DISTRICT COURT, CITY & COUNTY OF DENVER STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 DATE FILED: October 10, 2022 6:35 PM CASE NUMBER: 2022CV32620	
Plaintiffs: COLORADO OVER PARTY and FREDRICK SANDOVAL, an individual, v. **Defendant:** JENA GRISWOLD, COLORADO SECRETARY OF STATE, in her official capacity, and **Intervenor-Defendants**: JEFF SLOAN and LOUISA ANDERSON.	**▲COURT USE ONLY▲**
	Case No.: 22CV32620 Division: 409

ORDER REGARDING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This matter comes before this Court on Plaintiffs' *Motion and Integrated Memorandum for Temporary Restraining Order and Preliminary Injunction* (the "Motion"). The Court held a hearing on the Motion on October 6, 2022. All parties stipulated to all relevant facts and stipulated that it was not necessary to present the testimony of witnesses at the hearing. Plaintiffs stipulated that their request for a Temporary Restraining Order was mooted by the passage of time and the only issue presented for the Court's resolution at the time of the hearing was Plaintiffs' request for a Preliminary Injunction. The request for a Preliminary Injunction was opposed by the Secretary of State (the "Secretary") and Intervenors (the "Recall Petitioners").

BACKGROUND

The following facts were presented by stipulation to the Court. In 2016, Senator Kevin Priola was elected to the Colorado Senate, representing Senate District ("S.D.") 25. Sen. Priola was reelected

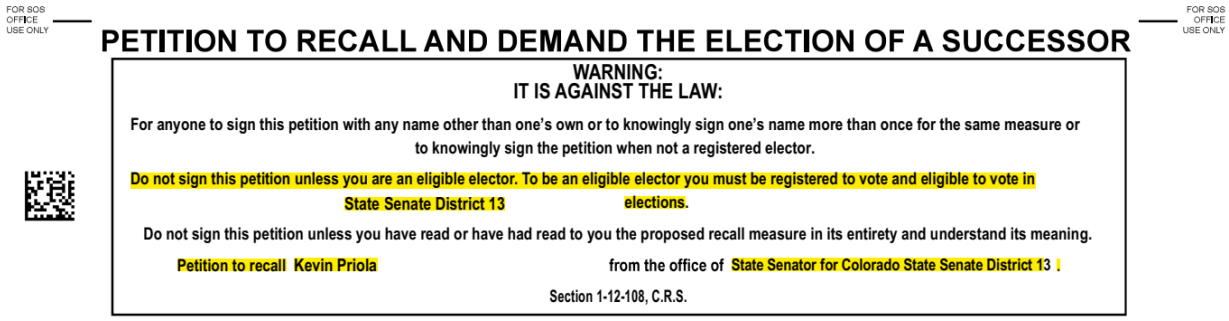
as state senator for S.D. 25 in 2020 and continues to represent the voters of S.D. 25. The current state senator for S.D. 13 is John Cooke. Sen. Cooke is term-limited and will no longer be eligible to serve as a state senator when his current term expires in January 2023.

In 2018, Colorado voters adopted changes in the legislative redistricting process and converted the then-existing reapportionment commission into an independent redistricting commission tasked with revising electoral districts following the federal census which takes place every decade. One result of the 20220-2021 redistricting commission's work, which the Colorado Supreme Court approved in late 2021, was the redrawing of S.D. 25 and S.D. 13. *See In Re: Colorado Independent Legislative Redistricting Commission*, 513 P.3d 352 (Colo. 2021). The redistricting was approved by the supreme court on November 15, 2021. As a result of the finalized redistricting plan, when the General Assembly reconvenes for regular session on January 9, 2023, Sen. Priola will represent S.D. 13. There will not be another regularly scheduled election for S.D. 13 senator until November 2024.[1]

Senator Priola currently represents S.D. 25, and will continue to do so until January 9, 2023, when the General Assembly next reconvenes for regular session. The boundaries of S.D. 13 as they exist today are different than they will be when redistricting takes place. The boundaries of S.D. 25 as they exist today are different than they will be when redistricting takes place.

In anticipation of Sen. Priola becoming their state senator in January 2023, several electors from S.D. 13 initiated a recall of Sen. Priola from the office of state senator for Colorado State Senate District 13. On September 9, 2022, the Secretary authorized circulation of a recall petition. *See* Exhibit 1 to Complaint (the "Recall Letter") and Exhibit 2 to Complaint (the "Recall Petition"). In approving the Recall Petition, the Secretary approved the following language which provides that electors from S.D. 13, rather than S.D. 25, may sign the Recall Petition and may ultimately vote for or against Sen. Priola's recall.

[1] The voters of the future S.D. 25 will elect a new state senator in the November 2022 general election.



FOR SOS OFFICE USE ONLY

PETITION TO RECALL AND DEMAND THE ELECTION OF A SUCCESSOR

FOR SOS OFFICE USE ONLY

WARNING:
IT IS AGAINST THE LAW:

For anyone to sign this petition with any name other than one's own or to knowingly sign one's name more than once for the same measure or to knowingly sign the petition when not a registered elector.

Do not sign this petition unless you are an eligible elector. To be an eligible elector you must be registered to vote and eligible to vote in State Senate District 13 elections.

Do not sign this petition unless you have read or have had read to you the proposed recall measure in its entirety and understand its meaning.

Petition to recall Kevin Priola from the office of State Senator for Colorado State Senate District 13

Section 1-12-108, C.R.S.

The Secretary stipulated at the October 6, 2022 hearing that the Secretary will permit voters that currently reside in what will be the redrawn S.D. 13 to sign the Recall Petition. Voters that currently reside in what is currently S.D. 25—but which will not be part of S.D. 13 following redistricting—*will not* be permitted to sign the recall petition. Plaintiff Sandoval currently resides within the boundaries of S.D. 25 and will continue to reside within the boundaries of S.D. 25 after redistricting. As a result, the Secretary will not permit Plaintiff Sandoval to sign the Recall Petition to recall Sen. Priola.

Pursuant to C.R.S. §1-12-108(1.5), the Recall Petitioners have sixty (60) days from the Secretary's September 9, 2022 petition approval date, or November 8, 2022, to obtain the necessary signatures on the Recall Petition. The Recall Petitioners have attested that they will utilize all 60 days available to them for the collection of signatures. As a result of the Recall Petitioner's intention to utilize all 60 days for collection of signatures, all parties have stipulated that any resulting recall election will not be held until after the General Assembly reconvenes for regular session on January 9, 2023. The Secretary has estimated that the earliest a recall election could be held is January 27, 2023.

Plaintiffs seek declaratory judgment and injunctive relief to stop the recall procedure, including the circulation of the Recall Petition. Plaintiffs argue that permitting the Recall Petition to circulate and be signed only by voters living in what will be future S.D. 13 deprives the electors of current S.D. 25 their state and federal constitutional rights to participate in the recall procedure,

whether for or against, and it is unconstitutional to permit the electors of one senate district (future S.D. 13) to participate in the recall procedure of a senator elected by and who represents the electors of another district (current S.D. 25).

In summary, Plaintiffs argue that S.D. 25 electors have a fundamental constitutional right to control who represents them in the Colorado State Senate and to participate—or decline to participate—in their senator's recall. They also assert a corollary fundamental right to be free from interference by the electors of a different senate district in their choice of elected representative. Plaintiffs ask this Court to enter a preliminary injunction because they claim the violation of a constitutional right is presumed to cause irreparable harm and absent immediate injunctive relief, there will be no order the Court could fashion that would repair the harm done.

In contrast, the Secretary and the Recall Petitioners argue that it is proper for voters from future S.D. 13 to circulate the Recall Petition at the present time and to be the only individuals permitted to sign the Recall Petition. They base their argument on the language of Colorado Constitution Art. 21, §1 which provides, "[e]very elective public officer of the state of Colorado may be recalled from office at any time by *the registered electors entitled to vote for a successor of such incumbent* through the procedure and in the manner herein provide for. . . ." (emphasis added). According to the Secretary and the Recall Petitioners, because a recall election, if any, will be held following the reconvening of the General Assembly on January 9, 2023, only voters from the future S.D. 13 will be "entitled to vote for a successor" to Sen. Priola. In addition to disputing the merits of Plaintiffs' claims, the Secretary and the Recall Petitioners raise numerous challenges to this Court's jurisdiction to hear Plaintiffs' case prior to the Secretary's determination of the sufficiency of the Recall Petition.

ANALYSIS

Court's Jurisdiction:

The Secretary and the Recall Petitioners assert that this Court does not have jurisdiction to hear Plaintiffs' request for a preliminary injunction for two reasons.

First, the Secretary and Recall Petitioners assert that the dispute is not yet ripe because the Recall Petitioners have not yet gathered the signatures necessary to sustain a recall and the Secretary has not yet certified the sufficiency of the Recall Petition. Thus, because it is uncertain whether the matter will proceed to a recall election, the Secretary and Recall Petitioners argue that the dispute is purely speculative.

Courts lack subject matter jurisdiction over matters that are not ripe. *See Zook v. El Paso Cnty.*, 494 P.3d 659, 662 (Colo. App. 2021). "Ripeness tests whether an issue is real, immediate, and fit for adjudication." *Id.* Courts should therefore "refuse to consider uncertain or contingent future matters that suppose a speculative injury that may never occur." *Id.*

Relatedly, the Secretary and the Recall Petitioners also assert that C.R.S. §1-12-108(9) provides the exclusive remedy for protesting the validity of a recall petition. "Where administrative remedies are provided by statute, the statutory procedure must be followed when the matter complained of is within the jurisdiction of the administrative authority." *Denver–Laramie–Walden Truck Line, Inc. v. Denver–Fort Collins Freight Serv., Inc.*, 399 P.2d 242, 243 (Colo. 1965). This rule prevents piecemeal application for judicial relief and unwarranted interference by the judiciary in the administrative process. *See Moschetti v. Liquor Licensing Auth.*, 490 P.2d 299, 301 (Colo. 1971). "Where a statute creates legal duties and provides a particular means of enforcement, the designated remedy is exclusive and courts are without authority to impose others." *Holter v. Moore & Co.*, 681 P.2d 962, 965 (Colo. App. 1983). The Secretary argues that this principle applies with special force when considering the people's fundamental right to recall. "A recall provision in a constitution is intended as a reservation in the

people of the power to recall any official without judicial interference." *Groditsky v. Pinckney*, 661 P.2d 279, 282 (Colo. 1983).

The Court finds that these arguments are misplaced because of the nature of the constitutional injury that has been alleged by Plaintiffs.

All parties acknowledge that the Recall Petitioners may not be able to obtain the 18,291 signatures necessary for the Recall Petition to be deemed sufficient and for a recall election to be held. *See* C.R.S. §1-12-104(1) (a petition to recall a state officer shall be signed by eligible electors equal in number to twenty-five percent of the entire vote cast at the last preceding general election for all candidates for the office held by the incumbent). Therefore, according to the Secretary and the Recall Petitioners, until the Secretary certifies that the Recall Petitioners obtained sufficient signatures on the Recall Petition, there is no controversy regarding whether the Secretary permitted the proper set of electors to sign the Recall Petition.

However, the ripeness argument does not prevail given the nature of the constitutional injury claimed by Plaintiffs. Plaintiffs have alleged that the decision of the Secretary to permit the circulation of the Recall Petition amongst voters of the future S.D. 13 deprives current S.D. 25 voters the right to recall (or not to recall) Sen. Priola even though he is the current legislator for S.D. 25. The Secretary confirmed at the October 7th hearing that under her interpretation of the Colorado Constitution and C.R.S. §1-12-101, electors from current S.D. 25 would not be permitted to circulate a recall petition for Sen. Priola at the present time, nor are voters from current S.D. 25 permitted to sign the currently circulating Recall Petition unless they also qualify as voters in the future S.D. 13.

Accordingly, the Secretary's September 9, 2022 decision to allow the S.D. 13 Recall Petition to be circulated and concomitant decision to bar S.D. 25's current voters from participating in recall efforts implicate Plaintiffs' rights to petition for the recall of Sen. Priola, regardless of whether the Recall Petitioners are able to obtain the necessary number of petition signatures. Because the

Secretary's September 9, 2022 decision negatively impacts Plaintiffs' rights to petition for recall, the issue is ripe for this Court's consideration.

The Secretary and the Recall Petitioners also argue that this Court does not have jurisdiction at present because the exclusive means of contesting the Secretary's determinations regarding recall petitions is found at C.R.S. §1-12-108(9) which governs protests of the Secretary's decision regarding the sufficiency of the signatures on recall petitions. C.R.S. §1-12-108(9)(a)(I) provides that a protest may be filed within fifteen days of the date the Secretary verifies a recall petition as being sufficient. However, the statue provides that such a protest may be filed "by an eligible elector." It is not clear that the Secretary would entertain a protest filed by Plaintiff Sandoval because the Secretary has already determined that Plaintiff Sandoval is not an "eligible elector" for purposes of recalling Sen. Priola. Therefore, there is significant question as to whether the protest process is available to Plaintiff Sandoval.

Additionally, the requirement that a plaintiff exhaust administrative remedies does not apply where administrative review would be inadequate or futile. *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1197 (Colo. 1993). Here, the protest process is inadequate because that process is limited to "failure of any portion of a petition or circulator affidavit to meet the requirements of this article 12 or any conduct on the part of petition circulators that substantially misleads persons signing the petition." C.R.S. §1-12-108(9)(a)(ii). While this protest process may allow an individual deemed to be an eligible elector to challenge whether the signatures on the Recall Petition were from eligible electors, this statutory right of review does not contemplate the constitutional claims made by Plaintiffs. Specifically, the statutory protest process does not contemplate a challenge by someone that has been excluded from the recall process and who asserts claims that their constitutional right to recall was impermissibly limited.

The statutory limitations on the scope of the available protest grounds are compounded by the prohibition on administrative agencies considering facial constitutional challenges. The requirement of exhaustion of administrative remedies are not furthered when available administrative remedies are ill-suited for providing the relief sought and when the matters in controversy consist of questions of law rather than issues committed to administrative discretion and expertise. *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1197 (Colo. 1993) *citing Collopy v. Wildlife Comm'n*, 625 P.2d 994, 1006 (Colo.1981).

Here, the Court finds that the primary issues raised by Plaintiffs' complaint and request for a preliminary injunction are questions of law that challenge the facial and "as applied" constitutionality of the Secretary's interpretation of C.R.S. §1-12-101 and Colorado Constitution Art. 21, §1. Because these matters are not committed to the Secretary's discretion or expertise, it would be inadequate to require Plaintiffs to exhaust the statutory protest process prior to seeking judicial intervention. Therefore, the Court finds that it does have jurisdiction to address Plaintiffs' request for a preliminary injunction.[2]

Preliminary Injunction:

To obtain a preliminary injunction, a moving party must satisfy the six factors established by the Colorado Supreme Court in *Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982): 1) a reasonable probability of success on the merits; 2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; 3) lack of a plain, speedy, and adequate remedy at law; 4) no disservice to the public interest; 5) balance of equities in favor of the injunction; and, 6) the

[2] *See also Combs v. Nowak*, 43 P.3d 743 (Colo. 2002). In *Combs*, the Colorado Supreme Court concluded that the court had jurisdiction to consider a legal challenge to the procedures employed in a recall election, despite the rejection of the recall petition by the voters. The court held that the case fell within both exceptions to the mootness doctrine, namely that it presented an issue capable of repetition, yet evading review and was a matter involving a question of great public importance to the citizens. This Court finds the issues presented here are of a similar nature.

injunction will preserve the status quo pending a trial on the merits. *Id.* at 653–54. The Court will consider each of these factors in turn.

I. Reasonable likelihood of success on the merits.

Plaintiffs are likely to succeed on their claim that the current recall procedure violates the recall and voting rights of S.D. 25 electors guaranteed by the Colorado and United States Constitutions.

In their Verified Complaint, Plaintiffs have sought a declaration that any circulation or signing of a petition to recall Sen. Priola among electors of a senate district other than current S.D. 25 before the General Assembly reconvenes on January 9, 2023 would violate the recall and voting rights of the electors of S.D. 25, including Plaintiff Sandoval, in violation of Article 21, §1 of the Colorado Constitution, C.R.S. §1-12-101, and the First and Fourteenth Amendments of the United States Constitution. *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993) ("[T]he right to vote…is guaranteed by the federal constitution, and by article II, section 5 of the Colorado Constitution."); *see also In re Hickenlooper*, 312 P.3d 153, 157 (Colo. 2013) (finding federal constitutional violations where electors were not permitted to vote for a successor unless they also voted on the incumbent's recall). Plaintiffs argue that they are likely to succeed on their declaratory judgment claim because the recall procedure approved by the Secretary deprives S.D. 25 electors of their right to sign (or not sign) the recall petition, and vote for (or against) Sen. Priola's recall.

Article 21, §1 of the Colorado Constitution provides, in relevant part, "Every elective public officer of the state of Colorado may be recalled from office at any time by the *registered electors entitled to vote for a successor of such incumbent* through the procedure and in the manner herein provided for, which procedure shall be known as the recall, and shall be in addition to and without excluding any other method of removal provided by law." (emphasis added). Likewise, C.R.S. §1-12-101 provides that "[e]very elected officer of this state or any political subdivision thereof is subject to recall from office at any time by *the eligible electors entitled to vote for a successor to the incumbent*." (emphasis added).

The parties fundamentally disagree on whether the critical phrase "eligible electors" is forward looking—meaning electors that would be eligible to vote for a successor at the time a recall election is actually held—or whether it is a present condition—meaning the electors eligible to vote for a successor if the recall election was held at the time the petition is circulated. This is an issue of first impression and there is no statute or caselaw that directly addresses this issue.

In conducting its statutory interpretation analysis, this Court is guided by the following principles which were articulated in *State v. Nieto*, 993 P.2d 493, 500-01 (Colo. 2004). When construing a statute, courts must ascertain and give effect to the intent of the General Assembly, *see Walker v. People*, 932 P.2d 303, 309 (Colo. 1997), and must refrain from rendering judgments that are inconsistent with that intent. *See Farmers Ins. Exch. v. Bill Boom, Inc.*, 961 P.2d 465, 469 (Colo. 1998). To determine legislative intent, a court must first look to the plain language of the statute. *See Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997). If a court can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said. *See Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333, 1337 (Colo. 1996); *see also* C.R.S. §2–4–101 ("words and phrases shall be read in context and construed according to ... common usage"). If the statutory language is clear and unambiguous, courts need not look further. *See Town of Superior v. Midcities Co.*, 933 P.2d 596, 600 (Colo. 1997); *Boulder County Bd. of Equalization v. M.D.C. Constr. Co.*, 830 P.2d 975, 980 (Colo. 1992). However, where the words chosen by the legislature are unclear in their common understanding, or capable of two or more constructions leading to different results, the statute is ambiguous. *See Colby v. Progressive Cas. Ins. Co.*, 928 P.2d 1298, 1302 (Colo. 1996). Where a statute is ambiguous so that the words chosen do not inexorably lead to a single result, resort to the legislative history to ascertain legislative intent is appropriate. *See* C.R.S. §2–4–203.

Here, the Court finds that the phrase "eligible electors entitled to vote for a successor to the incumbent" contained in C.R.S. §1-12-101 and reflecting the language of Colorado Constitution Art. 21, §1 ("registered electors entitled to vote for a successor of such incumbent") is ambiguous and is susceptible to two or more different constructions. Such language could refer to the voters of current S.D. 25, or it could refer to the voters of future S.D. 13. Therefore, following the guidance of *State v. Nieto*, *supra*, this Court must engage in further statutory analysis and construction.

"If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters: (a) [t]he object sought to be attained; ... (c) [t]he legislative history; ... (e) [t]he consequences of a particular construction; ... [and] (g) [t]he legislative declaration or purpose." §2–4–203(1)(a), (c), (e), and (g). To reasonably effectuate the legislative intent, a statute must be read and considered as a whole and "should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts." *People v. District Court*, 713 P.2d 918, 921 (Colo. 1986); *see also Martinez v. Continental Enters.*, 730 P.2d 308, 315 (Colo. 1986). A statute must also be construed to further the legislative intent represented by the entire statutory scheme. *See Allen v. Charnes*, 674 P.2d 378, 381 (Colo. 1984); *Public Employees Retirement Ass'n v. Greene*, 580 P.2d 385, 387 (Colo. 1978). It is presumed that "[t]he entire statute is intended to be effective" and "[a] just and reasonable result is intended." C.R.S. §2–4–201(1)(b), (c).

Further, in construing a statute, a court must seek to avoid an interpretation that leads to an absurd result. *See Ingram v. Cooper*, 698 P.2d 1314, 1315 (Colo. 1985); *see also* C.R.S. §2–4–201(1)(c) ("A just and reasonable result is intended."); *AviComm, Inc. v. Colorado Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998) ("[T]he intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result."). Statutory interpretation leading to an absurd result will not be followed. *See Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998).

Finally, the Court must ensure that its statutory interpretation does not run afoul of the constitution. *See In re Estate of Gallegos*, 499 P.3d 1058, 1062 (Colo. App. 2021).

The Colorado Constitution establishes the broad rights of Colorado voters to recall their elected officials. "Every elective public officer of the state of Colorado may be recalled from office at any time[.]" Colo. Const. Art. 21, §1. This Court is cognizant that the ability to recall elected officers "is a fundamental right of citizens" in Colorado. *Shroyer v. Sokol*, 191 Colo. 32, 34 (1976). As such, the power of the people to use the recall procedures "must be liberally construed in favor of the ability to exercise it. Conversely, limitations on the power [of recall] must be strictly construed." *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974) *citing Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969); *see also R.E.C.A.L.L. v. Sauer*, 721 P.2d 154 (Colo. App. 1986). However, these general principles do not help resolve the immediate question before the Court, namely, which citizens are entitled to the broad right to recall Sen. Priola? At the present time, do the electors of current S.D. 25 have the fundamental constitutional right of recall power over Sen. Priola, or do the electors of future S.D. 13 presently have that recall right?

In seeking to resolve these questions, this Court has found some guidance in the constitutional and statutory limitations that exist concerning the right to recall elected officials. Colo. Const. Art. 21, §4 provides, "[n]o recall petition shall be circulated or filed against any officer until he has actually held his office for at least six months, save and except it may be filed against any member of the state legislature at any time after five days from the convening and organizing of the legislature after his election." This constitutional provision evidences a clear intent that a recall petition may not be circulated until such time as an elected officer actually holds office. This constitutional provision is codified and expanded at C.R.S. §1-12-102 which was amended by the General Assembly during the 2021 legislative session. As relevant here, C.R.S. §1-12-102(1) now provides:

> (1) *No recall petition may be circulated* or filed against any elected officer *until* the officer has actually held office for at least six months following the last election, or six

> months following the assumption of office by an appointed official; except that a recall petition may be filed against any member of the general assembly at any time *after the fifth day following the convening and organizing of the general assembly after the election or appointment of the official sought to be recalled.* (emphasis added).

Thus, the Colorado Constitution and the Election Code both contemplate that a member of the general assembly cannot be subject to recall until that member has actually taken office, whether it be by election or appointment. These limitations on the timing of recall petitions are consistent with the purpose of the right to recall elected officials. "Recall [in contrast to impeachment] may be used for a purely political reason. The purpose underlying recall of public officials for political reasons is to provide an effective and speedy remedy to *remove an official* who is unsatisfactory to the public and whom the electors *do not want to remain in office*, regardless of whether the person is discharging his or her duties consistent with his or her abilities and conscience." (emphasis added) *Id., citing Dunham v. Ardery*, 43 Okl. 619, 143 P. 331 (1914).

This expression of the purpose of a recall election is consistent with the constitutional limitations on recall petitions, namely that the recall petition cannot be circulated until the legislature convenes following the election of the member of the general assembly to be recalled. In other words, the member of the general assembly must be *in office* before the electorate can petition to have him or her *removed* from office.

Here, Sen. Priola is presently serving in the office of state senator for S.D. 25. Sen. Priola will not be in the office of state senator for S.D. 13 until January 9, 2023. The Secretary's interpretation of C.R.S. §1-12-101 and Colo. Const. Art. 21, §1 would allow an elector from future S.D. 13 to remove the currently seated senator for S.D. 25. In light of the purpose of C.R.S. §1-12-101 and Colo. Const. Art. 21, §1, this would be an absurd result.

Moreover, the Secretary's "forward looking" interpretation of "eligible elector" is impractical given the lack of a fixed period of time in which a recall election will be held. For any particular recall

petition, numerous variables will influence when the actual recall election will take place such that a recall election may be held somewhere between 75 and 204 days from the Secretary's approval of a recall petition. Under the recall timeframes established by C.R.S. §1-12-108, the following chart shows the difference in timing that could occur during two hypothetical recall efforts.

Potential Timelines for Recall Elections

Event	**Potential Timeframe**	**Expedited**	**Due Course**
Recall Petition Circulated for Signature	Up to 60 days	14	60
Secretary of State Petition Signature Review	Up to 28 days	7	28
Petition Cure Period	Up to 5 days	0	5
Protest Period	Up to 15 days	15	15
Hearing on Protest	Up to 30 days	7	30
Period for Incumbent to Resign	5 Days	5	5
Secretary Certifies Petition to Governor	1 Day	1	1
Election Held	30 to 60 days	30	60
Total Potential Timeframe	**Up to 204 days**	**75 days or 2 ½ mos.**	**204 days or 6 ¾ mos.**

Given the lack of a fixed timeline for holding a recall election, the Secretary's proposed "forward looking" statutory interpretation would require the Secretary to make assumptions about how quickly a recall election would be held to determine which set of electors is entitled to vote on a redistricted office holder. Such a result is unworkable and would lead to confusion among voters and recall petitioners. This Court will not interpret the statute in a manner that would lead to inconsistent results.

On the other hand, Plaintiffs advocate for an interpretation of C.R.S. §1-12-101 and Colo. Const. Art. 21, §1 which would dictate that, where a holdover incumbent is redistricted to a new district, the electors of that incumbent's new district cannot begin circulating a recall petition until [five days] after the reconvening of the general assembly at which point the incumbent is an office holder in the new district. This Court finds Plaintiffs' interpretation to be: 1) consistent with the broad

recall powers reserved to the electors that placed in incumbent in office and whom the incumbent represents leading up to the reconvening of the general assembly; 2) consistent with the purpose of the recall process to *remove* officials from office (as opposed to preventing such officials from ever taking office); 3) consistent with the statutory and constitutional limitations on the power of recall, namely that recall petitions may not be circulated until the general assembly convenes following the election or appointment of the individual to be recalled; and 4) capable of being applied in a uniform, harmonious and consistent manner.

Thus, this Court finds that Plaintiffs have demonstrated a reasonable likelihood of success on the merits of their claim for declaratory judgment. Specifically, it is likely that Plaintiffs will be able to sustain their burden of establishing that only electors of the current S.D. 25 are entitled to sign the Recall Petition prior to January 9, 2023 and that the Secretary's interpretation of C.R.S. §1-12-101 and Colo. Const. Art. 21, §1 violates the fundamental right to recall held by the current electors of S.D. 25.

II. Danger of real, immediate, and irreparable injury

There is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief.

Where Plaintiffs have demonstrated a substantial likelihood of succeeding on the merits of their claim regarding their constitutional right to recall Sen. Priola, irreparable harm can be presumed. *See Free the Nipple-Ft. Collins v. City of Ft. Collins, Colo.,* 237 F.Supp.3d 1126, 1134 (D. Colo. 2017), aff'd 916 F.3d 792, 797 (10th Cir. 2019) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976)) ("holding that the denial of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury")).

Irreparable injury exists where, as here, the Court will be unable to remedy the harm following a final determination on the merits. *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury

is necessary." *Id.* at 752 (*quoting Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). This is particularly true in the electoral context, where interference with the democratic process is precisely the type of irreparable harm that calls for preliminary relief. *See, e.g.*, *Fish*, 840 F.3d at 752 (holding that interference with the right to vote weighs heavily in favor of irreparable harm); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury"); *Garbett v. Herbert*, No. 2:20-cv-245-RJS, 2020 WL 2064101, at *15 (D. Utah April 29, 2020) (holding that the potential of being "unjustifiably shut out from an election constitutes irreparable injury"); *Fleming v. Gutierrez*, No. 13–CV-222 WJ/RHS, 2014 WL 12650657, at *10 (D.N.M. Sept. 12, 2014) (holding that plaintiffs "would certainly be irreparably harmed if they are unable to vote because of another mismanagement of the election").

Here, the Recall Petition and procedure approved by the Secretary on September 9, 2022 likely violate the participation and voting rights of S.D. 25 electors. The Secretary's approval of the Recall Petition directed at future S.D. 13 electors and the Secretary's concomitant determination that current S.D. 25 electors no longer have the right to petition for the recall of Sen. Priola likely violate the fundamental constitutional rights of current S.D. 25 electors to recall, or not recall, their elected state senator. Because this right to recall (or not to recall) Sen. Priola is a fundamental right of S.D. 25 voters, the harm to Plaintiffs is real and irreparable when they are denied such right.

III. Availability of a plain, speedy and adequate remedy at law

There is no plain, speedy, and adequate remedy at law.

A speedy remedy is one that is available when the injunction is sought, not some later time. *Rathke v. MacFarland*, 648 P.2d 648, 653 (Colo. 1982) (describing that an injunction is appropriate where "immediate" relief is necessary). Speedy and immediate action is necessary in constitutional cases because every day a constitutional violation persists, there is irreparable harm. *Free the Nipple-Ft. Collins v. City of Ft. Collins, Colo.*, 237 F.Supp.3d 1126, 1134 (D. Colo. 2017). Here, but for the

Secretary's determination that future S.D. 13 voters hold the right to recall Sen. Priola, that recall right would exist in S.D. 25 voters. The Secretary's decision has stripped that constitutional right from the S.D. 25 voters. Enduring weeks of constitutional violations while waiting for the statutory opportunity to protest the sufficiency of the Recall Petition is inadequate.

Moreover, as addressed above, it is not clear that the Secretary would permit S.D. 25 voters to protest a determination of sufficiency of the Recall Petition. Therefore, the Court concludes that the protest process established by C.R.S. §1-12-108(9) is not a plain, speedy or adequate remedy for Plaintiffs.

IV. Disservice to the public interest

No disservice will be done to the public interest.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Free the Nipple-Ft. Collins*, 237 F.Supp.3d at 1134 (D. Colo. 2017). The possible loss of S.D. 25 electors' state and federal constitutional participation and voting rights is underscored by the facts discussed above—permitting the collection of signatures and/or conducting a recall election before Sen. Priola becomes the S.D. 13 senator would deprive the electors of S.D. 25 their right to participate in (or decline to participate in) the recall procedure for their own senator.

Conversely, the only public interest identified by the Secretary or the Recall Petitioners is the asserted right of the S.D. 13 electors to commence their recall efforts at the present time, as opposed to waiting until such time as Sen. Priola represents them. As addressed above regarding the merits of Plaintiffs' claim, this is not a right that the future voters of S.D. 13 presently possess. Thus, a preliminary injunction would not be a disservice to the public interest.

V. Balance of Equities

The balance of equities favors entry of the requested injunction.

To issue a preliminary injunction, the Court must also find that the balancing of equities favors injunctive relief. With respect to this prong, this Court finds the equities favor injunctive relief. Without such injunctive relief, S.D. 25 electors are *denied* their constitutional right to recall (or not recall) their state senator. On the other hand, future S.D. 13 electors' right to recall is merely *delayed*. Future S.D. 13 electors will not lose anything other than the opportunity to conduct a recall election immediately upon the reconvening of the general assembly in January 2023.

The Recall Petitioners have argued that if they are not able to circulate a recall petition until January 2023, they will likely be represented by Sen. Priola throughout the entire 2023 legislative session. While that may be true, such a timeline is consistent with Colo. Const. Art. 21 §4 and C.R.S. 1-12-102(a) which limits the circulation of recall petitions for newly elected members of the general assembly to five days after the commencement of the legislative session. In other words, the delay about which the Recall Petitioners complain is a limitation imposed by the Colorado Constitution and the enacting legislation setting forth the timeline of recall proceedings. Further, as addressed above, it would be possible for a recall election to be held within 75 days of the commencement of the legislative session should the Recall Petitioners act in an expedited manner, in which case Sen. Priola would not necessarily serve for the entire legislative session.

The Recall Petitioner's complaints about their future representation by Sen. Priola appear related to their dissatisfaction with the redistricting process by which they will acquire a holdover state senator that was elected by voters from a different district. However, this practice has been upheld by the Colorado Supreme Court. *See In re Reapportionment of Colorado General Assembly*, 647 P.2d 191, 199 (Colo. 1982), *citing Ferrell v. Hall*, 339 F.Supp. 73 (D.C. Okla. 1972) and *Stout v. Bottorff*, 249 F.Supp. 488 (D.C. Ind. 1965).

VI. Preservation of the status quo

The injunction will preserve the status quo pending a trial on the merits.

The status quo to be preserved is the *status quo ante*; that is, the status quo as it existed before the violation occurred or "the last uncontested status." *Lopez v. Griswold*, Civil Action No. 22-cv-00247- JLK, 2022 WL 715122, at *3 (D. Colo. Mar. 10, 2022); *accord Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006). "Frequently, status quo is used as a shortened term for status quo ante, but the absence of the last word, 'ante,' leads to a misperception that the term means the status 'at present' rather than 'before.' *Id.* at 3, n.3.

Here, the status quo until September 9, 2022 was that Sen. Priola was subject to the will of and answerable only to his constituents in S.D. 25. The Secretary's approval of the Recall Petition allowed a shift in the recall right to constituents of a neighboring district whom Sen. Priola does not currently represent and will not represent until January 9, 2023. The Court finds that entry of the requested preliminary injunction will return the interested parties to the *status quo ante*.

CONCLUSION and ORDER

For the foregoing reasons, the Court enters a Preliminary Injunction barring the Secretary of State from taking or permitting any further action in furtherance of the recall of Sen. Priola by the electors of the future S.D. 13 until after the General Assembly reconvenes on January 9, 2023.

Dated this 10th day of October, 2022.

BY THE COURT:

District Court Judge