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 nonprofit 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▲**
Attorneys 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

AFFIDAVIT OF MARILYN R. MARKS SUPPORTING
JOINT ANSWER BRIEF OF RESPONDENTS IN RESPONSE
TO RULE TO SHOW CAUSE

City and County of Pitkin)
) ss.

State of Colorado)

MARILYN R. MARKS ("Affiant"), being of lawful age and first duly sworn upon oath, deposes and states as follows:

1. I am the president of Citizen Center, a non-profit organization with a focus on election transparency.

2. In addition to my election transparency work in Citizen Center, I have been personally engaged in election transparency advocacy and research since early 2009.

3. I was the plaintiff in Marks v. Koch, 284 P.3d 118 (Colo. App. 2011), which clarified that voted ballots are open public records in Colorado. Through research work related to that case, subsequent legislation (House Bill 12-1036, An Act Concerning Clarification of the Exemption from the "Colorado Open Records Act" for Investigative Files), other election-related litigation, election research and transparency projects, I have obtained responses and official records from a number of Colorado election officials related to their view of Colorado voters' right to a secret ballot. This affidavit includes references to a small sample of those responses.

4. In general, it is my experience that the widespread stated view and practice of many Colorado election officials is that election officials, appointed partisan election judges, and candidate and party-appointed watchers are privy to individual voters' private choices, under the condition that those individuals not disclose this private voter information to the public.

5. The Hart InterCivic voting system is used in some counties and local jurisdictions with optional programming to permanently mark the face of every ballot with a unique number and barcode, distinguishing each ballot from any other. The unique barcoding function can be suppressed in the software options for this system.

6. Election officials using the Hart system have traditionally used mail ballot records that directly correlate the unique barcode to the mail ballot voter. This practice has been somewhat curtailed in federal and state elections by newly issued Rule 10-8[1] (attached as Exhibit A, page 3).

7. In many other counties, not employing the barcoding system, other mail ballot organizing, batching and filing techniques are in place to effectively "mark" the mail ballots in a way that they can be connected back to the individual voter.

8. Having experienced the denial of various Colorado Open Records Act requests for voted ballots due to election officials' claims that the requested ballots are identifiable, I founded Citizen Center and initiated litigation (Citizen Ctr. v. Gessler, No. 12-CV-00370-CMA-MJW (D. Colo. Sep. 25, 2012)), currently on appeal to the U.S. Court of Appeals for the 10th Circuit (Citizen Ctr. v. Gessler, No. 12-1414 (10th Cir. filed Oct. 19, 2012)) against both the Colorado Secretary of State and the Clerks & Recorders of Boulder, Chaffee, Eagle, Jefferson, Larimer, and Mesa Counties to vindicate Colorado voters' right to a secret ballot. Some of the examples referenced herein are excerpts from pleadings in that litigation.

9. The Clerks & Recorders of Boulder, Chaffee, Eagle, Jefferson, Larimer, and Mesa Counties (as joint defendants) stated, "***The Colorado Constitution does not prevent election officials from discovering how an individual voter voted, it only protects public disclosure of that information.***" J. Mot. Dismiss at 23 ¶ C.1, Citizen Ctr. v. Gessler, No. 12-CV-00370-CMA-MJW (D. Colo. Sep. 25, 2012) (attached as Exhibit B).

10. The Clerks further stated, "***There is no fundamental constitutional right to a secret ballot***." Sched. Order, June 13, 2012, at 8 ¶ 4, Citizen Ctr. v. Gessler, (No. 12-CV-00370-CMA-MJW) (attached as Exhibit C).

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[1] http://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-1/Rule10.pdf

11. The Clerks of Boulder, Chaffee, and Eagle Counties have all used uniquely barcoded "marked" Hart InterCivic ballots for a number of years and dozens of elections.

12. Affidavits filed in Citizen Ctr. v. Gessler by affected voters in Boulder, Chaffee, and Eagle Counties demonstrated the ability to connect the unique marked numbers with individual voters:

a. Eberle Affidavit, Boulder County voter. (Attached as Exhibit D.)

b. Arnold Affidavit, Chaffee County voter. (Attached as Exhibit E.)

c. Branscomb Affidavit, Eagle County voter. (Attached as Exhibit F.)

13. The Mountain Mail has reported on the ability to trace barcoded ballots. *Arnold Describes Ballot Tracing Methods*, THE MOUNTAIN MAIL, August 17, 2012, at 1 (attached as Exhibit G).

14. Clerk Reno of Chaffee County stated, "***We will not release through a CORA or other request any printed, voted ballots until such time as the Hart sequential serial numbers embodied in the Hart barcodes are redacted… Such protocols eliminate the ability for members of the public to trace or identify a voter.***" Decl. Joyce Reno, August 22, 2012, at ¶ 9, Citizen Ctr. v. Gessler (No. 12-CV-00370-CMA-MJW) (attached as Exhibit H).

15. Eagle County Clerk Simonton stated, "***We were made aware of a traceability issue…. Although it appears Mr. Arnold may not have done such a tracing exercise in Eagle County, he did indicate that such tracing was possible using the same methodology. …Through this analysis of the process we learned that the employees involved with the printing process did, in fact, keep all stubs***

and ballot in sequential order for certain precincts." Decl.Teak Simonton, August 24, 2012, at 3 ¶ 6, Citizen Ctr. v. Gessler (No. 12-CV-00370-CMA-MJW) (attached as Exhibit I).

16. Boulder County Clerk Hall stated, "***Clerk Hall further objects to producing documents which, individually or in combination with other documents, could allow non-election staff to link a voted ballot with an individual voter on the grounds that disclosures such information to the public could violate the privacy interests of the voters.***" She agreed to release only ballot copies with the identifying barcodes redacted. Resp. to Pl.'s Disc. Req. at 6-7, Citizen Ctr. v. Gessler (No. 12-CV-00370-CMA-MJW) (attached as Exhibit J).

17. Douglas County Clerk Arrowsmith responded to my July 19, 2012 CORA request for Hart barcoded marked voted ballots from the June 2012 primary election with the statement, "***Our current voting system software security prohibits County access to scanned ballot images. … Because we are unsure if this will compromise voter anonymity and ensure secrecy in voting as prescribed in Article 8 [sic], Section 8 of the Colorado Constitution, we will be asking the voting system vendor to redact any and all serial numbers as well as barcodes.***" Letter from Jack Arrowsmith to Marilyn Marks at Resp. to ¶ 2 (July 24, 2012) (attached as Exhibit K).

18. Clerk Arrowsmith has also stated, "***There is no Federal Constitutional right to ballot secrecy and no Colorado Constitutional right to an absolutely secret ballot upon which to base Plaintiffs' claims.***" Mot. Dismiss 2d Am. Compl. at 5 ¶ III.8, Busse v. Gessler, No. 2012 CV 5322 (Dist. Ct., City & Cnty. of Denver, Oct. 22, 2012) (attached as Exhibit L).

19. Clerk Arrowsmith admitted an allegation in the Second Amended Complaint in Busse v. Gessler that stated that in the 2012 primary and prior elections, "***The ballots appear in these .pdf documents in the same order as voters appear on the Initial Ballot List. The first ballot in each .pdf file was mailed by IVS to the first voter in the .pdf file for that ballot style, and so on,***" as well as an

allegation that stated "***Each ballot image generated by Douglas County contains a unique serial number, and each ballot's number is one higher than the preceding ballot in the .pdf file.***" 2d Am. Compl. at ¶¶ 17-18, Busse v. Gessler (No. 2012 CV 5322) (attached as Exhibit N); Def. Jack Arrowsmith Douglas Cnty. Clerk & Recorder Answer 2d Am. Compl. at ¶ 6, Busse v. Gessler (No. 2012 CV 5322) (attached as Exhibit M).

20. Gilpin County Clerk Colleen Stewart refused to allow Citizen Center co-founder Mary Eberle to make copies of the 2011 general election voted ballots due to the embedded traceable barcodes. Citizen Center wrote to Clerk Gilpin to request that she allow copies of the voted ballots, referencing her original response that "***I will send you one ballot that is not redacted and the rest will be redacted,***" referencing redaction of the unique barcode. Email from Colleen Stewart to Marilyn Marks (April 25, 2012, 8:30 a.m.) (attached as Exhibit O).

21. Many other Colorado counties, including Jefferson, Larimer, and Mesa counties, batch, file, and organize ballots in a manner that essentially virtually "marks" voted ballots in a manner that they can be connected back to the voter.

22. Jefferson County Clerk & Recorder Pamela Anderson stated, "***Unsealing those ballots outside of a VALID contest destroys ballot secrecy…***" Def.'s Ex. 25 at 10, In re Request of Marks, No. 11CV3576 (Colo. Dist. Ct. Jefferson Cnty. filed Aug. 19, 2011) (attached as Exhibit P).

23. Mesa County Clerk & Recorder Sheila Reiner stated, "***What resources does one need to identify how a person voted? 1. Voted ballots 2. Election Materials/Reports 3. Motivation 4. Time…It took 15 minutes to identify that Sheila Reiner's (and husband's) ballot style is unique in a specific batch.***" Pl.'s Ex. WW at 1, In re Request of Marks, No. 11CV4530 (Colo. Dist. Ct. Mesa Cnty. filed Aug. 19, 2011) (attached as Exhibit Q).

24. Mesa County Clerk Reiner, in response to my CORA request for voted electronic ballot records stated, "***If Ms. Reiner were to make available to Ms. Marks the EL155 in electronic or paper form, Ms. Reiner would be committing a criminal offense as cited in §1-13-712(3) and (4), C.RS., by providing information which would enable Ms. Marks to determine how individual voters voted in the November 2010 general election***." Pet. at 4 ¶ 19, In re Request of Marks, No. 11CV4530 (Colo. Dist. Ct. Mesa Cnty. filed Aug. 19, 2011) (attached as Exhibit R).

25. The Grand Junction Sentinel reported their conclusions concerning Mesa County's traceable system in their editorial, after Clerk Reiner gave the editorial board a demonstration using voted ballots, "***Comparing a ballot with a variety of other information available to the public – the precinct it is from, the date it was cast, the vote center where it was cast or the batch of mail it arrived with and the batch it was counted with, allows an examiner to track a supposedly anonymous ballot and connect it with an identified voter in most instances.***" *Protect Voter Anonymity*, GRAND JUNCTION SENTINEL, Nov. 16, 2011, at 1 (attached as Exhibit S).

26. Eagle County Clerk Simonton requires election judges to scan and count the barcoded mail-in "marked" ballots with the identifying stubs still attached. She stated, "***[w]hile mail ballots from the 2010 primary in Eagle County were scanned prior to removing the ballot stubs, the scanned image did not capture or include the ballot stubs, and the ballot stubs were removed immediately following scanning.***" Eagle Cnty. Disc. Resp. at 5 ¶ 3, Citizen Ctr. v. Gessler (No. 12-CV-00370-CMA-MJW) (attached as Exhibit T). It is my understanding that marked ballot scanning and counting remains the standard practice in Eagle County.

27. The partial copy of the 1944 ballot used as an exhibit in this brief was obtained from the Pitkin County Clerk & Recorder's office on June 23, 2012. I personally examined the sample ballot and received the pdf copy from Dwight Shellman, III, then Elections Manager for Pitkin County. The copy is a true and

correct copy of the top half of the 1944 Pitkin County General Election ballot that I inspected in the Clerk's office.

28. The referenced documents in paragraphs 9, 10, 12, 14-16, 22-24, and 26 above are true and correct copies retrieved from my personal files or Citizen Center litigation files maintained by me on behalf of Citizen Center in the administration of its routine business. The referenced document in paragraph 17 is a true and correct copy of a letter I received from the person shown thereon as the sender. The referenced document in paragraph 20 is a true and correct copy of an email I received from the person shown thereon as the sender. Newspaper reports referenced in paragraphs 13 and 25 are true and correct copies I printed from official online newspaper sites.

29. Documents in paragraphs 17 and 18 are true and correct copies of the court pleadings from the public court file provided to me by plaintiff Lu Busse in Busse v. Gessler (No. 2012 CV 5322).

30. Further Affiant sayeth not.

Marilyn R. Marks

NOTARIZATION

Subscribed and sworn to before me this 25 day of July, 2013, by Alina Pitman.

Witness my hand and official seal.

My commission expires: 11/24/16.

Alina Pitman

Notary Public

[SEAL]