

SUPREME COURT, STATE OF COLORADO
Two East 14th Ave.
Denver, Colorado 80203

Petition for Review of the Judgment of the
Saguache County District Court, Case No. 2013
CV 30009, Div. 3, the Hon. Martin A. Gonzales.

In Re:

Plaintiffs-Contestors:

MAURICE C. JONES, an individual, and
CITIZEN CENTER, a Colorado nonprofit
corporation,

v.

Defendants-Contestees and Defendants:

CHRISTIAN R. SAMORA, in his official
capacity as Clerk & Treasurer of the Town of
Center, Colorado, and
the TOWN OF CENTER, COLORADO, a
Colorado statutory town, and
HERMAN DICKY SISNEROS, an individual,
and
EDWARD W. GARCIA, an individual, and
GERALDINE MARTINEZ, an individual.

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Case No.:

PETITION FOR REVIEW

Petitioners, Herman Dicky Sisneros, Edward W. Garcia, and Geraldine Martinez (Defendants-Contestees in the District Court), by their undersigned attorneys, pursuant to Colorado Appellate Rule 21 and C.R.S. § 31-10-1305, respectfully submit this Petition for Review of the June 7, 2013 Judgment of the District Court. As grounds therefor, Petitioners state as follows.

(A) Identity of the petitioner and of the proposed respondent.

The Petitioners are Herman Dicky Sisneros, Edward W. Garcia, and Geraldine Martinez. The Petitioners are the Defendants-Contestees in the District Court. The Respondents are Maurice C. Jones and Citizen Center, who were the Plaintiffs-Contestors in the District Court.

(B) Identity of the court below and case name and number.

This Petition seeks review of the June 7, 2013 Judgment of the Saguache County District Court, Case Number 2013 CV 30009, Div. 3, the Hon. Martin A. Gonzales.

(C) Identity of the persons or entities against whom relief is sought.

Relief is sought against Maurice C. Jones and Citizen Center, who were the Plaintiffs-Contestors in the court below.

(D) The ruling complained of and the relief being sought.

This case has to do with a filing by the Respondents of a Verified Election Contest Filing Statement Pursuant to § 31-10-1303, C.R.S., and Complaint ("Complaint"). Respondents brought this election contest case seeking to set aside the results of a March 19, 2013 Recall Election in which three members of the Board of Trustees of the Town of Center, Colorado were recalled and in which the Petitioners were elected to replace the recalled Board members. The District Court's June 7, 2013 Judgment set aside the results of the Recall Election and ordered a new recall election, to be held within 30-90 days. The Judgment also reinstated the three members of the Town Board who had been recalled.

The relief being sought is a reversal of the District Court Judgment which (1) set aside the results of the March 19, 2013 Recall Election, (2) ordered a new recall election, and (3) reinstated the three recalled members of the Board.

(E) The Reasons why no other adequate remedy is available.

Pursuant to C.R.S. § 31-10-1305, the district court is to conduct a trial on the Respondents' action brought under the Election Contest statutes, C.R.S. §§ 31-10-1301, *et seq.* C.R.S. § 31-10-1305 also states that "[s]uch proceedings may be reviewed and finally adjudicated by the supreme court of this state if application to such court is made by either party and if the supreme court is willing to assume jurisdiction of the case." Thus, the statute specifically states that review of the

District Court Judgment lies within this Court if this Court is willing to assume jurisdiction of this case.

No other adequate remedy exists for several reasons. First, in its June 7, 2013 Judgment, the District Court set aside the March 19, 2013 Recall Election and ordered a new recall election to be held in not less than 30 days nor more than 90 days from the date of that Judgment. The Petitioners believe that the District Court had no authority under the Election Contest statutes to order a new recall election, and the Town of Center should not have to incur the expense of another recall election. Rather, under C.R.S. § 31-10-1307 any judgment of the District Court is limited to setting aside the Recall Election, and the District Court does not have authority to order a new recall election. However, no adequate remedy exists if the Petitioners appeal the Judgment to the Colorado Court of Appeals. Such an appeal could not be heard before the new recall election must be held as ordered by the District Court in its Judgment. Thus, the Petitioners will have had to endure another recall election, and the Town will have had to incur the cost of another recall election before any appeal before the Colorado Court of Appeals could be decided.

Second, the June 7, 2013 Judgment reinstated the three Board members who had been recalled in the March 19 Recall Election. The Petitioners believe that the

District Court had no authority under the Election Contest statutes to reinstate the recalled Board members. Rather, pursuant to C.R.S. § 31-10-1307 any judgment of the District Court, when the judgment is against a contestee, is that the election of a new board member is annulled, and if no person was duly elected the judgment must be that a vacancy exists. However, per the District Court's Judgment the three Town Board members who were recalled have resumed their positions as members of the Town Board and have participated in meetings and decisions of the Town Board, and the Petitioners have been deprived of the duly elected positions as Town Board members. The Petitioners have no other adequate remedy because many actions of the Town Board with the recalled members participating will have long been made effective by the time any appeal before the Colorado Court of Appeals is decided.

Third, by resuming their positions as members of the Town Board, the three Town Board members who were recalled have participated in meetings and decisions of the Town Board, notwithstanding that under C.R.C.P. 62(a) an automatic 14-day stay of execution should apply to the Judgment and notwithstanding that the District Court does not have authority to reinstate the recalled Board members. The Petitioners have no adequate remedy to resume their positions on the Town Board or to contest the current actions of the Town Board,

which are premised upon the three recalled members of the Board participating in the votes and decisions of the Town Board.

(F) The issues presented.

The issues presented for review are issues of first impression, as follows:

1. Did the District Court err in determining that the March 19, 2013 Recall Election should be set aside and ordering a new recall election because the election judges counted absentee (mail-in) ballots on which the stubs containing ballot numbers remained, notwithstanding that the stubs were removed by the election judges when they realized that the stubs had remained on the ballots.
2. In support of its decision to set aside the Recall Election and to order a new recall election, did the District Court err in determining that there was a potential for the secrecy of ballots to be compromised when the ballots were counted with the numbered stubs remaining on them, notwithstanding the undisputed evidence that the secrecy of ballots was not violated because no one did determine, and no one could have determined, how any particular voter had voted.
3. In setting aside the Recall Election and ordering a new recall election, did the District Court err in relying on the case of *Taylor v. Pile*, 154 Colo. 516,

391 P.2d 670 (1964), inasmuch as that decision was issued before the Colorado Municipal Election Code of 1965 was enacted, which adopted specific statutory procedures for municipal elections for statutory towns such as the Town of Center.

4. Did the District Court err in reinstating the three recalled Town Board members and ordering a new recall election when the remedy under the Election Contest statutes, C.R.S. § 31-10-1307, does not give authority to the District Court to reinstate recalled board members or order a new recall election.
5. In setting aside the Recall Election results and ordering a new recall election because election judges counted absentee ballots before removing the numbered stubs, did the District Court err by not applying the "substantial compliance" test of *Erickson v. Blair*, 670 P.2d 749 (Colo. 1983) and related cases.

(G) The facts necessary to understand the issues presented.

This case arises out a March 19, 2013 Recall Election, which sought to recall from office Town of Center Mayor Susan Banning, Trustee John Faron, Trustee Maurice Jones, and Trustee Julio Paez. The Town Clerk, Christian Samora, served as the designated election official for the Recall Election and a Recount, which

occurred on March 29. As result of the Recall Election, Mr. Samora certified the results as follows: (1) Ms. Banning was recalled as Mayor by a margin of 33 votes; (2) Mr. Sisneros was elected to replace Ms. Banning as Mayor with 275 votes; (3) Mr. Faron was recalled as Trustee by a margin of 44 votes; (4) Mr. Garcia was elected to replace Mr. Faron as Trustee with 152 votes; (5) Plaintiff-Contestor Jones was recalled as Trustee by a margin of 34 votes; (4) Ms. Martinez was elected to replace Mr. Jones with 150 votes; and (5) Mr. Paez was retained as Trustee by a margin of nine votes.

The decision by the District Court to set aside the Recall Election stems from the actions by the election judges in counting the absentee ballots after the polls closed at 7:00 p.m. on the night of the Recall Election. Prior to counting the ballots, a list containing the ballot stub numbers of absentee voters was placed in a cardboard box located across the room from where the counting occurred. Mr. Samora was present during the counting and insured that no election judges or watchers accessed the list during the counting of the ballots. The absentee ballots were handled by the election judges in a manner to maintain the secrecy of the ballots. (1) The ballot box containing the envelopes was opened; (2) envelopes were bundled into stacks of 25; (3) while bundling the envelopes, the election judges reviewed them to verify that that the Affidavit of Voter was signed; and (4)

working in pairs, one election judge opened the envelope and removed the secrecy sleeve containing the ballot, and the second judge removed the ballot from the secrecy sleeve, unfolded the ballot, and placed the ballot back into a stack of 25. *See* C.R.S. § 31-10-1007(1). This process ensured that the election judge opening the envelope did not come into contact with the voted ballot. The election judges counted the ballots because all the Affidavits on the ballots were signed affirming that the voters were qualified and registered electors in the Town of Center.

The counting of ballots proceeded in four stages, as required by C.R.S. § 31-4-504(6) and (7). During the first stage, the election judges counted the “yes” and “no” responses to the question of whether Banning, Faron, Jones, and Paez should be recalled on absentee ballots. The second stage of counting was limited to the counting of “yes” and “no” responses on in-person voter ballots. During the third stage of counting, the election judges counted the votes for the candidates to the offices that were vacated by the recall on absentee ballots. Finally, the fourth stage of counting involved the counting of votes for candidates on in-person ballots.

During the first stage of counting, the election judges realized they had left the ballot stubs attached to the absentee ballots. They decided, and so announced, that they would proceed to count all the “yes” and “no” responses on the absentee

and in-person ballots and then remove the ballot stubs from the absentee ballots before proceeding to the third stage of counting.

After all of the ballots were counted, the election judges completed election returns showing that Ms. Banning, Mr. Faron, and Mr. Jones were recalled from office; Mr. Sisneros, Mr. Garcia, and Ms. Martinez were elected to replace them; and Mr. Paez was retained as a Trustee. *See* C.R.S. § 31-10-613.

At the conclusion of the March 29, 2013 Recount (the Recount was requested by Respondent Jones), Mr. Samora certified the results as follows: (1) Ms. Banning was recalled as Mayor by a margin of 33 votes; (2) Mr. Sisneros was elected to replace Ms. Banning as Mayor with 275 votes; (3) Mr. Faron was recalled as Trustee by a margin of 44 votes; (4) Mr. Garcia was elected to replace Mr. Faron as Trustee with 152 votes; (5) Mr. Jones was recalled as Trustee by a margin of 34 votes; (4) Ms. Martinez was elected to replace Mr. Jones with 150 votes; and (5) Mr. Paez was retained as Trustee by a margin of nine votes.

The Respondents (Plaintiffs-Contestors) filed their Complaint on April 8, 2013. On April 29, 2013 the Defendants and Defendants-Contestees filed their Answer, Jury Demand with respect to the Sixth Claim for Relief, and Counterstatement. On May 6, 2013, the Plaintiffs-Contestors filed their Reply. A

trial on the election contest claim (Claims for Relief 1 through 5) was conducted from June 3 to June 6, 2013. The trial court issued its Judgment on June 7, 2013.

(H) Argument and points of authority.

The District Court Erred in Relying on *Taylor v. Pile*, Which is Contrary to the Subsequently Enacted Municipal Election Code

Taylor is Distinguishable From This Case and Does Not Apply

The District Court's decision in this case is based entirely on the case of *Taylor v. Pile*, 391 P.2d 670 (Colo. 1964). However, *Taylor* has been overruled by the Municipal Election Code and it is distinguishable from the present case.

The Colorado Supreme Court issued its decision in *Taylor* one year before the Colorado Legislature adopted the Municipal Election Code, *See* C.R.S. § 31-10-101 ("This article shall be known and may be cited as the "Colorado Municipal Election Code of 1965"). Thus, to the extent the holding of *Taylor v. Pile* conflicts with the Municipal Election Code, it is superseded by that statute. *See Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 71 (Colo. 1998).

In *Taylor*, it appears that the ballots were numbered in a manner whereby the ballot numbers were not separable from the ballot. The *Taylor* Court agreed with an opinion from the Arapahoe County District Attorney that any election wherein the ballots are numbered in a way that the vote of any person "thereafter may be determined by comparison with the number on the ballot and the poll registration

book” violates Colorado’s constitutional and statutory guarantee of a secret ballot. In that case, the ballots were marked with numbers that could not be removed. *See id.* at 672.

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, on each of which is printed the number of the ballot, which numbers shall be consecutive. C.R.S. § 31-10-902(4). Before an absent voter’s ballot is sent to that voter, the clerk is required to record, among other things, the elector’s name and the number appearing on the stub of that voter’s ballot. C.R.S. § 31-10-1002(3). *See* June 7, 2013 Judgment, ¶¶ 14, 126, and 24. Thus, numbering the ballots is a statutory requirement that was enacted after *Taylor* was decided. In fact, the District Court in this case recognized that the ballots must be numbered. Further, numbering the ballots provides that the ballots can be tracked to ensure that each absentee voter casts only one vote, and it avoids the possibility of fraud by ensuring that duplicate ballots cannot be made. June 7, 2013 Judgment, ¶¶ 24(b) and 25.

Moreover, unlike *Taylor*, pursuant to the Municipal Election Code, the numbered stubs in the present case were removable at perforated lines. One stub was removed before the ballot was sent to the absent voter, and one was removed

after the ballot is returned. Once the stubs are removed, the ballot is no longer marked in a manner that violates the right to cast a secret ballot.

The Right to Secrecy in Voting Has Not Been Compromised

Taylor sought to protect the right to secrecy in voting. The purpose of the right to secrecy in voting is to protect “from public disclosure the identity of an individual voter and any content of the voter’s ballot that could identify the voter.” *Marks v. Koch*, 284 P.3d 118, 122 (Colo. 2011). Thus, a voted ballot cannot have anything on its face that allows the identity of the voter to be revealed. *Id.* The Municipal Election Code, with which the subject ballots complied, maintains secrecy in voting while seeking to prevent fraud by numbering the ballots on removable stubs, which were appropriately used in this case. While permanently affixed numbers on ballots violates secrecy in voting, marking ballots with removable numbered stubs as required by the Municipal Election Code does not. *See id.*; C.R.S. § 31-10-902(4).

The mere fact that one stub remained on each of the mailed-in ballots on Election Night for a short period of time while the ballots were counted also does not violate secrecy in voting or the Municipal Election Code. The Municipal Election Code does not specify when the numbered stubs on absentee ballots must be removed. Further, the testimony at trial establishes that during the time the stubs

remained on the mailed-in ballots, the identity of the voter could not be discerned because none of the people present had access to the list associated voters' names with their respective ballot numbers, and the list was placed in a cardboard box across the room. June 7, 2013 Judgment ¶¶ 19, 21(b), and 22. Moreover, the ballots were placed and remained face down except when they were being counted. June 7, 2013 Judgment ¶ 19(a). Thus, the voter's identity could not be ascertained from the information on the face of the ballots, and there was no evidence that any voter's identity was actually ascertained from the information on the face of the ballots. In fact, the District Court specifically found that none of the election judges or watchers knew which ballot numbers were assigned to which voter during the counting process. June 7, 2013 Judgment ¶ 19(b), *see also* ¶ 26. Moreover, the election judges all took oaths requiring them to affirm, among other things, that they would not ascertain how any elector voted. June 7, 2013 Judgment ¶ 9.

In addition, the stubs were removed before the end of Election Night, and once that was completed nothing remained on the ballots from which the voters' identities could be ascertained. As such, unlike *Taylor*, the ballots no longer contained any marks that allowed the voter's identity to be ascertained, and the ballots contained no numbers or other identifying marks at the recount several days

later. There was no public disclosure of the identity of any individual voter or the content of any particular voter's ballot that could identify that voter in this case. Accordingly, the right to secrecy in the subject election was not violated. *See Marks, supra.*

The Election Complied with the Provisions of the Municipal Election Code, and the District Court Erred in Finding that the Election was Invalid

The Municipal Election Code provides that its terms are to “be liberally construed so that all legally registered electors may be permitted to vote” C.R.S. § 31-10-1538. Applying this standard, the case law in Colorado since the adoption of the Municipal Election Code has held that “substantial compliance is the appropriate standard for evaluating the validity of absent voter ballots.” *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983). In reaching that conclusion, Colorado courts have repeatedly emphasized the importance of the right to vote and that Colorado's laws should be interpreted in a manner that recognizes otherwise valid votes. In *Erickson*, the Colorado Supreme Court noted:

We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage.... Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of election. These electors, no less than in-person voters, should be able to present their views on issues of public importance without being encumbered by an unyielding standard of statutory exactitude. Moreover, the right to vote is a fundamental right of the first order. Absentee voting legislation should not be construed in a manner that

unduly interferes with the exercise of this right by those otherwise qualified to vote.

Id. at 754-755 (internal citations omitted; *emphasis added*). The *Erickson* court specifically objected to an interpretation of the law that would “result[] in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities.” *Id.* at 755. In reaching that decision, the *Erickson* court found persuasive a Florida Supreme Court case that explained:

The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Id. at 755 (internal citations omitted).

Additionally, it has long been the policy in Colorado that voters should not be disenfranchised by an honest mistake by election officials. In *Baldauf v. Gunson*, the Court held that “The will of the people should not be defeated by an honest mistake of election officers....” 8 P.2d 265, 266 (Colo. 1932) (citation omitted). Further, the holding of *Bullington v. Grabow* provides that “One who has performed every act required of her cannot be disenfranchised because of irregularities or mistakes of election officials....” 298 P. 1059, 1062 (Colo. 1931).

Under this longstanding policy in Colorado and the Municipal Election Code, Colorado courts have strongly disfavored rejecting election results, holding that “the power of the court to reject election results should be exercised with great caution and only as a last resort.” *Leeks v. City of Golden*, 870 P.2d 580, 583 (Colo. App. 1993), citing *Baldauf, supra*. However, contrary to this rule, in the present case the District Court rejected the results of the recall election despite its affirmative finding that no fraud, undue influence, or intentional wrongdoing occurred and its failure to find that any violation of the right to secrecy in voting occurred. *See* June 7, 2013 Order, ¶ 48.

Additionally, the delayed removal of the stubs was, at most, an error by the election judges. Moreover, even if the delayed removal of the stubs was an error, the election judges’ removal of the stubs still substantially complies with the requirements of the Municipal Election Code, which does not specify when the stubs must be removed. Because substantial compliance was achieved in the recall election, there was no basis to invalidate the subject election, and the District Court erred in doing so. *See Erickson, supra*.

Despite the rule that an unintentional mistake by an election official is insufficient to invalidate the votes of every absentee voter, the District Court has done just that. The District Court’s interpretation of the law and application of

Taylor has resulted in the needless and improper disenfranchisement of the Town of Center's voters, and this decision should be reversed.

**The District Court May Only Order Relief Pursuant to C.R.S. § 31-10-1307
and Its June 7, 2013 Judgment Exceeds This Authority**

The trial on the election contest claims proceeded under the election contest provisions of the Municipal Election Code, C.R.S. §§ 31-10-1301, *et seq.* C.R.S. §§ 31-10-1302 through 1306 provide for the procedure for such an election contest, and C.R.S. § 31-10-1307 sets forth the relief that the court can enter. That section provides that:

The court shall pronounce judgment whether the contestee or any other person was duly elected. The person so declared elected is entitled to the office upon qualification. If the judgment is against the contestee and he has received his certificate, the judge annuls it. 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.

C.R.S. § 31-10-1307, *emphasis added*. Thus, pursuant to this section, the only remedies the District Court may award in this case are:

- (1) to declare that some or all of the Contestees were duly elected into their offices;
- (2) to declare that some other person was duly elected; or
- (3) if the court determined that no person was duly elected, to set aside the election and declare that a vacancy existed for the contested positions. (Once a vacancy exists, the Colorado Revised Statutes provide the procedure for filling such vacancy. *See* C.R.S. § 31-4-303.)

Additionally, if the contestee has already received his certificate and the court does not declare that the contestee was the person who was duly elected, the court shall annul the certificate.

However, in this case, the District Court ordered none of the relief allowed by C.R.S. § 31-10-1307, and it instead ordered that the Town set a new recall election and that the Board of Trustees of the Town of Center as constituted before the March 19, 2013 recall election was the governing body. *See* June 7, 2013 Judgment. In other words, the District Court removed the members of the Town Board that had been elected in the March 19, 2013 recall election and reinstated the Board members that were recalled in the March 19, 2013 election. Such relief is not permitted by section 1307 of the Municipal Election Code, and the District Court exceeded its authority under the Municipal Election Code. As such, this Court should issue a rule to show cause and order that the District Court enter an Order that provides relief as set forth in C.R.S. § 31-10-1307.

For these reasons, the District Court's June 7, 2013 decision and order is in error, a rule to show cause should be issued, and the District Court's order should be reversed and the case remanded for further proceedings.

(I) List of supporting documents.

1. Verified Election Contest Filing Statement Pursuant to § 31-10-1303, C.R.S., and Complaint, filed April 8, 2013.
2. Answer, Jury Demand with Respect to the Sixth Claim for Relief, and Counterstatement, filed April 29, 2013.
3. Verified Reply to Counterstatement, filed May 6, 2013.
4. Judgment, filed by the District Court on June 7, 2013.
5. Transcript of the June 3-6, 2013 trial (this is not yet available but has been ordered).

(J) Names, addresses, telephone and fax numbers of counsel for the parties.

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Respectfully submitted,

SENDER, GOLDFARB & RICE, LLC

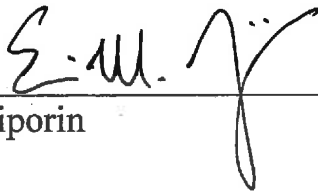


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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 12th day of June 2013 a true and complete copy of the foregoing **PETITION FOR REVIEW** was served on the parties below via U.S. mail and e-mail:

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