SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding, Saguache County District Court Judge Martin Gonzales Case No.: 13CV30009	
In Re: **Plaintiffs-Respondents:** MAURICE JONES, an individual, and CITIZEN CENTER, a Colorado non-profit corporation, **v.** **Defendants-Petitioners:** CHRISTIAN SAMORA, , in his official capacity as Clerk & Treasurer of the Town of Center, Colorado; TOWN OF CENTER COLORADO, a Colorado statutory town; HERMAN DICKY SISNEROS, an individual; EDWARD W. GARCIA, an individual; and GERALDINE MARTINEZ, an individual.	**▲COURT USE ONLY▲**
Attorney for Plaintiffs-Respondents: Robert A. McGuire, #37134 Jeffrey D. Baines, #44369 MCGUIRE BAINES LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Telephone: (303) 734-7175 Facsimile: (303) 734-7166 E-mail: ram@mcguirebaines.com jdb@mcguirebaines.com	Supreme Court Case Number: 13SA148
JOINT ANSWER BRIEF OF RESPONDENTS IN RESPONSE TO RULE TO SHOW CAUSE	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, other than C.A.R. 28(g), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief does not comply with C.A.R. 28(g). It contains **10,805** words in sections that count toward word limits under C.A.R. 28(g). Leave for an appropriate enlargement of the applicable word limit has been sought from this Court contemporaneously with the filing of this brief.

The brief complies with C.A.R. 28(k). Because this is an original proceeding under C.A.R. 21, rather than an appeal, the requirements of C.A.R. 28(k), which are addressed to issues raised on appeal, do not apply to this brief .

By: S/ *Robert A. McGuire*
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COUNTERSTATEMENT OF THE ISSUES

The substance of the issues presented for review by section (F) of the Petition for Review is most properly formulated as follows:

A. Whether this case involves an issue of "significant public importance" that warrants the exercise of this Court's original jurisdiction, where the petitioners – like many Colorado election officials – interpret the constitutional guarantee of secrecy in voting under COLO. CONST. art. VII, § 8, as prohibiting disclosure of a voter's preferences only to the *public*, but not to election insiders.[1]

B. Whether the district court correctly applied *Taylor v. Pile*, 391 P.2d 670 (Colo. 1964), to the nearly identical facts of this case when it declared the Town of Center's March 19, 2013, recall election to be void *ab initio* and the pre-recall board of trustees to be the governing body of the Town, based on the admitted fact that over 75% of the voted ballots counted by election officials were marked with numbers that corresponded to voters' names in the poll book.[2]

C. Whether *Taylor*'s bright-line "duty" to void an election in which ballot secrecy is pervasively compromised should continue to control how courts

[1] Issue A is inherently presented by the Petition for Review, but not enumerated therein.

[2] Issue B corresponds to petitioners' issues 1, 2, 3 and that part of issue 4 that addresses the district court's reinstatement of the pre-recall town board.

evaluate failures by election officials to preserve the personal, constitutionally guaranteed right of voters to secrecy in voting, rather than being replaced by the "substantial-compliance" standard that typically governs judicial review of non-compliance with less fundamental requirements.[3]

D. Whether, the district court exceeded its jurisdiction to the narrow extent that it ordered a new election to be held without first requiring renewed compliance with the statutory procedures for effecting a recall.[4]

STATEMENT OF THE CASE

This case involves a challenge to the validity of the Special Recall Election (the "Election") conducted on March 19, 2013, by the Town of Center, Colorado (the "Town"), and the recount of the Election held on March 29, 2013.

The respondents (plaintiffs-contestors below) are Maurice C. Jones ("Jones"), a trustee of the Town who was purportedly recalled in the Election, and Citizen Center, a Colorado non-profit corporation whose membership includes at least one registered elector of the Town who voted by absentee ballot in the Election.

[3] Issue C corresponds to petitioners' issue 5.
[4] Issue D corresponds to that part of petitioners' issue 4 that addresses the district court's order requiring a new recall election.

The petitioners (defendants-contestees below), Herman Dicky Sisneros, Edward W. Garcia and Geraldine Martinez (the "contestees"), are individuals who were elected to replace three municipal officers purportedly recalled in the Election. The Town and its clerk, Christian Samora ("Samora"), were defendants below, but are not petitioners in this Court.

Jones and Citizen Center timely sued the contestees and defendants for election-contest and declaratory relief and asked to have the Election declared void *ab initio* under *Taylor*, 391 P.2d at 670, for violation of the Colorado Constitution's guarantee of secrecy in voting.[5] Jones and Citizen Center also sought relief under 42 U.S.C. § 1983 for denial of equal protection to Citizen Center's members who voted by absentee ballot.[6]

Counsel for the defendants and contestees demanded a jury trial on the § 1983 claim. Accordingly, the district court severed that claim from the rest of the case to avoid delaying trial of the contest and state constitutional claims. The § 1983 claim remains pending below.

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[5] Jones and Citizen Center raised other claims also, but the district court's ruling on those claims is not at issue here.

[6] The § 1983 claim alleges constitutionally deficient disparate treatment of polling-place voters (whose ballots were properly rendered anonymous by removal of identifying stubs before polling-place ballots were cast and counted) and absentee voters (whose identifying stubs were improperly left on the absentee ballots during counting.)

On June 7, 2013, following a four-day bench trial, the district court ruled, *inter alia*, that, "[b]ecause absentee ballots were left 'numbered in such a manner that the vote of any person thereafter may be determined' by comparison with the number on the ballot and the poll registration book," the Election violated "Colorado's constitutional and statutory guarantee of a secret ballot" and was void *ab initio*. (*Judgment 22*.) The court *sua sponte* ordered the Town to conduct a new special recall election between 30 and 90 days after the judgment using the same ballot form and question from the voided Election. (*Id. 22-23*.) The court also declared the pre-Election board of trustees to be the Town's governing body until the new recall election was completed. (*Id. 23*.)

The three individual contestees petitioned this Court to take jurisdiction and reverse the foregoing portions of the district court's judgment. On June 21, 2013, this Court issued its Order and Rule to Show Cause.

COUNTERSTATEMENT OF THE FACTS

The facts of the case that are relevant to the issues before this Court, as found by the court below and shown by testimony and admissions, are as follows:

Genesis of the Special Recall Election

The Town of Center has a history of acrimonious elections, and this case continues that tradition. In early 2013, a self-appointed recall committee petitioned

to recall the mayor and three of the Town's trustees, including respondent Jones.

The recall committee was comprised by Jennie Sanchez, Mary McClure, Nadine Martinez-Bocock, Adeline Sanchez and Geraldine Martinez.[7] These are powerful individuals in the Town. Martinez-Bocock is the sister of Teresa Chavez, who runs the Housing Authority, which provides subsidized housing to a majority of the Town's residents. (*N. Martinez-Bocock Test., Tr. 78:12-:15; P. Martinez Test., 472:23-:24.*) Mary McClure works at Center Head Start, and Adeline Sanchez, herself a former mayor, is the family services manager at Head Start. (*A. Sanchez Test., Tr. 161:15-:20*.) Both Housing and Head Start loom large in the lives of Town residents, either as employer or vital services provider or both. (*P. Martinez Test., Tr.* 472:3-:24.)

Election Preparations

The recall petition succeeded, and Samora as Town clerk duly set the Election. To assist him in conducting the Election, Samora appointed four judges: Linda Howard and Randi DePriest, both from outside the Town; Marie Barela, a long-time Town resident; and – incredibly, given her leadership of the recall –

[7] Although Jennie Sanchez and Mary McClure were leaders of the recall effort and actively circulated petitions and collected signatures, (*J. Sanchez Test., Tr. 67:22-68:3; M. McClure Test., 138:15-139:4*), their Statement of Endorsement describes them only as "long-time residents and registered electors in the Town." (*Stmt. Endrsmt. 2*.)

Adeline Sanchez. Samora provided these judges with pre-Election training that specifically included the statutory requirement that identifying stubs to be removed from ballots before counting to preserve secrecy in voting. (*C. Samora Test., Tr. 807:16-:21*.) The judges each swore an oath not to ascertain or disclose how any elector voted, as required by C.R.S. § 31-10-407 (2012). (*Judgment 3 ¶ 9*.) This same oath has been a feature of Colorado election law since 1877.

Prior to the Election, the various candidates designated as their watchers Peggy Martinez a trustee of the Town who opposed the recall, (*P. Martinez Test., Tr. 445:10-:15*); Bill McClure, a recall petition circulator and former spouse of recall committee member Mary McClure, (*B. McClure Test., Transcr 52:12-:24*); and Audrey Chavez, manager of the Housing Authority and sister of recall committee member Nadine Martinez-Bocock, (*P. Martinez Test., Tr. 445:23-446:6*). The Town required watchers to swear the oath set out at C.R.S. § 1-7-108(1) (2012), which unlike the judges' oath contains no language addressing secrecy of voting.

The ballots in the Election bore double-perforated numbered stubs, as required by C.R.S. § 31-10-902(4) (2012). (*Judgment 9 ¶ 24*; *Trial Ex. MM*.) When mailing absentee ballots to voters who requested them, Samora recorded the stub number of each ballot next to that voter's name on his list of registered voters.

(*Judgment 4 ¶ 11, 9 ¶ 24*.) Prior to and including Election Day, absentee voters returned their ballots in sealed envelopes to Town Hall, where Samora collected them. Over seventy-five percent of the votes in the Election were ultimately cast by absentee ballot. (*See Trial Ex. X-2*.)

Election Day

On Election Day (March 19), Samora gave each of the four judges access to the public record listing all registered electors, which also included next to the name of each absentee voter the ballot stub number of the ballots that had been issued to that voter. (*Judgment 9 ¶ 25*.)

Adeline Sanchez used her copy of Samora's list, (*Trial Ex. AAA*), to check in polling-place voters and record each polling-place voter's ballot stub number as ballots were issued at the polls. (*A. Sanchez Test., Tr. 145:3-:25*.) In the twelve hours that the polls were open, only approximately 100 voters voted in person at the Town Hall polling place. During the entire day, when Linda Howard testified that "there were long periods of time when nobody came in" and that "it's very hard to sit there for 12 hours and do nothing," (*L. Howard Test., Tr. 513:16-:18*), recall committee member Sanchez, Samora, the candidates' designated watchers and the other election judges, and the voters present had unrestricted access to this list.

After completing a voter affirmation card provided by judge Barela, each polling-place voter was issued a ballot with a single stub whose number was recorded beside the voter's name on Trial Ex. AAA by judge Sanchez and in a poll book listing of polling-place voters by judge DePriest. After marking their ballots, each polling-place voter was instructed to fold her ballot to conceal her votes and to return the ballot to judge Howard for removal of the remaining stub. After removing the stub, Howard would return the now-anonymous ballot to the voter for casting in the ballot box. (*L. Howard Test., Tr. 493:19-494:8.*) By this process, polling-place voters saw the removal of the numbered identifying stub from their ballots.

Ballot Counting

After the polls closed at 7:00 p.m., counting began. The judges began by counting only the yes-or-no votes on the four recall questions, starting with the absentee ballots.

Between them, the four election judges conducting the counting had decades of experience serving as election judges and had just been trained to remove the stubs days before. (*L. Howard Test., Tr. 505:8-:11.*) Yet when they began counting the absentee ballots, they failed to comply with the statutory requirements to treat the absentee ballots the same as polling-place ballots by first removing the

identifying numbered stubs. (*L. Howard Test., Tr. 496:13-497:4.*)

Sometime during the counting of the recall questions on the absentee ballots, the judges first discussed their error in improperly leaving the stubs attached to the absentee ballots. (*Judgment 10 ¶ 34.*) Rather than immediately correct this mistake when it first came up, the judges announced that *they would proceed* to *count all the 'yes' and 'no' responses* on the absentee *and in-person* ballots and *only then* remove the ballot stubs from the absentee ballots.[8] (*Id.*) All of the absentee ballots – fully seventy-five percent of the votes cast in the Election, (*Trial Ex. X-1*) – were therefore counted with identifying stub numbers affixed. (*Judgment 11 ¶ 35.*) As a result of these decisions, the voted absentee ballots remained traceable to individual voters by means of these stub numbers until the outcome of the four recall questions had been determined. (*Id. at 10 ¶ 34.*) Peggy Martinez, a watcher for trustee Julio Paez, left once the judges finally began removing the stubs, and testified that, "Had I known at the time that I could have stated that I thought that the election could have been stopped, I would have at that time because I knew that what had happened was not just human error. It was something else." (*P. Martinez Test., Tr. 465:2-:6.*)

[8] This finding expressly contravenes the factual premise of petitioners' first issue presented that, "the stubs were removed by the election judges *when they realized* that the stubs had remained on the ballots." Pet. Rev. 6 § (F)1 (emphasis added).

The district court expressly found on the basis of these facts that, "This mistake provided the opportunity to violate the secrecy of the ballot. Because the stubs were left on during some stage of the counting, the election judges, particularly the judge verifying the voter as being on the Voter Registration Lists, could have determined how a particular absentee voter voted." (*Judgment 20*.) The election judge who had verified that voters were on the voter registration list (*Trial Ex. AAA*) was recall committee member Adeline Sanchez. (*A. Sanchez Test., Tr. 145:3-:25*.)

The district court did not find "any evidence that anyone, including the election judges, took this opportunity to in fact violate the secrecy of the ballot," (*Judgment 11 ¶ 35*), but neither did it affirmatively conclude that secrecy was preserved. Indeed, the district court expressly found that, "[w]hile this Court cannot find that any violation of the secrecy of the ballot actually occurred … under the circumstances the secrecy of the ballot could have been violated."[9] (*Id. at 21*.) This conclusion was inescapable because the district court found that, "the testimony does establish there was opportunity to draw comparisons of the lists during the counting with the previously observed list." (*Id. at 9 ¶ 27*.)

[9] This finding expressly contravenes the factual premise of petitioners' second issue presented that, "*no one could have determined* how any particular voter voted." (*Pet. Rev. 6 § (F)2 (emphasis added)*).

Aftermath of a Compromised Election

The final tally showed Jones recalled from the office of trustee by a 34-vote margin and replaced by Martinez. Mayor Banning and Trustee Faron were recalled by slightly larger margins, while Trustee Paez retained his seat by a 9-vote margin. (*Trial Ex. X-1*.) At Jones's request, a recount was held March 29.

On April 4, after the recount but before the contest was filed below, recall committee member Nadine Martinez-Bocock, whose sister Teresa Chavez had been a watcher in the counting room on Election Night, entered the Center branch of Community Banks – where Bocock was not a customer – and confronted absentee voter Socorro Aguilar at her teller station. In an animated exchange captured by a bank security video and introduced as Trial Ex. 14, Martinez-Bocock told Aguilar, "I know how you voted. I saw how you voted." (*C. Garcia Test., Tr. 409:22-41:6, 411:20-:25*), and intimated that Ms. Aguilar's legal status was being investigated. (*S. Aguilar Test., Tr. 399:5-:13, 403:3-:8.*) Ms. Aguilar was upset by the encounter. (*C. Garcia Test., Tr. 411:7-:9.*) The district court admitted testimony of the exchange as evidence of these utterances by Martinez-Bocock, but not to prove whether Martinez-Bocock was telling the truth. (*S. Aguilar Test., Tr. 394:24-398:20*; *Judgment 18-19.*)

Jones and Citizen Center commenced the action below on April 8, 2013.

SUMMARY OF ARGUMENT

This case examines the protection for secrecy in voting afforded by Article VII, § 8, of the Colorado Constitution. It is appropriate for this Court to exercise original jurisdiction. While this matter does not raise questions of first impression, it does present a compelling opportunity for this Court to reinforce the bright-line holding of *Taylor*, 391 P.2d at 670, that lower courts have a "duty" to declare elections void *ab initio* where secrecy of the ballot has been pervasively compromised.

Taylor imposed this "duty to void" on the district court here, where officials failed to detach removable identifying numbered stubs from all absentee ballots cast in the Election before they were counted. The district court correctly applied *Taylor* by declaring the Election void *ab initio* and restoring authority to the pre-Election board of trustees.

The petitioners' argument that "substantial compliance" should replace the bright-line "duty to void" enunciated in *Taylor* must be rejected. Although substantial compliance is an appropriate standard to guide judicial review of non-compliance with lesser legal requirements, substantial compliance is *not* appropriate for evaluating failures by election officials to preserve the personal, constitutionally guaranteed right of voters to secrecy in voting that *Taylor*

recognized as "so fundamental to our system of government." Even if substantial compliance were the appropriate standard, the conduct of the Election did not substantially comply with Article VII, § 8, of the Colorado Constitution.

Finally, Jones and Citizen Center agree with the petitioners that the district court exceeded its jurisdiction by *sua sponte* ordering a new recall election.

Accordingly, the Rule to Show Cause should be discharged, except as to that limited portion of the district court's judgment requiring a new recall election.

ARGUMENT

The Plaintiffs-Respondents, Maurice Jones and Citizen Center, hereby respectfully answer the Petition for Review pursuant to this Court's Order and Rule to Show Cause.

I. Introduction

Just seven answers from the trial-court testimony distill this case to its essence. Asked of Ms. Christina Garcia:

> Q Please tell us what happened when Miss -- Ms. Garcia, please tell us what happened when Ms. Martinez-Bocock came into the bank.
>
> A She just walked into the bank and went straight to the middle station where Socorro was seated and just told her that she knew how she had voted and that there was going to be a question about her residency and her signature, and that was really it.

….

Q And then when [Ms. Martinez-Bocock] left, were you able to observe Socorro -- Ms. Aguilar's reaction?

A Yeah. She was upset.

Q Did you understand why?

A Well, I asked her, and she just was upset, knowing the fact that she had never voted before. You know, it was probably within the last couple of elections she voted; and so she was happy to know that she could vote absentee ballot. And so now she thought that, with everybody knowing how she voted, it upset her because, to her, it felt like it was nobody's right to know how she voted.

Q And you said that Ms. [Martinez-Bocock] said, "We know how you voted." Did she actually say those words?

A She said, "I know how you voted. I saw how you voted." That was her exact words. "I saw how you voted."

(*C. Garcia Test., Tr. 409:22- 410:6, 411:7-:25.*)

Asked of Ms. Socorro Aguilar:

Q So how did Ms. [Martinez-Bocock]'s discussion with you at the bank affect your feeling about the security of voting?

A Well, I feel like not voting no more because you don't want to get in trouble just to vote, so just don't do it.

Q And why would you get in trouble?

A Well, the way she told me that they were investigating my legal status or something like that.

Q Is that connected to how you voted?

A I guess. I don't know. That's the way I feel when she told me that, like, okay, I'm just not voting no more, and then I don't get in trouble or whatever.

(*S. Aguilar Test., Tr. 404:17-405:7.*)

Socorro Aguilar's right to vote is not merely the mechanical right to pull a lever or fill in an oval and be included in a tally; rather, it is the right to "vote one's conscience without fear of retaliation," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995), in other words, to "vote freely," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), "without explaining to anyone for whom, or for what reason, the vote is cast," *Rogers v. Lodge*, 458 U.S. 613, 647 n.30 (1982).

Since 1946, the Colorado Constitution has protected the freedom of electoral conscience that lies at the very heart of the right to vote by guaranteeing to voters that no one – including *especially* interested election insiders – will *ever* be able to plausibly tell them, "I know how you voted. I saw how you voted." This case asks whether that guarantee still exists for Socorro Aguilar and millions like her, or if its protection has simply become an historical artifact of freer days.

II. This case is appropriate for the exercise of original jurisdiction

Standard of Review; Preservation (C.A.R. 28(k))

No standard of review applies to this Court's exercise of original jurisdiction, and preservation is inapplicable. Because taking jurisdiction is wholly within this Court's discretion, *see In re Marriage of Wiggins*, 2012 CO 44, § 12, *any* matters may properly be considered in the jurisdictional determination, whether they are part of the record below or otherwise.

This Court has previously explained that it will take jurisdiction "to address issues of 'significant public importance which we have not yet examined.'" *In re DCP Midstream, LLP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 22. This case does not involve unexamined issues, but it does involve matters of significant public importance that merit this Court's attention.

A. This case is *not* a matter of first impression; this Court examined virtually identical facts, issues and arguments in *Taylor v. Pile*.

The Petition calls the questions presented in this case issues of first impression, (*Pet. Rev. 6*), but that characterization could not be further from the truth. In *Taylor*, this Court examined the same constitutional provision, a remarkably similar set of facts and virtually identical legal arguments. *Taylor*, 391 P.2d at 670.

Taylor involved an election held to incorporate a town called Skyline Village. After an election commission was appointed by the county court and the election held, the validity of the return was challenged on the basis that the commissioners had used ballots that were "marked" at the top by numbers that were in each case recorded in the poll book next to the name of the voter who had received the corresponding ballot. *Id.* at 672.

Because the offending numbers were not removed when the ballots were cast, the objectors claimed that the election violated Article VII, § 8, of the Colorado Constitution, which provided then as now that, "no ballot shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it." COLO. CONST. art. VII, § 8. This Court agreed with the objectors, and held:

> [W]e … will not lengthen this opinion with citations of authorities, which are plentiful, on propositions so fundamental to our system of government. The use of 'marked ballots' by which the vote of every elector could be ascertained resulted in a void election.
>
> ….
>
> [W]hen the undisputed fact was made to appear that all the ballots cast were not secret ballots, it was the duty of the court to declare the election void. All proceedings and orders thereafter entered were void.

Taylor, 391 P.2d at 673.

The petitioners claim that this case is different. But their attempts to distinguish *Taylor* only serve to demonstrate a lack of familiarity with the details of that case.

First, petitioners claim that, in *Taylor*, "the ballot numbers were not separable from the ballot," (*Pet. Rev. 11*), and that "the ballots were marked with numbers that could not be removed," (*id. at 12*), whereas the "numbered stubs in the present case were removable at perforated lines," (*id*.) But the briefings in *Taylor* make it plain that *Taylor* also involved "numbered stubs … left attached to ballots" just as this case does. *See* Answer Pet. Writ Prohib. at 6 ¶ 2(a), *Taylor v. Pile*, 391 P.2d at 670 (No. 20836) (attached).

Second, petitioners assert that, "Unlike the ballots in *Taylor*, under the Municipal Election Code, municipalities using paper ballots are now required to print ballots with two stubs at the top of each ballot…. Thus, numbering the ballots is a statutory requirement that was enacted after *Taylor* was decided." (*Pet. Rev. 12*.) But this claim is simply fiction: Colorado law has required the use of double-perforated numbered stubs on ballots since at least 1891, and the statutory language of this requirement is virtually the same today as it was 122 years ago. *Compare* 1891 Colo. Sess. Laws 143, 151 § 18 (requiring perforated stubs), *with*

C.R.S. § 49-9-1 (1953) (same when *Taylor* was decided), *and* C.R.S. § 31-10-902(4) (2012) (same today).

Far from being distinguishable on the facts, *Taylor* is nearly identical to this case. There was no claim or showing in *Taylor* that anyone had learned how any elector voted; on the contrary, the entire case turned on the inability of the proponents of incorporation to break a tie vote without obtaining a court order compelling an ineligible voter who had nonetheless cast a ballot to testify about *how* she had voted on the incorporation question.

Even the factual circumstances surrounding how the ballot stubs were left attached to the ballots in *Taylor* are reminiscent of the decision made by the election judges in this case. *See* Br. Resp't. at 4, *Taylor*, 391 P.2d at 670 (No. 20836) (explaining that "the election commissioners at the polls decid[ed] after some discussion, and in good faith, to leave the numbered stub which was attached to each ballot attached thereto") (attached).

The similarities between this case and *Taylor* understandably extend beyond the facts. The very same arguments advanced here by the petitioners and their endorsers were made in *Taylor*. For example, the *Taylor* respondent argued that, "the stubs containing numbers attached to each ballot were *inadvertently* left on when placed in ballot box," (Answer Pet. Writ Prohib. at 6 ¶ 7, *Taylor*, 391 P.2d at

670 (No. 20836) (emphasis added) (attached)); that leaving the stubs attached was "merely a mistake and a matter of inadvertence and certainly no fraud was intended as indicated by the oath taken by each of the election commissioners, not to disclose or ascertain how any elector voted," (Br. Resp't. at 14-15, *Taylor*, 391 P.2d at 670 (No. 20836) (attached)); and finally that, "the electorate, i.e., all the electors voting, should not be disenfranchised because they took no active part in leaving the numbered stubs attached," (Br. Resp't. at 15, *Taylor*, 391 P.2d at 670 (No. 20836) (attached)).

The statement in the Petition that "The issues presented for review are issues of first impression," (*Pet. Rev. 6(F)*), is simply false. Unless *Taylor* is to be overruled, it inescapably controls the case below as a matter of *stare decisis*.

B. This case presents issues of significant public importance because *Taylor* is routinely disregarded by Colorado election officials.

Even though it does not involve matters of first impression, this case still warrants this Court's attention because election officials across Colorado routinely conduct elections as though *Taylor* does not exist. Under any standard, the systematic disregard of fundamental voting rights by public officials and their staff and volunteers is a matter of grave public significance, and this case provides a compelling opportunity for this Court to address the phenomenon.

1. Election insiders routinely subordinate secrecy in voting to administrative convenience under a rationale that the Colorado Constitution permits them to discover and know how individuals vote.

Citizen Center is aware of extensive failures by Colorado election officials to preserve secrecy of the ballot. (*See generally* Marks Aff.) These failures are not accidental but are, rather, based on the belief that Article VII, § 8, only protects voters against the disclosure of their electoral preferences to the *public*, not against disclosure to election insiders. As articulated in a pleading in U.S. District Court filed jointly against Citizen Center by six county clerks, this belief holds that,

> Article VII, § 8 of the Colorado Constitution explicitly in its second sentence states that election officials "shall be sworn or affirmed not to inquire or disclose how any elector shall have voted" which coincides with the election officials' viewing of the marked ballots. The Colorado Constitution, thus, specifically contemplates election officials reviewing ballots and, in some circumstances, determining how an elector voted. Otherwise, the oath provision would be superfluous.

(Cnty. Clerks' J. Mot. Dismiss 1st Am. Compl. at 15-16, *Citizen Ctr. v. Gessler*, No. 12-CV-00370-CMA-MJW (D. Colo. Sep. 25, 2012) (citations omitted).)

Through its litigation over secrecy in voting, (Marks Aff. 3-4 ¶¶ 7-15), and over the intersection of Article VII, § 8, with the public's right to inspect ballots under the Colorado Open Records Act, C.R.S. §§ 24-72-200.1 to -206 (2012)

("CORA"), (Marks Aff. 4-6 ¶¶ 16-25), Citizen Center has uncovered that many Colorado election officials routinely act in conducting elections on the basis of this belief that secrecy in voting does not apply to them.

For example, in Citizen Center's ongoing litigation with the Secretary of State and a number of county clerks over the use of unique barcodes on ballots, there is evidence that ballots marked with unique, permanent barcodes (*not* removable stubs) rendered almost 100% of voted ballots cast in the 2012 primary elections traceable to individual voters in Boulder, Chaffee and Eagle counties. (Marks Aff. 3-4 ¶¶ 7-15.) Officials in those counties are presently defending those practices as lawful.

Similarly, Douglas County voters filed suit after that County printed unique serial numbers on all of its June 2012 primary ballots. *See* 2d Am. Compl., *Busse v. Gessler*, No. 2012 CV 5322 (Dist. Ct., City & Cnty. of Denver, Oct. 22, 2012) (attached). In the *Busse* case, Douglas County and the Secretary of State's office admitted to the use of unique serial numbers, but moved to dismiss the voters' Complaint on the grounds that Article VII, § 8, does not prohibit use of unique serial numbers so long as the marked barcoded ballots are not released to the public. *Compare* 2d Am. Compl. ¶ 11-17, 19-22, 27 & 33, *Busse* (No. 2012 CV 5322), *with* Def. Arrowsmith's Ans. 2d Am. Compl. ¶ 1, *Busse*, (No. 2012 CV

5322) (attached) (admitting use of serially numbered ballots and maintenance of corresponding voter lists); *see also* Secretary of State's Mot. Dismiss Pls.' 2d Am. Compl. 12-16, *Busse* (No. 2012 CV 5322) (attached) (arguing, without citing or distinguishing *Taylor*, that Art. VII, § 8, does not prohibit use of unique serial numbers so long as ballots are not released to the public); Def. Arrowsmith's Mot. Dismiss Pls.' 2d Am. Compl. 5-6, *Busse* (No. 2012 CV 5322) (attached) (adopting Secretary's argument).

Beyond litigation, in the last two years alone responses given by elections officials in Jefferson, Boulder, Douglas, Chaffee, Eagle, Larimer and Gilpin counties in answer to CORA requests seeking the inspection of voted ballots have revealed that election officials in those counties by their own admission maintain for themselves materials that would, they assert, violate voters' right to secrecy in voting if disclosed to the general public. (Marks Aff. ¶¶ 13, 16, 21-25.) It is apparent from these examples that the understanding many Colorado election officials have of what Article VII, § 8, of the Colorado Constitution requires has diverged substantially from the interpretation of that provision's imperatives adopted by this Court in *Taylor*.

2. The history of the ballot in Colorado shows that the right to secrecy in voting is meant to shield voters' choices as much from the prying eyes of election insiders as from the general public.

The right to secrecy in voting has existed in Colorado since Statehood. Colorado's first Constitution required that all voting be "by ballot," COLO. CONST. art. VII, § 8 (1876), a term that was uniformly understood at the time to connote secrecy, *see, e.g.*, *Williams v. Stein*, 38 Ind. 89, 92 (1871) ("The common understanding in this country certainly is, that the term "ballot" implies secrecy. I have nowhere found a dictum to the contrary.").

Although the 1876 Constitution required all ballots to be numbered and those numbers to be recorded alongside voters' names in the poll book, the original Article VII, § 8, also required election officers to foreswear attempts to determine how any elector might have voted and provided for the numbered ballots to be compared with the list of voters *only* in election contests and then *only* "under such safeguards and regulations as may be prescribed by law." COLO. CONST. art. VII, § 8 (1876).

Just fifteen years later, in 1891, the General Assembly adopted S.B. 28, the so-called "Australian Ballot Act," which first introduced the requirement that ballots have double-perforated stubs using statutory language that has remained substantially unchanged in Colorado's election laws for 122 years. *Compare* 1891

Colo. Sess. Laws 143, 151 § 18 (requiring perforated stubs), *with* C.R.S. § 49-9-1 (1953) (same when *Taylor* was decided), *and* C.R.S. § 31-10-902(4) (2012) (same today).

The Australian Ballot Act also contained provisions clearly intended to prevent election insiders from learning voters' electoral choices. *See* 1891 Colo. Sess. Laws 143, 157-58 § 26 (requiring judges receiving ballots "not to expose or show how the voter has voted" and to paste down the ballot's corner to conceal the sequential number recorded there). Such protections were observed for the next half century. (*See, e.g.*, Marks Aff. 7 ¶ 27 (attaching 1944 sample ballot with printed black corner used to paste over identifying numbers to obscure them from election insiders)).

Article VII, § 8, was amended in 1905 to allow the use of voting machines, subject to the added, explicit proviso "that secrecy in voting be preserved." *See* 1905 Colo. Sess. Laws 168-69. The constitutional guarantee of secrecy in voting finally reached its current form in 1946 when the "Secret Ballot Constitutional Amendment" amended Article VII, § 8, to replace the previous requirement that ballot numbers be recorded in the poll book with the new requirement that, "no ballots shall be marked in *any way* whereby the ballot can be identified as the

ballot of the person casting it." *See* 1947 Colo. Sess. Laws 427-28 (emphasis added).

It was clear to contemporary observers in 1946 that the purpose and effect of the Secret Ballot Constitutional Amendment was to eliminate any ability of election officials to associate a ballot with the individual who had cast it. *See Reject the Amendments!*, ROCKY MOUNTAIN NEWS (Denver), Nov. 2, 1946, at 10 ("The aim is to protect the secrecy of the ballot. If adopted, however, this proposal would make virtually impossible the tracing of ballots and would prevent the investigation of election frauds….") (attached). And this is the form of Article VII, § 8, that was applied by this Court in *Taylor* in 1964. Notably, prior to 1968, the Colorado Open Records Act was not yet law, leaving election insiders as the *only* persons with any capacity to compromise secrecy of the ballot. Colorado's long-standing protections of secrecy can only be understood if they have always been intended to protect voters from disclosure of their electoral choices to election insiders as well as from disclosure to the general public.

3. This case presents a compelling opportunity to reinforce that *Taylor* is good law and that Colorado voters still enjoy a constitutional right to vote by absolutely secret ballot.

Unprotected and vulnerable voters across the State urgently require this Court's renewed protection of their constitutional right to vote by absolutely secret

ballot. It is untenable that a court in a formal proceeding, with the outcome of an election possibly in the balance, is (rightly) unable lawfully to compel a good-faith voter to reveal how she voted, *see Mahaffey v. Barnhill*, 855 P.2d 847, 851 (Colo. 1993), but a partisan county clerk may employ ballot marking systems that casually amass and store this same information on *all* voters in an election without implicating that voter's same constitutional right to secrecy in voting.

For 137 years in Colorado, the *legal* right of the voters to secrecy of the ballot has moved toward absolute secrecy. Meanwhile, the practical reality of how election insiders conduct elections since 1964 has led them in the opposite direction. The voters have seen their most important voting rights cast into doubt as a result. This case presents a compelling opportunity for this Court to arrest this divergence and, by affirming the decision of the court below applying *Taylor*, to reiterate that the voters' right to secrecy of the ballot remains the same vibrant right that it was held to be half a century ago.

III. The district court correctly followed *Taylor v. Pile* by declaring the Election to be void *ab initio* and holding, as a result, that the pre-Election board of trustees remains the governing body of the Town.

Standard of Review; Preservation (C.A.R. 28(k))

In the arena of constitutional rights, a trial court's application of law to fact merits *de novo* review. *See People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo. 2002).

Findings of fact themselves are entitled to deference and will not be overturned if supported by competent evidence in the record. *See People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002). The issue of whether the district court correctly applied *Taylor* to the facts of this case was preserved in closing argument. (*Tr. 857:23-859:9*.)

A. *Taylor* is controlling authority of this Court on the legal issue that confronted the district court, and it should continue to apply to violations of Article VII, § 8, as *stare decisis*.

Taylor is settled law and a venerable precedent of this Court. *See Mahaffey*, 855 P.2d at 850 (relying upon *Taylor*). *Taylor* could hardly be any more on point. *See supra* § II.A. As *stare decisis*, then, the decision in *Taylor* must apply to determine the outcome of this case unless this Court is "clearly convinced that (1) the rule was originally erroneous or is no longer sound due to changing conditions and (2) more good than harm will come from departing from precedent." *People v. Padilla-Lopez*, 2012 CO 49, ¶ 7. Since neither part of this two-prong test can be satisfied, *Taylor* must apply and decide this case.

1. *Taylor* was not originally erroneous, and it is still sound.

Several arguments were originally raised in *Taylor* against its ultimate result of voiding an election where secrecy of the ballot is compromised, and additional arguments have been raised here by the petitioners and endorsers. All of the

arguments raised fail clearly to convince either that *Taylor* was erroneously decided in 1964, or that any changing conditions have made the decision unsound today.

First, as a threshold matter, the Petition suggests in its third issue presented and first argument that *Taylor*, which was decided in 1964, was superseded by the adoption a year later of the Colorado Municipal Election Code of 1965, C.R.S. §§ 31-10-101 to -1540 (2012). (*Pet. Rev. 6-7, 11-13*.)

This argument is entirely without merit. For one thing, *Taylor* construed and applied a provision of the Colorado Constitution that has not changed. That construction therefore has constitutional weight that a mere statute is incapable of abrogating. Additionally, even if a statute could somehow supersede this Court's interpretation of the Colorado Constitution, petitioners are simply wrong to claim that perforated and numbered ballot stubs were something new introduced by the Municipal Election Code. As previously discussed, s*ee supra* § II.B.2., all of the provisions that petitioners point to, (*Pet. Rev. 11-13*), had already been part of Colorado's election laws for almost a century at the time *Taylor* was decided.

Second, under an umbrella heading stating that secrecy in voting was not compromised, the Petition argues that the ballot stubs were detachable instead of permanent; that they were only left on the absentee ballots for a short period of

time; that the Municipal Election Code does not specify when numbered stubs on absentee ballots must be removed;[10] that no one discerned the identity of any voters using the ballot stubs; that the judges were all under oath; that unlike in *Taylor* the stubs were removed before the end of Election Night; and that there was no public disclosure of the identifiable ballots. (*Pet. Rev. 13-15*.) The endorsers echo parts of this argument by calling the judges' conduct in leaving the stubs attached during counting "a technical, harmless, and temporary error that …was quickly fixed by the Town Clerk." (*Stmt. Endrsmt. 5*.)

Third, the Petition argues that the Election substantially complied with the Municipal Election Code and thus should not have been declared void in the absence of an affirmative finding of fraud, undue influence or intentional wrongdoing; and further that voiding the Election needlessly and improperly disenfranchised voters due to "an honest mistake by election officials" that was "at most, an error" and "an unintentional mistake." (*Pet. Rev. 15-18*.) The endorsers

[10] This statement by petitioners is false. Duplicate stubs are required to be removed from all absentee ballots by the election judges as the absentee ballots are taken out of their envelopes. *See* C.R.S. § 31-10-1007(1) (2012) (absentee ballots are removed from envelopes and cast by judge into ballot box in same manner as if absentee voter were voting in person); *see also* C.R.S. § 31-10-607 (2012) (in-person voter's stub is removed from ballot by judge immediately before ballot is cast by voter into ballot box)

add the related argument that leaving the stubs attached had no impact on the results of the Election. (*Stmt. Endrsmt. 5*.)

Fourth, the endorsers suggest that that Article VII, § 8, does not require the Election to be declared void because the constitutional provision "specifically contemplates that election judges may sometimes learn how an elector voted" and provides for judges to be under oath to accommodate this possibility. (*Stmt. Endrsmt. 5-6*.)

None of the foregoing arguments suggests either that *Taylor* was erroneously decided in 1964 or that changing conditions have rendered *Taylor* unsound. To the extent these arguments are based on differentiating *Taylor* on the facts, they must fail. As discussed previously, *Taylor* involved ballots counted without first removing detachable stubs. The election officials there were also under oath not to inquire or disclose how any voter voted. The official in *Taylor* acted inadvertently. There was no evidence in *Taylor* that election officials were not acting in good faith. There was no public disclosure in *Taylor*.[11] There was no evidence that any official, or anyone else, had actually ascertained how any elector

[11] The petitioners' claim that there was no public disclosure in this case is arguably wrong, since three watchers were present in the counting room who, unlike the judges, were and are under no oath of confidentiality whatsoever. *See* C.R.S. § 1-7-108(1) (2012) (watchers' oath).

had voted. In short, there is simply nothing in the facts of this case that sets it apart from the facts this Court considered in *Taylor*.

As for the argument that *Taylor* is distinguishable because ballots remained traceable in that case after the day of the election but the stubs here were quickly removed by the end of Election Night here, the record in *Taylor* actually shows that the court ordered the ballots to be secured and that "no one" should inspect them without court permission. *See* Excerpts Tr. at 19, *Taylor*, 391 P.2d at 670 (No. 20836) (attached). Thus, even on this subject the two cases are functionally indistinguishable because the ballots in one were sealed, while ballots in the other have belatedly had their stubs removed. In both cases, the identifiable ballots are practically inaccessible, and what the court is left wrestling with is the consequence of the earlier violation.

The suggestion that Article VII, § 8, is not addressed to election officials because the provision requiring that the election officials "shall be sworn or affirmed not to inquire or disclose how any elector shall have voted," is meritless. This provision was in place when *Taylor* was decided, as it has been since 1876, and it made no difference to this Court then; it should make no difference now. In any event, it seems readily apparent that this provision, which is a vestige of the original, 1876 version of Article VII, § 8, is intended only to protect against the

rare situation in which an election official randomly and unintentionally comes into knowledge of information about how a voter voted. The oath provision is certainly *not* an implicit attempt by the drafters of the Colorado Constitution to grant election officials access to voters' private votes.

The operative phrase in Article VII, § 8, provides that "no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it." COLO. CONST., art. VII, § 8 (1876). This language, if it was intended to be read as the petitioners prefer to read it, could have been written as, "no ballots shall be marked in any way whereby the ballot can be identified… *by the public… or… by anyone other than election officials.…* as the ballot of the person casting it." But that is not how Article VII, § 8, was written because that is clearly not the section's intended meaning.

The only issue that petitioners and endorsers raise that was not expressly addressed by this Court in *Taylor* is the potential applicability of a substantial-compliance standard in place of the bright-line "duty to void" enunciated by *Taylor*. For reasons set out and discussed in § IV, *infra*, the application of a substantial-compliance standard to officials' adherence to the protections of Article VII, § 8, is simply inappropriate.

In sum, rather than presenting any clearly convincing reason for this Court to disregard Taylor as *stare decisis*, the arguments of the petitioners and endorsers do nothing more than rehash the very theories that this Court rejected fifty years ago when it construed Article VII, § 8. For this Court to ignore *Taylor* as *stare decisis* requires more.

2. Departing from *Taylor* would cause more harm than good, not the reverse.

As noted above, *Taylor* is settled law, and it has been cited with approval by this Court since it was first decided. *See Mahaffey*, 855 P.2d at 850 (relying upon *Taylor*). Election challenges based on secret-ballot violations appear to be rare occurrences, due no doubt to the high value Americans place on their voting rights, as those are popularly understood, and due to diligent citizen oversight of elections. There is little reason to believe that departing from *Taylor* would create any discernible benefit to anyone apart from the petitioners in this case, whereas the weakening of the right to secrecy in voting would damage a right that this Court itself called "fundamental to our system of government." *Taylor*, 391 P.2d at 673. It seems apparent that departing from *Taylor* would cause more harm than good.

B. *Taylor* imposed a "duty" on the district court to declare the Election void *ab initio*.

Even applying a *de novo* standard of review must lead this Court to the same result that the district court reached, which is that the "duty to void" imposed by *Taylor* applied to the case below. *Taylor* itself did not deal with a situation in which anyone actually learned how an elector voted. To the contrary, the simple fact that voters' private choices were exposed during counting on ballots that still had their identifying stubs attached was sufficient.

The salient fact corresponding to *Taylor* in this case was that Samora, the four judges and at least three watchers all had access to Trial Ex. AAA throughout the course of the Election, during which time they *could* have made a mental or physical note of the absentee ballot numbers corresponding to specific voters residing in this small community. And then those same individuals were present in the counting room when the seventy-five percent of the votes cast by their friends, employees, neighbors and constituents were counted with identifying stubs bearing those same numbers still attached. To the extent they had not planned to inspect particular ballot numbers, anyone in the counting room could have noted the three-digit number on any interesting ballot and referenced it afterward using Trial Ex. AAA.

Because of the variety of possibilities, the absentee voters' constitutional right to a secret ballot was violated as soon as those in the counting room examined the first voted absentee ballot "marked" by its attached numbered stub. The Election was constitutionally flawed and the district court acted properly when it declared the election void *ab initio*.

C. When the Election was declared void *ab initio*, all of its consequences – including its divestiture of Jones and two others from their offices – were also rendered void.

Petitioners urge that even if the Election was properly set aside by the district court, a vacancy must exist. They reach this conclusion by reference to C.R.S. § 31-10-1307 (2012) ("If the court finds that no person was duly elected, the judgment shall be that the election be set aside and that a vacancy exists."). But the petitioners' argument misapprehends the nature of the relief granted to Jones and Citizen Center by the district court. As the court below correctly recognized, the board of trustees, as constituted on the eve of the Election, must remain the Town's governing body when the election was declared void *ab initio*, since an election that is void *ab initio* is treated as if it never occurred in the first place.

This outcome is consistent with *Taylor* itself, which held that, once it became clear that the trial court had a duty to declare the unconstitutional election

void, "[a]ll proceedings and orders thereafter entered were void." *Taylor*, 391 P.2d at 673. The same principle applies in this case; once the district court declared the Election void *ab initio*, there was no "election" to set aside under the contest statute; instead, the world simply reverted to the *status quo ante*. No other option was available to the district court but to recognize that the pre-Election board was, and had throughout the duration of the post-Election period and contest proceedings always been, the governing body of the Town.

IV. Petitioners' argument that adherence to secrecy in voting under Article VII, § 8, should be subject to "substantial compliance" instead of the bright-line "duty to void" enunciated by *Taylor* must be rejected.

Standard of Review; Preservation (C.A.R. 28(k))

The interpretation of a constitutional provision is a question of law that is reviewed *de novo*. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006). This issue was preserved in the post-trial issue brief addressing the applicability of *Taylor* filed by the defendants and contestees below. (*Defs.' Post-Tr. Issue Br. 7-8.*)

The petitioners urge that Article VII, § 8's requirement for preservation of secrecy in voting should be enforced with an eye to obtaining only substantial compliance, and that the *Taylor*'s bright-line rule imposing a "duty" on courts to declare non-secret elections void should therefore be discarded. This argument

must be rejected, for it mistakes secrecy in voting for a lesser legal requirement, rather than respecting *Taylor*'s recognition that ballot secrecy is "fundamental to our system of government." *Taylor*, 391 P.3d at 673.

A. Where there is no claim or showing of fraud, undue influence or intentional wrongdoing in an election, substantial compliance is an appropriate standard to guide judicial review of imperfect compliance with requirements that might themselves otherwise impact the exercise of fundamental rights.

In the elections context, the substantial-compliance standard is often applied to govern interpretations of acceptable compliance with legal requirements that have the potential to constrain the exercise of more fundamental rights, most typically the right to vote itself. *See, e.g.*, *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (absentee voting requirements in tension with fundamental right to vote). Most frequently, the substantial-compliance standard is applied to construe statutory provisions, *see e.g.*, *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993), but this Court has also applied it to evaluate compliance with constitutional requirements of a procedural nature where strict compliance would otherwise implicate the fundamental right to vote, *see Bruce v*, 129 P.3d at 992 (constitutional notice of election); *City of Aurora v. Acosta*, 892 P.2d 264, 269 (Colo. 1995) (same); *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994) (same). The basic insight guiding this Court has been its recognition that

"[i]mposing a requirement of strict compliance with voting regulations, especially in the absence of any showing of fraud or other intentional wrongdoing, would unduly restrict the franchise." *Bickel*, 885 P.2d at 226-27.

B. Substantial compliance is *not* appropriate for evaluating failures by election officials to preserve the personal, constitutionally guaranteed right of voters to secrecy in voting that *Taylor* recognized as "so fundamental to our system of government."

Applying a substantial-compliance standard to violations of the right to secrecy in voting is not only inappropriate, but would in fact be contrary to this Court's history of applying substantial compliance for two reasons. First, the right of secrecy in voting guaranteed to voters by Article VII, § 8, has itself been characterized as a right that is "*fundamental* to our system of government." *Taylor*, 391 P.3d at 673 (emphasis added). To retreat from such a towering pronouncement about the central character of the right to vote by secret ballot – a right that is as deeply embedded in our national traditions and political consciousness as the right to vote itself – would be truly revolutionary. No good reason justifies anything like such a radical abandonment by this Court of a concept so sacred to the American understanding of democratic self-governance.

Second, applying a substantial-compliance standard to the right to vote by secret ballot is inappropriate because the fundamental right to secrecy in voting, far from being in tension with the fundamental right of suffrage, is actually an inherent

component of the fundamental right of suffrage. As *Taylor* and *Mahaffey* both implicitly recognize, secrecy of the ballot is a bedrock feature of our system of government that enables, facilitates and promotes the free exercise of the franchise. It turns the right to vote upside down to portray suffrage as being in any way capable of being infringed when secrecy in voting is strictly enforced. To the contrary, voters who are deprived of secrecy of the ballot have *already seen* their right to vote infringed.

There is of course no question that declaring an election void *ab initio* where secrecy in voting has been compromised, as *Taylor* requires and as the district court did in this case, does impose a severe impact on the exercise of the franchise *in a particular election*. But that impact, which should rarely have to be imposed, is the local price that must be paid from time to time for the larger benefit to our entire system of government. And insofar as the right to vote and the right to secrecy do come into tension with each other on occasion, this Court has already implicitly taken the view that secrecy trumps obtaining the "right" result for the electorate in any single election. *See, e.g.*, *Mahaffey*, 855 P.2d at 851 (holding that a good-faith voter's right to secrecy prevailed over the electorate's right to determine the actual count in a contest, even where the effect of this ruling was to set aside the election). Thus, where this Court has confronted a choice between

"disenfranchising" the electorate in a particular election, on one hand, and sanctioning the violation of individuals' right to secrecy in voting, on the other hand, this Court has *twice* favored secrecy over the interests of temporary electoral majorities – nonce in *Taylor* and once in *Mahaffey*.

In *Erickson*, this Court noted the "fundamental character of the right of suffrage," in determining to apply a substantial-compliance standard to absentee voting legislation where strict compliance would result in "needless disenfranchisement of absent voters for *unintended and insubstantial irregularities* without *any demonstrable social benefit*." *Erickson*, 670 P.2d at 755 (emphasis added). The duty to void a non-secret election under *Taylor* is fully consistent with the foregoing rationale stated in *Erickson*, since secrecy has an obvious and acknowledged social benefit. Indeed, *Taylor* is consistent with all of this Court's substantial-compliance cases because this Court has itself been consistent in applying substantial compliance only to lesser legal obligations, and secrecy in voting does not fall into that category. Both in its own independent right and in its character as an intrinsically enabling feature of the fundamental right of suffrage itself, the guarantee of secrecy in voting in Article VII, § 8, is fundamental and requires strict observance. It would be utterly inappropriate, and in derogation of

this Court's existing case law, to "downgrade" the right to secrecy of the ballot to an object of merely substantial compliance.

C. Even if substantial compliance were an appropriate standard, the conduct of the Election did not substantially comply with Article VII, § 8, of the Colorado Constitution.

Even if substantial compliance were an appropriate standard for judging observance of secrecy in voting, which it is not, the district court would have reached the same result by applying that standard because the Election did not comply substantially with Article VII, § 8.

To determine whether substantial compliance with a legal requirement has occurred,

> the Court must, at a minimum, consider the following factors: (1) the extent of noncompliance, that is a court should distinguish between isolated examples of district oversight and what is properly viewed as systematic disregard of the requirements under the Election Code, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the noncompliance, and (3) whether it can reasonably be inferred that the district made a good faith effort to comply.

Bickel v, 885 P.2d at 227.

Under the second prong of this test from *Bickel*, imperfect compliance can only constitute substantial compliance if the purpose for which compliance is required is still substantially achieved. As a general matter, due to the qualitative

nature of the right to a secrecy in voting, *no* conduct that violates the right can *ever* substantially comply with it under *Bickel* because where secrecy has been violated at all, the entire purpose of the right – namely to afford voters confidence that their electoral choices are known to them alone – will almost certainly be destroyed. The entire purpose of the preservation of secrecy in voting is to foster the voter's trust that she is free to vote her conscience without fear of retribution. That purpose cannot be achieved if "accidents happen" because once it becomes known that accidents compromising voting rights are tolerated when they happen, "accidents" will inevitably start to happen more often, with voter disenfranchisement as the immediate result.

With respect to the conduct of the Election, if this Court does not uphold the district court's decision then the entire Town will know that secrecy of the ballot was violated with impunity because the Town well knows by now that all of the recall contests were fully counted before ballot stubs were removed, even though the judges had realized earlier that the stubs were still attached. The Town well knows that any people in the counting room who were interested in how particular voters voted – but who perhaps hadn't focused on the stubs still being attached before the issue was discussed – would certainly have been aware of the identifiable ballots for the remainder of the counting. In future elections the

Town's voters will remember this outcome, and those who fear the consequences of voting the "wrong" way will adapt their choices accordingly, perhaps even by choosing not to vote at all. Because preservation of secrecy in voting is not the means to another end but is itself the object of Article VII, § 8, the only conduct that can substantially comply is conduct that also strictly complied. Thus even under a substantial compliance standard, the Election must be declared void *ab initio*.

V. The district court improperly exceeded its jurisdiction, but only to the narrow extent that it ordered a new recall election without first requiring renewed compliance with statutory recall procedures.

Standard of Review; Preservation (C.A.R. 28(k)

A trial court's interpretation of the authority granted to it by a statute is a legal question, and this Court reviews legal conclusions *de novo*. *See Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 81 (Colo. 2003). The issue of the district court's power to order a new recall election *sua sponte* was both created and preserved for review by the trial court's judgment itself. (*See Judgment 22-23.*) "In an original proceeding pursuant to C.A.R. 21, the burden is on the petitioner to clearly establish that the trial court is proceeding without or in excess of its jurisdiction." *Brewer v. Dist. Court*, 655 P.2d 819, 820 (Colo. 1982).

Jones and Citizen Center agree with the petitioners that the court below exceeded its jurisdiction by ordering the Town to conduct a new recall election to take the place of the voided Election. To the extent the district court's authority to declare the Election void *ab initio* flows from *Taylor*, this Court in that case did not order a replacement election. To the extent the district court's authority to set aside the Election derives from the municipal election contest statute, that statute does not grant a district court authority to order a new election. *See* C.R.S. § 31-10-1307 (2012). In fact, the statutory provisions that govern the timing and petition requirements for municipal recall elections, *see, e.g.*, C.R.S. §§ 31-4-503(4) (timing) and -505(2) (2012) (signature thresholds for repeated recalls), directly conflict with the district court's requirement that a new recall be conducted based on existing petitions and using the same ballot form and question as the Election, (*Judgment 22-23*). Finally, the parties never had any opportunity below to argue the propriety of a new recall election, and both sides apparently agree that a new recall is not appropriate.

"Where, as here, the specific authority of the court derives from the statute, the court may *only* exercise the powers granted." *In re Marriage of Nichols*, 553 P.2d 77, 79 (1976) (emphasis added). By ordering a new recall election, the district court exercised powers beyond the authority granted to it either by *Taylor*

or under the municipal election contest statute. That portion of the district court's judgment requiring the Town to conduct a new recall election should therefore be reversed.

VI. Ms. Socorro Aguilar's experience demonstrates why this Court must revitalize its holding in *Taylor* – because only absolute secrecy of the ballot can truly safeguard any voter's right to freely vote her conscience without fear of retribution.

The fundamental right to secrecy of the ballot is sunlight and oxygen for the free exercise of the right to vote itself. Without the guarantee of an absolutely secret ballot, no voter can genuinely be free from the possibility of retribution. For the absentee voter from the Town of Center who lives in subsidized housing at the Center Housing Authority (controlled by a member of the recall committee and a watcher at the Election); for the voter who works for or has a child enrolled in Head Start (run by a member of the recall committee and a judge at the Election); for the small-town voter who knows the trustees or the Town clerk socially – for any of these voters, the possibility of consequences from being exposed as voting the "wrong" way is all too real. For such voters, anything less than absolute secrecy of the ballot is the same thing as no secrecy at all.

The experience of Ms. Socorro Aguilar demonstrates why the district court properly declared the Election void *ab initio*. The district court did not admit the words, "I know how you voted. I saw how you voted," for their truth, but merely

to show that the words were said. But the words do not *have* to be true to do their damage; they only have to be *plausible*. If this Court allows elections to stand in which it has been found – as the district court here found– that voted ballots can be connected to voters, then secrecy in voting *has* been violated, and the words, "I know how you voted. I saw how you voted," become not only plausible, but intimidating. When that happens, voters like Ms. Aguilar will stop voting, and our democracy will be fundamentally diminished as a result.

CONCLUSION

The Rule to Show Cause should be discharged as to petitioners' requests for relief from that portion of the district court's judgment declaring the Election to be void *ab initio* and that portion declaring the pre-Election trustees to be the governing body of the Town of Center; and the Rule should be made absolute with respect to petitioners' request for relief from that portion of the judgment ordering a new recall election.

REQUEST FOR ATTORNEY FEES

Because a substantial federal equal-protection claim was raised below based on the same "nucleus of operative facts" that underlies the state constitutional claim at issue in this original proceeding, Jones and Citizen Center respectfully request this Court to award them attorney fees on appeal pursuant to C.A.R. 39.5

and 42 U.S.C. §§ 1983 and 1988. *See Brown v. Davidson*, 192 P.3d 415, 420 (Colo. App. 2006) ("For attorney fees to be awarded, the constitutional claim must be substantial, and both the state and constitutional claims 'must arise out of a common nucleus of operative facts.'"); *see also Holcomb v. Steven D. Smith, Inc.*, 170 P.3d 815, 817 (Colo. App. 2007) (noting that a prevailing appellate party will be entitled to its appellate attorney fees under a fee-shifting statute if it subsequently prevails in the lower court following remand).

Respectfully submitted this 25th day of July, 2013.

MCGUIRE BAINES LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2013, I served a true and correct copy of the foregoing JOINT ANSWER BRIEF OF RESPONDENTS IN RESPONSE TO RULE TO SHOW CAUSE, with all attachments, by ICCES, to each of the following:

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