signature-gathering on a petition. The district court's 50% threshold is arbitrary, does not account for a candidate's individual circumstances (*e.g.*, how many days a campaign was adversely affected by COVID-19), and negates the district-by-district distribution requirement. Such a standard would disadvantage candidates who chose the party assembly process or who collected more signatures than Ms. Ferrigno Warren but chose not to litigate despite also being unsuccessful. The only way to treat all similarly situated candidates fairly is to adopt the Secretary's formula.

The Secretary urged the court below to do so because it is capable of being applied neutrally and consistently to this and other candidate petitions that may have been impacted by the COVID-19 pandemic in determining whether the substantial compliance standard has been satisfied. This formula is outlined in detail above, at pp 20–22. Here, the district court determined that Ms. Ferrigno Warren's signature

collection effort was affected by COVID-19, at the earliest, on March 7, 2020. Therefore, her campaign was adversely affected by COVID-19, at most, for 11 days. Under the Secretary's formula, this results in a COVID-19 discount rate of 324 signatures per congressional district. Thus, Ms. Ferrigno Warren would need to gather at least 1,176 valid signatures per congressional district, for a total of at least 8,232 valid signatures statewide in order to satisfy the substantial compliance standard.

Applying the Secretary's discount-rate is consistent with the substantial compliance factors set forth by *Loonan*, 882 P.2d at 1384. Under that precedent, a court considers the following non-exclusive list of factors in determining whether a party has substantially complied with statutory requirements:

> (1) the extent of noncompliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance, and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate.

Fabec, 922 P.2d at 341 (citing *Loonan*, 882 P.2d at 1384).

Here, the Secretary's proposed formula would allow the Court to assess each factor. *First*, the extent of each candidate's noncompliance with the signature threshold and distribution requirements will vary, but the proposed formula measures it based on a neutral per-day average number of valid signatures to be collected in each congressional district and fairly discounts the days on which signature gathering actually was obstructed by COVID-19. Moreover, the same formula can be applied neutrally to different candidates and is easily adapted to apply to candidates for offices with different signature threshold or distribution requirements. Here, Ms. Ferrigno Warren's noncompliance is significant because she failed to collect the reduced requirement of 1,176 valid signatures per congressional district in six of seven congressional districts (and failed to collect anywhere near 50% of the reduced threshold in three of the seven districts). *See App. E.*

Second, the proposed formula is consistent with the purpose of the applicable signature threshold, distribution, and validity provisions: to ensure that each candidate appearing on the primary ballot has "significant modicum of support." *Cox*, 892 F.3d at 1089 (internal

citations omitted). As the Tenth Circuit recently held, states have significant interests in "regulating the manner in which a candidate may qualify for an election ballot[;]" "avoiding confusion, deception, and even frustration of the democratic process" in elections; "protecting the integrity of their political processes from frivolous or fraudulent candidacies[;]" "ensuring that their election processes are efficient[;]" and "avoiding voter confusion caused by an overcrowded ballot." *Cox*, 892 F.3d at 1089–90 (internal citations omitted). The Secretary's proposed formula allows the Court to substantially achieve those important state interests by requiring candidates to comply with the statutory purpose by demonstrating significant public support before accessing the primary ballot, while still relaxing the statutorily-required level of support due to COVID-19. As demonstrated above, because Ms. Ferrigno Warren has not met the discount-rate formula in six of seven congressional districts, she has not substantially complied with the threshold and signature requirements.

And *third*, the Secretary's proposed formula enables the Court to assess whether each candidate made a good-faith effort to comply with

the signature threshold, distribution, and validity requirements of the Election Code. For each candidate petition review that her office completes, the Secretary must "notify the candidate of the number of valid signatures and whether the petition appears to be sufficient or insufficient." § 1-4-908(3), C.R.S. Here, there is no dispute that Ms. Ferrigno Warren acted with good-faith intentions, but she did choose to adopt a strategy that backloaded her collection efforts onto the final two weeks. Further, there is evidence in the record that other factors, such as Ms. Ferrigno Warren's campaign budget, the retention of paid petition circulators by other campaigns, and winter weather prevented her from collecting signatures throughout the 57-day collection window.

Because the first two *Loonan* factors weigh strongly against a finding of substantial compliance here—even if this Court finds Ms. Ferrigno Warren acted in good faith—the Court should reverse the district court's order requiring the Secretary to certify Ms. Ferrigno Warren to the primary election ballot.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court accept this appeal and reverse that the district court's order directing the Secretary to place Ms. Ferrigno Warren on the 2020 primary election ballot as a Democratic candidate for U.S. Senate.

APPENDIX

A. Ms. Ferrigno Warren's Section 113 Petition and Exhibits

B. The Secretary's Hearing Brief and Exhibits

C. Ms. Ferrigno Warren's Reply Brief

D. Joint Stipulated Facts

E. Statement of Insufficiency

F. Signer Adjudication Report

G. Transcript of April 16, 2020 Hearing

H. District Court's April 21, 2020 Order

Respectfully submitted this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she filed the foregoing **APPLICATION FOR REVIEW PURSUANT TO § 1-1-113(3), C.R.S.** and served a true and correct copy of same on all counsel of record via the Colorado Courts E-Filing system on April 24, 2020.

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