

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding District Court Saguache County 2013CV30009</p>	
<p>In Re:</p> <p>Plaintiffs:</p> <p>Maurice Jones, an individual and Citizen Center, a Colorado nonprofit corporation,</p> <p>v.</p> <p>Defendants:</p> <p>Christian R. Samora, in his official capacity as Clerk & Treasurer of the Town of Center, Colorado; Town of Center Colorado, a statutory town; Herman Dickey Sisneros, an individual; Edward W. Garcia, an individual; and Geraldine Martinez, an individual.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General LEEANN MORRILL, First Ass't Attorney General*</p> <p>Registration Number: 38742 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6159 E-Mail: leeann.morrill@state.co.us *Counsel of Record</p>	<p>Case No. 13SA148</p>
<p style="text-align: center;">COLORADO SECRETARY OF STATE'S AMICUS CURIAE BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

As *amici curiae* are not parties and have not raised any of the issues on appeal, the brief contains neither statements of the applicable standard of appellate review, nor citations to the precise location in the record where issues were raised and ruled on.

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

s/ LeeAnn Morrill

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Scott E. Gessler, in his official capacity as Colorado Secretary of State (hereinafter “the Secretary”), by and through undersigned counsel, hereby submits the following *Amicus Curiae* Brief.

STATEMENT OF ISSUE ADDRESSED

Even if the violation of a constitutional provision governing elections is alleged, Colorado courts must apply the substantial compliance test absent proof of fraud, undue influence, or other intentional misconduct that would change the outcome of an election.¹

STATEMENT OF THE CASE

This case involves a challenge to the Saguache County district court’s award of extraordinary relief to the challengers of the Special Recall Election conducted by the Town of Center, Colorado (“Town”) on March 19, 2013, to determine whether several members of the board of

¹ Although worded differently, the second issue presented by the Secretary is encompassed by Issue #5 as presented in the petition for review, as well as by Issue C as presented in the Respondents’ joint answer brief.

trustees would be recalled (“Election”). Based on an irregularity in the standard absentee ballot counting procedure caused by human error on the part of sworn election officials under the supervision of the Town’s Clerk & Treasurer, Christian R. Samora (“Clerk”), the trial court voided *all* of the votes cast in the Election, including those cast in-person by non-absentee voters whose ballots were not subject to the procedural irregularity.

The Petitioners in this Court are the Defendants-Contestees below, Herman Dicky Sisneros, Edward W. Garcia, and Geraldine Martinez, who were elected to replace the three Town trustees recalled in the Election (“Contestees”). The Town and the Clerk also were Defendants below, but are not Petitioners in this Court.

The Respondents in this Court are the Plaintiffs-Contestors below, Maurice C. Jones, a trustee of the Town who was recalled in the Election, and Citizen Center, a Colorado nonprofit corporation whose members include at least one registered elector of the Town who voted by absentee ballot in the Election (“Contestors”).

The Contestors sued the Contestees and other Defendants under the election contest provisions in Section 31-10-1301 of the “Colorado Municipal Election Code of 1965,” §§ 31-10-101, *et seq.*, C.R.S. (2012) (“Municipal Election Code”). Specifically, the Contestors alleged that numerous ballot counting errors and malconduct occurred that changed the outcome of the Election, including the Clerk’s decision to count as legal votes absentee ballots that were counted by election judges with the removable numbered stubs still attached in violation of the ballot secrecy provision of Article VII, Sec. 8 of the Colorado Constitution (“Section 8”). In addition to other relief, the Contestors asked the trial court to declare the Election void *ab initio* because secrecy in voting was not preserved.

At the conclusion of a four-day bench trial, the trial court issued a Judgment dated June 7, 2013, in which it concluded that “[b]ecause absentee ballots were left ‘numbered in such a manner that the vote of any person my thereafter 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*, at p. 22). The court 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.*, at p.22-23). The trial court also declared the pre-Election board of trustees to be the Town’s governing body until the second recall election was completed. (*Id.*, at p.23).

The Contestees then filed a petition for discretionary view by this Court, which sought to reverse the district court’s award of relief to the Contestors. On June 21, 2013, this Court issued an Order and Rule to Show Cause.

STATEMENT OF FACTS

The Secretary hereby adopts and incorporates by reference the findings of fact set forth in the trial court’s Judgment dated June 7, 2013. (*Judgment*, at p.2, ¶ 1 – 14, ¶ 48).

SUMMARY OF ARGUMENT

Regardless of whether a plaintiff alleges the violation of a provision of the Municipal Election Code or a constitutional provision

governing elections, courts must determine whether the alleged violation is subject to a strict or substantial compliance standard. In this case, the trial court erred in failing to determine whether a strict or substantial compliance standard applied to the Contestors' claim that the Clerk violated Section 8's ballot secrecy provision.

Furthermore, absent a showing of fraud, undue influence, or other intentional misconduct that changed the outcome of an election, courts must apply the substantial compliance standard to alleged violations of constitutional provisions. Based on the factual findings made by the trial court in this case, substantial compliance was the appropriate legal standard to apply to the Contestors' claim that the Clerk violated Section 8's ballot secrecy provision.

By submitting this *amicus curiae* brief, the Secretary is not advocating for a particular outcome in support of either the Petitioners or the Respondents. Rather, the Secretary believes that the trial court erred in its legal analysis of the Contestors' ballot secrecy claim and advocates only for the application of the correct legal standard in this case.

ARGUMENT

- I. **Courts must first determine whether a strict or substantial compliance standard applies to an alleged election law violation and, absent a showing of fraud, undue influence, or other intentional misconduct that changed the outcome of an election, must apply a substantial compliance standard.**
 - A. **The trial court correctly analyzed the Contestors' Municipal Election Code claims and applied the correct legal standard to same.**

At the outset of the “Analysis” section of its Judgment, the trial court summarized the two issues for it to decide in the Election contest:

[F]irst, whether claims [that] fraud, undue influence and/or intentional wrongdoing was present in the Election, trigger the application of a strict compliance standard of review for the conduct of the Election and, Second, whether the Town's leaving identifying stubs on absentee ballots during the first round of counting rendered those ballots effectively marked, thereby depriving the citizens of the Town who voted by absentee ballot of their right under the Colorado Constitution to vote by secret ballot.

(Judgment, at 15).

The first issue encompassed the Contestors' claims that the following provisions of the Municipal Election Code were violated: (1)

C.R.S. § 31-10-1301(b) – illegal votes received and legal votes rejected sufficient to change the result of the Election²; (2) C.R.S. § 31-10-1301(c) – counting errors or mistakes by the Clerk or election judges sufficient to change the result of the Election³; (3) C.R.S. 31-10-1301(d) – misconduct, fraud, or corruption on the part the Clerk or election judges sufficient to change the result of the Election⁴; and (4) C.R.S. § 31-10-1301(e) – for any other cause which shows that another was the legally elected person.⁵ (Complaint, at 11, ¶ 79 – 19, ¶ 119).

² Which asserted, *inter alia*, that “[t]he votes associated with all 364 absentee voter ballots counted with voter-identifying ballot stubs attached thereto were illegal.” (*Complaint*, at 13-14, ¶ 84(f))

³ Which asserted, *inter alia*, that “[t]he votes associated with all 364 absentee voter ballots counted with voter-identifying ballot stubs attached thereto should not have been counted[.]” (*Complaint*, at 14-15, ¶ 94(f)).

⁴ Which asserted that “[b]allots of absentee voters in the Election were counted with identifying marks printed on them, in violation of Article VII, Section 8, of the Colorado Constitution. The denial of absentee voters in the Election of their right to a secret ballot constitutes misconduct on the part of Samora, as clerk.” (*Complaint*, at 17, ¶ 107).

⁵ Which asserted that “[b]allots of absentee voters in the Election were counted with identifying marks printed on them, in violation of Article VII, Section 8, of the Colorado Constitution. Absentee voters in the Election were thereby denied the right to a secret ballot, and the

At trial, the Contestors presented evidence intended to prove that the Clerk committed numerous counting errors and other malconduct that changed the outcome of the Election, as well as evidence of forged signatures, electioneering, and voter intimidation intended to prove fraud, undue influence, and/or intentional misconduct that changed the outcome of the Election. However, the trial court found that although the Contestors “have claimed fraud, undue influence and intentional wrongdoing occurred during the conduct of the Election, they have not . . . shown such fraud, undue influence and intentional wrongdoing at trial,” and therefore concluded that the statutory claims had not been proven by a preponderance of the evidence. (*Judgment*, at 14, ¶ 48, and 16 (emphasis in original)). The trial court also specifically found that the testimony of two unbiased election judges “establish[ed] by a preponderance of the credible evidence that this was election which was fundamentally untainted by any substantive intentional error of

Election must therefore be declared void *ab initio*.” (Complaint, at 18-19, ¶ 118).

procedure, free of any fraud or intentional violation of voting secrecy.”
(*Id.*, at 8, ¶ 22).

Based on these factual findings, the district court correctly concluded that it was required to apply a substantial, as opposed to a strict, compliance standard⁶ to the Contestors’ statutory claims. (*Judgment*, at 15-19). The district court relied on this Court’s decisions in *Erickson v. Blair*, 670 P.2d 749 (Colo. 1983), and *Meyer v. Lamm*, 846 P.2d 862 (Colo. 1993), as support for this conclusion and, in doing so, emphasized the following language from the *Erickson* opinion: “A rule of strict compliance, *especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial*

⁶ Strict compliance has been characterized as demanding “technical” or even “hypertechnical” compliance with a statutory or constitutional provision. *See Fabec v. Beck*, 922 P.2d 330, 341 and 344-45 (Colo. 1996) (quotations omitted). Substantial compliance demands less and requires a court to consider: (1) the extent of noncompliance; (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance; and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate. *See Id.*, at 341 (citations omitted).

irregularities without any demonstrable social benefit.” (Id., at 15, quoting Erickson, 670 P.2d at 754-55 (emphasis in original)).

B. In contrast, the trial court erred by failing to analyze whether a strict or substantial compliance standard applied to the Section 8 ballot secrecy claim.

The second issue considered by the trial court encompassed the Contestors’ claim for violation of a constitutional provision governing elections, namely the ballot secrecy provision of Section 8. As indicated by the quoted portion of the Judgment in Section I(A) above, the trial court analyzed the ballot secrecy claim separately even though it was not pled as a separate claim for relief in the Complaint, but rather was incorporated in to each of the Contestors’ Municipal Election Code claims. In doing so, the trial court wholly failed to analyze whether a strict or substantial compliance standard should apply to the claim that the Clerk’s error in counting the absentee ballot with numbered stubs affixed violated ballot secrecy. (*See Judgment*, at 19-22).

The trial court erred in this regard. Indeed, when considering a claim for violation of an election law, it is well-settled that courts must

first determine whether a strict or substantial compliance standard applies to the claim. This is true whether the controversy arises under a statute or the Colorado Constitution. *See Bickel v. City of Boulder*, 885 P.2d 215, 226-27 (Colo. 1994) (first considering whether strict or substantial compliance should apply to alleged violations of the petition format requirements established by the TABOR amendment to the Colorado Constitution); *Erickson v. Blair*, 670 P.2d 749, 753-56 (Colo. 1983) (first considering whether strict or substantial compliance should apply to allegations that absentee ballots did not comply with the statutory requirements for absentee voting); *Young v. Simpson*, 42 P. 666, 667 (Colo. 1895) (“[U]nless the statute declares that a strict compliance is essential in order to have the ballot counted, the courts will not undertake to disfranchise any voter by rejecting his ballot, where his choice can be gathered from the ballot when viewed in the light of the circumstances surrounding the election.”).

Accordingly, the trial court erred as a matter of law by not *first* determining whether a strict or substantial compliance standard applied to the Contestors’ ballot secrecy claim, before *then* determining

whether ballot secrecy actually was violated under the appropriate legal standard.

C. Absent a showing of fraud, undue influence, or other intentional misconduct that changed the outcome of an election, substantial compliance is the appropriate legal standard.

It is equally well-settled that where there is no “proof of fraud, undue influence, or intentional wrongdoing in the election,” substantial compliance is the appropriate legal standard to apply to alleged violations of statutory or constitutional election provisions. *See Erickson v. Blair*, 670 P.2d at 753 (rejecting argument that strict scrutiny should apply to violations of statutory provisions governing absentee ballots); *Bickel v. City of Boulder*, 885 P.2d at 226-27 (applying substantial compliance to violations of constitutional provisions because “[i]mposing a requirement of strict compliance with voting regulations, especially in the absence of any showing for fraud or other intentional wrongdoing, would unduly restrict the franchise.” (citations omitted)).

Simply put, substantial compliance is the appropriate standard for violations of statutory or constitutional provisions where there is no

proof of fraud or intentional misconduct because, as this Court has recognized for nearly a century, “it is inevitable that mistakes shall sometimes occur, and that very often the law will fail of strict compliance.” *Burbank v. Board of County Comm’rs*, 201 P. 43, 45 (Colo. 1921); *see accord Bullington v. Grabow*, 298 P. 1059, 1061 (Colo. 1931); *Baldauf v. Grunson*, 8 P.2d 265, 266 (Colo. 1932). Indeed, as this Court explained in *Erickson*, “[a] rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.” 670 P.2d at 754-55.

In this case, after the close of evidence at trial, the trial court made the following factual findings: (1) the election judges “all took the oath specified by C.R.S. § 31-10-407(1), which required them to affirm, among other things, that they would not ascertain how any elector voted”; (2) prior to commencing counting, the list containing the ballot stub numbers and associated absentee voters’ names “was placed in a cardboard box across the room from where the counting occurred”; (3)

“[s]ometime during the first stage of counting, the election judges realized they had left the stubs attached to the absentee ballots”; (4) as soon as the election judges finished counting all of the “yes” and “no” votes on the absentee and in-person ballots, they removed the ballot stubs from the absentee ballots before proceeding to the next stage of counting; (5) although counting the absentee ballots with the stubs affixed occurred in the Clerk’s presence, it was not a counting procedure authorized by law; (6) no election judge or watcher accessed the list during the ballot counting; and (7) no election judge or watcher knew which ballot numbers were assigned to which voters during the counting process. (*Judgment*, at 3, 5-6, and 10, ¶¶ 9, 19, 34, 34(a), and 19(b)).

Furthermore, although the Contestors’ were able to show that counting of absentee ballots occurred with stubs affixed, they were unable to show that the creation of the mere opportunity for ballot secrecy to be violated was caused by intentional misconduct – or

“malconduct”⁷ per the Municipal Election Code – on the part of either the Clerk or the election judges. Indeed, the trial court expressly found that although counting of absentee ballots occurred with stubs affixed, “that this was not intentional nor is there any evidence that anyone, including the election judges, took this opportunity to in fact violate the secrecy of the ballot,” and “that this was an election which was fundamentally untainted by any substantive intentional error of procedure, free of any fraud or intentional violation of voting secrecy.” (*Judgment*, at 11, ¶ 35, and 8, ¶ 22).

Yet, despite making express factual findings that no fraud, undue influence, or intentional misconduct occurred during the Election, the trial court implicitly applied a strict compliance standard to the ballot secrecy claim and voided the Election *ab initio*. The trial court erred as a matter of law in this regard. Accordingly, this Court should reverse

⁷ The Municipal Election Code does not expressly define the word “malconduct,” however when read in context – it appears next to the words “fraud” and “corruption” – it contemplates intentional bad conduct. Additionally, the common definition of “malconduct” is “bad conduct; *esp*: dishonesty in managing public affairs.” *Merriam-Webster.com*. Retrieved August 8, 2013, from <<http://www.merriam-webster.com/dictionary/malconduct>>.

the lower court's decision and remand this case with instructions for the trial court to apply a substantial compliance standard to the ballot secrecy claim.

CONCLUSION

Based on the reasons and authorities discussed above, the Secretary respectfully requests that this Court reverse the district court's decision voiding the Election *ab initio*, and remand this case to the district court with instructions to apply the appropriate legal standard to the Contestors' claim for violation of the ballot secrecy provision in Article VII, Sec. 8 of the Colorado Constitution.

Respectfully submitted this 12th⁸ day of August, 2013.

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⁸ Due to problems encountered in electronically filing their Joint Answer Brief, the Contestors were unable to successfully file all of the numerous exhibits to same until July 26, 2013. Fifteen days from that date as calculated under C.A.R. 26(a) is August 12, 2013.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the Colorado Secretary of State's

Amicus Curiae Brief upon all parties herein via ICCES, this 12th day of August, 2013.

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