

DISTRICT COURT, JEFFERSON COUNTY,
STATE OF COLORADO
100 Jefferson County Parkway
Golden, Colorado 80401

Plaintiffs-Contestors:

COLORADO UNION OF TAXPAYERS, a Colorado nonprofit corporation; CLYDE WADSWORTH, an individual; LINDA MACKETY, an individual; MIKE DONAHUE, an individual; DEVIN HOWARD, an individual

v.

Defendants-Contestees:

WEST METRO FIRE PROTECTION DISTRICT, a Colorado Special District; MELISSA HOLLISTER, in her official capacity as Designated Election Official for the West Metro Fire Protection District; CASSIE STENSTROM, an individual; MARTA MURRAY, an individual; TONY GONZALEZ, an individual; MICHAEL T. MUNDEN, an individual.

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Case No.: 2014CV031089

Division 11
Courtroom: 4B

The Honorable Stephen M.
Munsinger

PLAINTIFFS-CONTESTORS' CLOSING ARGUMENT

Plaintiffs-Contestors' Colorado Union of Taxpayers *et al.* hereby submits their closing argument and, in connection therewith, asks this Court to enter judgment finding that the May 6, 2014 West Metro Fire District Election is *void ab initio* as a result of the District's violation of the electors' well-established Constitutional right to a secret ballot in Colorado.

Taylor v Pile, 391 P.2d 670 (Colo. 1964) and very recently Jones v Samora, 318 P.3d 462 (Colo. 2014), provide clear guidance for this Court's decision when faced with systemic violations of voters' rights to a secret ballot. Only six months ago the Colorado Supreme Court, reinforcing Taylor, made it clear that when an election is conducted without a secret ballot, the election must be set aside and voided.

In this case, the evidence is clear that the election was conducted without a secret ballot. Reading Taylor and Jones together, therefore, it is the duty of the Court to set-aside and void the May 6, 2014 District Election.

I. INTRODUCTION

This matter concerns the May 6, 2014 West Metro Fire Protection District ("the District") election and the rights of the Plaintiffs-Contestors and all electors' rights to a secret ballot in Colorado. The District, through its Designated Election Official (DEO) and its other election officials and legal counsel, developed and administered a ballot processing procedure that violated all voters' rights to a secret ballot. Specifically, the ballot processing procedure adopted and utilized between April 25 and May 14 to process voted ballots not only allowed for, but resulted in, election judges, election watchers, and media observers viewing exposed voted ballots simultaneously with the names of the voters who cast the ballots., allowing those individuals to connect the voter with his voted ballot.

The District's ballot processing procedure was not an aberration or a result of inadvertent mistakes of a few election judges. Rather, the District's ballot processing procedure was specifically designed by election officials for the purpose of processing this Election's ballots and was consistently and systematically utilized to process virtually all voted ballots from April 25, 2014 until all the ballots were processed on May 14, 2014. The District was made aware of the public's concern regarding the lack of secrecy in voting by May 2, 2014, five days before Election Day, and 12 days before the ballot processing was completed. Despite concerns raised in numerous conversations with officials, the District affirmatively chose not to change the manner in which ballots were processed, testifying that legal counsel had approved their processes.

The District's ballot processing procedure and watchers' concerns were made known to the public through social media, word of mouth, and broadcast media prior to the May 6, 2014 7:00 p.m. deadline for casting ballots. Complaints in the public record made to the Secretary of State were filed on Election Day regarding the District's ballot processing practices. Plaintiff-Contestor Devin Howard chose not to exercise his right to vote in the Election because of the lack of secrecy in voting. It cannot be estimated how many hundreds or even thousands of voters may have become aware of the secret ballot violation prior to casting their vote or deciding not to vote, nor can the extent to which this information burdened their right to vote be quantified.

Based on officials' improper assurances posted on the District's website, many voters thought they were voting a secret ballot at the time they cast their ballot, only to find out later that election officials and others in the counting rooms could learn how they voted, although they never waived their right to a secret ballot. Other voters knew of the lack of voter privacy through public and private sources.

The District planned and utilized a ballot processing procedure that did not protect the right to a secret ballot. The case law in Colorado is clear that because the Election violated the right to a secret ballot, the proper remedy is for the Court to void the election results *ab initio*.

II. THE DISTRICT'S BALLOT PROCESSING PROCEDURE ALLOWED AND RESULTED IN ELECTION JUDGES, WATCHERS, MEDIA OBSERVERS AND OTHERS VIEWING EXPOSED IDENTIFIABLE VOTED BALLOTS

There is little dispute that the District's ballot processing procedure made it possible for voted ballots to be connected to the voters who cast the ballots during multiple stages of ballot processing. This occurred in multiple stages before the actual tallying (or tabulation) of the votes began. The District attempts to minimize the systemic nature of the process employed by labelling it an "*ad hoc* procedure." But the facts show that the procedures developed for processing ballots were planned, coordinated among themselves, approved by legal counsel, and consistent with their election judge training manual. Moreover, once the procedure was put into place as early as April 25, 2014, election judges, watchers, media observers, and anyone else walking through the counting rooms could not only view exposed ballots with the names and/or identifying ballot numbers of the voters, but some, in fact, did so.

A. The DEO and Election Officials Developed and Approved of the Ballot Processing System

Melissa Hollister ("Hollister"), as the DEO of the Election, testified that she was in charge of "running" the Election (*Hollister Testimony, 7/11/14*). Hollister testified that she "appointed" the election judge supervisors, Andrea Helecker and Richard Umsted. Hollister, was also responsible for paying the election judges, including the election judge supervisors. Significantly, Hollister also testified that she personally trained Helecker and Umsted. (*Ex. P5 at 16*).

After the District began to receive voted ballots, and prior to implementing the ballot processing procedure, Hollister met with Fire Chief Steve Aseltine, Alim Sharif and “possibly some of the judges” to develop a process for handling the incoming ballots. Despite labeling the process as “*ad hoc*,” Hollister thought that the conversation took place as early as April 21, 2014 (*Ex. P5 at 109-110*) and therefore had multiple opportunities to revise the process to protect secrecy of the ballot, but failed to do so, even after being made aware of ballot secrecy concerns by Marilyn Marks on May 2, 2014 (*Ex. P36, P37; Marks Testimony 7/11/14*).

Furthermore, the method devised for processing ballots was consistent with a literal reading of the election judge training manual the District used to train their election judges. Specifically, the election judge training manual required election judges to “remove the ballot from the return envelope *and secrecy sleeve*, and without unfolding the ballot, compare the ballot stub number of the ballot issued to the elector to the number show in the Poll Book (emphasis added).” (*Ex. J-5*). Andrea Helecker, as the election judge supervisor, indicated that it was her job to make sure other election judges followed the training manual. (*Ex. P6 at 29*).

The systemic nature of the process developed by the District and its implementation is further supported by expert testimony. Suzanne Staiert, Deputy Secretary of State, testified as a qualified expert witness in the area of Regulatory Administration of Colorado Elections. Ms. Staiert reviewed the deposition testimony provided by the District’s election officials in a deposition (*Exs. P4-P7*), a 20 minute video depicting the District’s processing procedures (*Ex. P17*), and complaints received by the Secretary of State concerning the Election (*Exs. P27-29*). Based on her review of the information, Ms. Staiert opined that because the judges were trained

in a certain way that a systemic violation of the secret ballot did occur because “every single ballot had a privacy violation as it was separated.” (Staiert Trial Testimony, 7/9/14).

Thus, it is clear that while the procedure devised by the DEO and election judges in the early stages of ballot processing was made to accommodate what they believed would be an unexpected large number of ballots, the process was prearranged, coordinated and complied with among election officials, including the DEO.

B. The District’s Failure to Use Secrecy Sleeves When Removing Ballots from Return Envelopes Caused Exposed Voted Ballots and Voter Names to be Viewed Simultaneously

Ballots were sent to voters in a mail packet that included a double-sided ballot, a secrecy sleeve and return envelope. The outside of the return envelope required the voter to print his or her name in the provided space and to sign an affirmation. The reverse side of the envelope provided space for the voter’s return address. Once a ballot was received, the tab covering the voter’s signature was removed exposing the signature and printed name. The voted ballots were subsequently removed from the return envelope without the secrecy sleeve in which the voters were directed to seal their voted ballot. The District began opening ballots with letter openers and found the method to be slow and inefficient. The DEO then approved procedures to use paper cutters to slit open the return envelopes on the right side (not the top) allowing the election judges to remove the voted ballots while leaving the secrecy sleeve inside the envelope, rendering the secrecy sleeve useless. Thus, the exposed voted ballot was visible to the election judge, candidate watchers and media observers while the voter’s name on both the front (return address) and back (required signature and printed name) and ballot stub number were also exposed, making it simple to connect the exposed voted ballot with the voter.

It should be noted that during the initial method of opening ballots prior to the use of paper cutters, the secrecy sleeves were also abandoned and identifiable ballots exposed and processed by the judges as their routine method of ballot handling. This evidence was discovered in the late-produced video records. (*Ex. P45*).

While ballots were being removed without the secrecy envelope, evidence recorded on video showed several election judges turning each folded ballot over, exposing all the District Director election votes to the observer.. In some instances, the same ballots were turned and viewed multiple times by judges. (*Ex. P17*).

The failure to use the secrecy sleeve also allowed for election judges, election watchers, media observers and visitors in the counting rooms to simultaneously view exposed ballots and the names of voters when the ballot number was being entered into the electronic poll book. Additionally, watchers may maintain a list of voters and their ballot numbers as they witness the ballot processing. The electronic poll book (visible on a computer screen) contains the name, address, and ballot number of each voter. The exposed ballots with the numbered ballot stub still attached, could be viewed simultaneously with the name of the voter who voted the ballot. (*Ex. P17*).¹

In cases when it was suspected that a voter received more than one ballot in the mail, election judges would place “sticky notes” containing the name of the voter on the exposed voted

¹ The District claims that they met the requirements of a secret ballot election because only sworn judges and authorized watchers had access to determine how voters voted. Even if that were an acceptable standard, the video recordings still under review and produced the morning of trial reveal that, contrary to sworn testimony, numerous visitors and district personnel were given unfettered and frequent access to ballot processing operations where exposed ballots were visible. The video also reveals that contrary to defendant’s testimony, ballots were not secured in accordance with instructions in the election code and the election judge manual for securing voted ballots in a sealed ballot box. Instead, ballots were left in open trays and stacked on tables inviting both security and privacy violations. The District claims that their judges did not “unfold” the voted ballots to reveal contests other than the District 1 Director contest. Video still under review reveals that ballots were unfolded at times in the handling process, at least prior to the time that paper cutters were used to slit ballot envelopes. (See *Ex. P45*).

Due to the Defendants-Contestees late disclosure of such important and relevant evidence of the District’s ballot processing procedures, the Plaintiffs-Contestees have been unable to properly view, analyze, and document irregularities in the many hours of video recordings in full, which severely prejudices the Plaintiffs-Contestors’ case. Additional relief may be warranted. See attached Meet and Confer letter sent to Defendants-Contestees Counsel (EXHIBIT A).

ballot until the original return envelope could be located, at which point the voted ballot still containing the ballot number was placed back inside the return envelope (still containing the name of the voter on the outside) and the judge placed the “sticky note” on the envelope. Once the non-duplicate ballots were counted, the potential duplicates were taken out of storage with the sticky notes on the return envelopes, removed from the envelope and then entered into the poll book. Thus, the ballots of the voters who happened to have received more than one ballot, as Plaintiff-Contestor Mike Donahue did, were subjected to having their ballot labeled with a “sticky note” printed with their name and reviewed on multiple occasions through various stages of the District’s ballot processing procedure. (*Helecker Trial Testimony, 7/10/14*).

Ms. Staiert testified that in her experience she has never encountered the use of sticky notes as used by the District in the Election to identify voters’ ballots and considered it a bad practice. She further testified that the District’s purpose and use of sticky notes in the Election “are inconsistent with our rules, they are inconsistent with the Constitution; it is a marking on the ballot that identifies the voter.” (*Staiert Trial Testimony, 7/9/14*).

In order to put the District’s failure to use the secrecy sleeve into context, it is important to note that absentee voters, who voted by mail ballot in prior elections had been covered by protections of the Uniform Election Code and the Secretary of State’s Election Rules, requiring that secrecy sleeves (or the physical equivalent) be used to conceal the voters’ choices from receiving judges. Hollister testified that the 2012 ballots were one-sided and folded to conceal the vote until the identifiable ballot stub was removed, making the ballot anonymous. Hollister testified that folding the ballots in the 2014 did not address the secrecy concerns because there was a contest above the fold on the front of the ballot. (*Ex. P5 at 88-89*).

Deputy Secretary Staiert testified that the purpose of the secrecy sleeve is to ensure “that the ballot is never together with the name of the voter to protect anonymity.” Staiert was very clear that the secrecy sleeves are to remain on the ballot so that the voted ballot cannot be traced back to the voter. This is true especially in cases where ballots are printed on both sides because someone could still see how an individual voted even if the ballot remained folded. (*Staiert Testimony, 7/9/14*). Staiert’s testimony is consistent with the requirement in the Secretary’s Mail ballot plan (*Ex. P47*) that the jurisdiction “ensure privacy by use of a secrecy sleeve or secrecy envelope so *receiving judges* cannot tell how the elector voted.”

Staiert’s testimony is also consistent with case law on the subject of the secret ballot. In *Bruce v. Colorado Springs*, by the Colorado Court of Appeals explained that “[t]he purpose of requiring a secrecy envelope is to protect a voter’s right to a secret ballot.” *Bruce v. City of Colorado Springs*, 971 P.2d 679, 685 (Colo. App. 1998).

C. Voted Ballots and Voter Names were Exposed to Election Judges, Watchers, Media Observers, and Others During Ballot Processing

Not only were voted ballots and the names of the voters who cast the ballots exposed to election judges, they were exposed to election watchers, media observers, and other who were allowed in the processing rooms. Kristina Cook persuasively testified that as media observer, she was able to view exposed ballots being removed from the return envelopes without their secrecy sleeves. She also testified that she could view both the names of the voter and their exposed voted ballots simultaneously while the ballot number was being entered into the electronic poll book had she been so inclined. (*Cook Trial Testimony, 7/9/14*).

Media observer, Marilyn Marks, similarly testified that she was able to ascertain how individual voters voted as a result of the District’s ballot processing procedures. She was able to view hundreds of exposed ballots with identifiable ballot stub numbers on them. Ballot stub

numbers and poll books are public records. Thus, absent procedures that guarded the privacy of the exposed ballots, anyone in the counting room could have viewed an exposed ballot and the ballot number (or sticky note name) connected to the name of the voter who cast the ballot. Marks testified that in fact she did ascertain how a voter voted. (*Marks Trial Testimony*, 7/10/14).

DEO Hollister confirmed through her testimony that election watchers were able to view exposed ballots just as election judges were capable of doing. Media observers were also allowed to view processing and could ascertain how individual voters voted. Significantly, Hollister testified that Pam Anderson, Jefferson County Clerk and Recorder, entered the ballot processing rooms and observed the process. Video surveillance records (*Ex. P 47*) indicate that Anderson handled judges' election records while visiting the ballot processing room. Anderson was not an election judge, election watcher, nor media observer, and had no official role in the district. Yet, the process described above, which allowed exposed voted ballots and the names of the voters who cast those ballots to be easily viewed, allowed for Anderson and presumably anyone else who entered the processing rooms (legally or illegally) to determine how a specific individual voted.

Defendants-Contestees argue that election judges and watchers take an oath to not disclose how an individual voted. Plaintiffs-Contestors specifically reject the notion that the taking of an oath insulates government officials or anyone else from violating the voter's right to a secret ballot. Nevertheless, while the DEO and election judges took oaths not to try to ascertain how any individual voted, the oaths taken by election watchers did not require them to not ascertain how an individual voted. (*Ex. P14, Certificate of Appointment of Watcher*). This is presumably because there is no legal requirement for watchers to swear an oath that they will not ascertain

how an individual voted, because there is a presumption of a secret ballot that no such opportunity and need for an oath would exist in a properly run election. See 1-13.5-602, C.R.S. Furthermore, Hollister conceded that media observers were not required to take an oath to observe ballot processing. (*Hollister Trial Testimony*, 7/11/14). This is consistent with Secretary of State Election Rule 8.9.

III. THE SECRET BALLOT VIOLATIONS WERE MADE PUBLIC PRIOR TO THE CLOSE OF THE POLLS.

The District's ballot processing procedure was developed, reviewed by legal counsel, adopted, implemented, and became known to some voters before the polls closed on Election Day, May 6, 2014.

The evidence shows, that the procedure used to process voted ballots without the use of a secrecy sleeve began no later than April 25, 2014 (See *Ex. P45*) and that that ballot processing continued to through May 14, 2014 using the same methods. (*Hollister Trial Testimony*, 7/10/14).

Some segment of the public also became aware of the District's ballot processing procedures prior to May 6, 2014. Ms. Marks testified that in addition to notifying her friends and family, as a media observer for KLZ radio, she notified the station of her findings on May 2, 2014 after she observed the failure of the District to maintain ballot secrecy and reported this concern in radio broadcasts, days before the polls closed. (*Marks Trial Testimony*, 7/11/14). Media observer Kristina Cook also posted on her Facebook page her findings and concerns regarding the lack of secrecy in the District Election on May 5, 2014 (*Ex. P38*) and discussed the lack of ballot secrecy on radio broadcast on May 5 and May 6, 2014. Cook testified that KLZ's broadcast area includes all of the West Metro Fire Protection District. Live streaming over the internet was also available. (*Cook Trial Testimony*, 7/9/14).

While it is impossible to estimate the number of individual voters who became aware of the lack of ballot secrecy in the Election, it is clear that some number of District voters became aware of the District's voter privacy violations. Chief Don Lombardi testified by deposition that he was notified on May 6, 2014 by an individual named Dan Smith that Mr. Smith intended file a complaint with the Secretary of State over the Department's secret ballot violations. (*Ex. P7, at 10-11 and Amendment to Lombardi Deposition*). Plaintiff-Contestor Clyde Wadsworth testified that he heard Ms. Marks on the radio discussing the lack of a secret ballot, which was a surprise to him because he thought his vote would be kept secret. (*Wadsworth Trial Testimony, 7/10/14*). Plaintiff-Contestor Linda Mackety also noted in her testimony that she heard several mentions on KLZ radio prior to May 6, 2014 concerning problems with ballot secrecy in the District. (*Mackety Trial Testimony, 7/10/14*).

Plaintiff-Contestor Devin Howard also became aware of the lack of a secret ballot prior to the Election. Howard was a candidate for the District's Board of Directors and declined to cast a vote in the Election because of the lack of secrecy. (*Ex. P28; Howard Trial Testimony, 7/10/14*). Mr. Howard further testified that he felt threatened to cast a ballot where his privacy would not be protected. This is a reasonable concern for a District Board of Directors candidate considering that Mr. Howard's vote on other District election officials and the tax levy increase could be viewed by officials and visitors in the ballot processing rooms.

District voter and gubernatorial candidate, Matthew Hess, also became aware of the lack of secrecy in voting prior to Election Day. Mr. Hess joined a complaint to the Secretary of State on May 6, 2014, (a public record), stating that he was concerned his vote in the District Election could harm his candidacy, personal, and professional image. (*Ex. JJ-7*).

Thus, it is clear that the concerns over the District's failure to maintain ballot secrecy became public knowledge prior to the deadline for casting ballots at 7 p.m. on May 6, 2014. The fact that media observers and watchers initially publicly warned the voters and caused the violation to become public knowledge is of no consequence in assessing the constitutional violation. Indeed, it is not only within the purview of election watchers and media observers, but also a duty and benefit to the public interest to make known the election integrity issues and concerns relating to the election process, and most certainly to warn voters of the privacy violations observed.

IV. THE DISTRICT VIOLATED THE RIGHT TO A SECRET BALLOT AND THE RESULTS MUST BE SET ASIDE AND VOIDED AB INITIO

The above facts demonstrate that the District, through its DEO and election officials, violated the Plaintiffs-Contestors' and the District's voters right to a secret ballot. The District's processing procedures were systemic and pervasive such that the integrity of the Election was compromised. The Colorado Supreme Court in Taylor v. Pile and as further explained in Jones v. Samora support setting aside and voiding the election when a violation of the secret ballot has occurred. While some election judges may have sworn they did not attempt to ascertain how anyone voted, and that they did not disclose to others how a specific individual voted, that is not a defense or reasonable excuse for violating the right to a secret ballot under the Colorado Constitution.

A. Taylor v. Pile As Reinforced By Jones v. Samora Requires The Election Results To Be Set Aside And Voided Ab Initio As The Proper Remedy

The Colorado Supreme Court has applied Article VII, Section 8 of the Colorado Constitution to void the results of an election when the process used by the election officials allowed for election officials to associate voted ballots with specific, individual voters. In Taylor v. Pile, an election was held for the purpose of determining whether the Town of

Skyline Village should be incorporated. During subsequent court proceedings contesting the validity of the election, a motion was made objecting to the filing of the election results with the Court on the grounds that the procedure used to count ballots violated the secrecy of the ballot guaranteed by the Colorado Constitution. The procedure used for counting ballots allowed “marked” ballots (with detachable stubs) to be used with numbers at the top corresponding to the names of voters that were entered into the poll book. Voters were instructed not to remove the detachable numbers on the ballots as ballots were cast. Judges failed to take the required step to remove the numbered stub before the ballots were cast. Adopting the argument of the Intervenor District Attorney, the Court held that “[a]n election wherein ballots are 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 is contrary to the state of Colorado's constitutional and statutory guarantee of a secret ballot and, therefore, void ab initio.” Taylor v. Pile, 391 P.2d 670, 673 (Colo. 1964).

The Defendants-Constestees inexplicably argue that Jones v. Samora holds something different and that Jones, not Taylor, should therefore control the outcome of this case. In so arguing, they utterly misread the holding of Jones, which did not in any sense overrule Taylor, but instead merely clarified the circumstances under which Taylor's remedy (of voiding an election) is appropriate. Read correctly, Jones plainly compels that the Election in this case be declared void *ab initio*, consistently with Taylor.

Jones involved a polling-place recall election that also utilized absentee ballots. The ballot tabulation did not begin until after 7 p.m. on Election Day. During the ballot counting process, the election judges (apparently) inadvertently failed to detach the numbered stubs from the voted absentee ballots prior to ballot tabulation. While ballots were being counted, election

judges also had access to a poll book in the tabulation room. The poll book detailed the names of electors associated with the detachable stub numbers on all ballots. While the election officials *could* have made the effort to walk across the room and research the stub number of a specific elector in the poll book, or *could* have remembered the numbers of targeted ballots or voters and researched the vote later, there was no evidence that judges took those steps. Upon openly acknowledging that they had not properly detached the removable numbered stubs from voted absentee ballots, the election judges in Jones decided to complete tabulation and then belatedly satisfy the technical details of the law by detaching the identifying stubs at the close of the tabulation process.

There is no question that Jones draws a fine distinction between what election practices constitute a violation of the Constitutional right to a secret ballot and those that do not. A key distinction made in Jones between an election that should be voided and an election that should not be voided is the pre-election knowledge of voters. Where voters are aware they are not voting a secret ballot, as in this case, the integrity of the election is irreparably tainted and the election must be voided. Where the secrecy violation arose after voters voted, and thus could not have impacted the integrity of the vote, as in Jones, the remedy of voiding the election may not be appropriate. Jones illustrated this fine distinction by citing a pair of cases from South Carolina to help guide courts in future cases, like the present case.

The first case cited in Jones describes a situation where a violation of the secret ballot actually and systematically occurred with voters' full knowledge – a situation that Jones approvingly cited as an appropriate example of when an election should be set aside:

“the Court found a violation of ballot secrecy where voters voted at tables in plain view of one another, rather than in voting booths, and where ballots could not be folded to conceal a voter's vote. [citations omitted]. The election challengers conceded that ‘no one testified he or she saw the vote made by another person, no one testified he or she refused to vote due to the method of

voting, and no one testified he or she was confused or intimidated during the process. [citations omitted]. But the Court found a violation of both the ‘statutory and constitutional right to a secret ballot’ based on the fact that the pervasive lack of secrecy threatened the integrity of the entire election.” Jones, 318 P.3d at 471 (citing to George v. Municipal Election Commission, 516 S.E. 2d 206 (S.C. 1999)).

The second case describes circumstances where ballots were ultimately identifiable but voiding the election was nevertheless inappropriate because the violations were isolated and individualized, thus meaning that the electorate at large necessarily did not know *at the time of the vote* that there was or would be a violation of the secret ballot:

“In contrast...six out of twenty-one challenged ballots were actually hand-written and signed by individual voters, making them plainly identifiable as the voters' ballots. Other ballots of the twenty-one challenged were allegedly "allowed to be seen." The Court emphasized the importance of ballot secrecy and concluded that proper election procedures were not followed. Yet, it ultimately concluded that, unlike in *George*, "there was no systemic invasion of privacy ... which affected the fundamental integrity of the election and gave rise to a constitutional violation sufficient to set aside the election results." Id. (citing to Taylor v. Town of Atlantic Beach Election Commission, 609 S.E. 2d. 500 (S.C. 2005)).

When read together, these two cases clarify the proper circumstances for application of the remedy provided for by Taylor v. Pile in Colorado with respect the right to a secret ballot under Article VII, Section 8 of the Colorado Constitution. The distinction lies in the “systemic” nature of the procedure used to process voted ballots – and in what voters know about those procedures at the time when they cast their ballots. In cases where the procedure for processing ballots itself is not flawed, but instances occur where individual judges do not follow the procedures, or where some voted ballots are accidentally viewed during an otherwise valid processing procedure, voiding of the entire election may not in fact be required as a per se remedy under Taylor v. Pile.

However, in those cases where the ballot processing procedure systematically and pervasively allows for almost all ballots being processed to be connected to the voter who cast the ballot, especially when voters are aware that their ballots are non-secret, and are denied

alternative arrangements to cast a secret ballot, then a violation of the Colorado Constitution's guarantee of secrecy in voting has occurred, and voiding the election is the only and proper remedy under both Taylor and Jones.

In this case, the ballot processing system developed by the DEO in coordination with other election officials and election judges was a method devised for processing *all* ballots that—by design—dispensed with the protection afforded to voters by the legally required secrecy sleeve and allowed for voted ballots to be simultaneously exposed next to the names of the individual who cast the ballot. This exposure of votes cast next to voters' names was not an isolated incident or inadvertent mistake, nor did it arise only after the voting was concluded. This ballot processing procedure was put into place no later than April 25, 2014, 11 days before the election. and it did in fact result in citizens feeling intimidated, including Plaintiff-Contestor Devin Howard, who--offended by the planned violation of ballot secrecy--declined altogether to exercise his right to vote, not only on his own race, but also on the other director races and on the tax issue on the same ballot, specifically because of his awareness of the lack of a secret ballot.

The public at large became aware of the District's ballot processing procedures through social media, word of mouth and the radio prior to 7:00PM on May 6, 2014. There is every reason to infer from this timing, and from the numbers of votes received in the final days of the Election, that many thousands of voters who cast their ballots in those final days of the Election had – like Mr. Howard - become aware of the systemic secrecy problems created by the District's procedures by the time they voted, or chose not to vote in certain races at all.

It is impossible to estimate with any certainty how many individual voters' decisions may have been affected or intimidated by this public information. What is obvious, however, is that

the integrity and verifiability of the Election is certainly in doubt, and that uncertainty alone is ultimately what must be shown to invoke the Taylor remedy of voiding an election after Jones.

The facts in this case fall squarely in line with the example the Jones court used to clarify the circumstances that warrant the voiding of the election under Taylor v. Pile. The circumstances in this case are in fact more compelling and persuasive than the facts in George and Taylor v. Pile because unlike those cases there is evidence in this case of judges viewing how voters voted, there is evidence that Devin Howard refused to vote because of the lack of secrecy, and there is evidence that voters were intimidated and concerned about the process prior to and after voting. The only proper remedy, therefore, under the Taylor v. Pile, as further explained by Jones, is for the Court to void the election.

B. Sworn Election Officials Must Also To Preserve The Right To A Secret Ballot

The plain text of Article VII, Section 8 of the Colorado Constitution is clear that the right to a secret ballot is a right held by the voter, and “election officers” (undefined in current law, but presumed to be election judges and the DEO), are not exempt from their duty to preserve and protect that right when conducting elections. The constitutional language makes not exceptions to the clear language that “no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it.” No language suggests that election officials may mark ballots (permanently or temporarily) in certain circumstances or view, review or inspect identifiable ballots. There is no indication that it is legal or acceptable for election officials to view identifiable ballots so long as they are sworn not to try to ascertain how someone voted or disclose to others how someone voted, even to another election judge, or the District Attorney, as DEO Hollister did.

It is crystal clear: *No ballot may be marked, by anyone, in a fashion that would allow anyone to identify the voter who cast the ballot.*

While the Constitution refers to “marking ballots”, the purpose as explained in Jones was to preclude the voted content of an individual electors’ ballot from being revealed to election officials, watchers and the public. Jones, 318 P.3d at 469. After the 1947 amendment eliminated permanent markings on the ballot, even the judiciary conducting an election contest, was precluded from determining how an individual voted.. Thus, the purpose of Article VII, section 8 was not just to preclude the identifiable marking of ballots, the purpose was to prohibit any election procedure that allowed for election officials, judicial officials, watchers, and the public from learning how an individual voted.

Defendants argue that, contrary to the plain meaning of the words, these terms should be construed only to prohibit the public at large from learning how an individual voted. Defendants’ argument illogically assumes that the first sentence of Section 8 (prohibiting identifiable marks on ballots) somehow conflicts with the second sentence, which has existed in this Article since Colorado’s first constitution in 1876, providing that “The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted.” They read this long-standing protection as an indication that election officers *are* allowed to casually observe who cast a particular ballot, and the purpose of the oath is to prevent public or private disclosure of that knowledge. They fail to acknowledge that this protection and oath is still required for those cases where a voter needs assistance in voting or for certain overseas military voters who must waive their right to a secret ballot to transmit their ballot electronically.

The Defendants-Contestees’ argument directly contradicts the plain language of the first sentence of Section 8. By doing so, it violates the rule that constitutional provisions should be

read “as a whole with effect given to every term contained therein.” Havens v. Bd. of County Comm'rs of County of Archuleta, 924 P.2d 517, 523 (Colo. 1996). Defendants’ strained interpretation would do just the opposite: create an illogical tension between the first and second sentences where none exists.

Defendants-Contestees ignore that it is possible for election officials to occasionally and legitimately learn how an individual voted even when there are procedures in place that protect voter secrecy during processing. For example, an election official’s assistance may be required to aid a disabled voter, a circumstance covered by statutory protections requiring documentation of such assistance. . The oath protects against inadvertent mistakes, as was the case in Jones, where an individual election officials may fail to follow the procedures in place to guard voter privacy, or accidentally discover an identifiable ballot

Thus, the purpose of the long-lived second sentence of Article VII, section 8 is not to provide an exception for officials to learn how individuals vote.. Rather, the purpose of the second sentence serves to add an additional safeguard for those rare circumstances where an election official may inadvertently learn how someone voted. It is not to permit or allow ballot processing procedures that systemically violate the voters’ well-understood right to a secret ballot.

C. 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.”

Defendants-Contestees further argue that the Election should not be set-aside or voided because they substantially complied with the right to a secret ballot. If the Defendants-Contestees position is to be accepted, the application of a “substantial compliance” standard to

the facts of this case would require the Court to impose a standard on ballot secrecy that the Colorado Supreme Court has never before accepted. See Jones, 318 P.3d at 472, footnote 6.

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 Colorado Supreme Court precedent. 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). Retreating from such a position that has been widely and historically accepted would certainly be drastic.

Additionally, 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 disenfranchising voters, is actually an inherent *component* of the fundamental right of suffrage. 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.

Voiding an election where secrecy in voting has been compromised may be considered drastic *in a particular election*. But that impact 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, the Supreme 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 v. Barnhill, 855 P.2d 847, 851 (Colo. 1993) (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).

While the Colorado Supreme Court has previously applied the substantial compliance standard to various election statutes, the Court has also recognized that “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 v. Blair*, 670 P.2d 749, 755 (Colo. 1983) (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 that must not be abandoned., even if there is a short term political or financial consequence. Indeed, *Taylor* is consistent Supreme Court precedent because substantial compliance has only been applied to lesser legal obligations, and secrecy in voting does not fall into that category.

Even if substantial compliance were an appropriate standard for judging observance of secrecy in voting, which it is not, the District’s administration of the Election did not substantially comply with Article VII, § 8.

To determine substantial compliance with a legal requirement, the Court must 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 systemic 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. City of Boulder*, 885 P.2d 215 at 227.

The District in this case implemented a ballot processing procedure that affected most if not all voted ballots. The procedure did not utilize the secrecy sleeves in any manner, nor were any

other substantially compliant protections put in place to prevent election officials and others from viewing identifiable voted ballots. The process was established at least eleven days before the polls closed and continued, despite being challenged, until all the ballots had been tabulated. As Deputy Secretary Staiert confirmed in her testimony, the District's ballot processing procedure were "systemic".

Furthermore, 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*. Due to the 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 he or she is free to vote her conscience without fear of retribution. That purpose cannot be accomplished if the District is allow to develop and administer a ballot processing procedure that compromises ballot secrecy for sake of efficiency and election officials' convenience.

D. There Is No Quantitative Measurement In Applying the Violation Of The Secret Ballot

While the election contest statutes reference the need to show that the illegal or improper conduct complained of must be sufficient to change the results of the election, see 1-13.5-1401(1), C.R.S., there is no such requirement in connection with the violation of the right to a secret ballot. Indeed such a requirement would be impossible to achieve since the lack of secrecy in voting affects the conscience and mental impressions of the voters, which cannot be objectively determined on a large scale. While it is possible to identify specific individuals whose right to vote was burdened, such as Plaintiff-Contestor Devin Howard in this case,

requiring a showing that the lack of secrecy in ballot processing procedures must be sufficient to change the results of the Election would effectively nullify the fundamental right to a secret ballot in Colorado which would clearly be contrary to the intent of the Article VII, section 8 and the Colorado Supreme Court's holdings in Taylor and Jones.

To the extent that the Court considers the lack of secrecy in ballot processing procedures then known to voters before or at the time they cast their ballots, that requirement has been met in this case. The evidence is clear that the District's ballot processing procedures became public knowledge through radio broadcasts, social media posts, and word of mouth as early as May 2, 2014. Several witnesses testified that they became aware of the lack of secrecy in voting prior to May 6, 2014 and several complaints were filed with the Secretary of State by Election Day, which immediately became public records. While the exact number of voters who became aware of the privacy violations can never be known, it is clear that the District's voting procedures became public knowledge prior to the closing of the polls. The burdening of each impacted individuals' right to vote cannot be measured, whether those voters chose not to vote at all, voted contrary to their conscience, or chose to leave more sensitive contests unvoted on their ballot.

Imposing a quantitative measure on whether systemic unconstitutional disenfranchisement of voters should void an election would simply lead to the ability of the majority to routinely discriminate against the minority in matters of voting rights without negative consequence to the majority.

Even if a quantitative measure were imposed in this case, the District demonstrably failed to meet even minimal measure of compliance in key areas required for a verifiable and accurate election vote tabulation. For example, the number of counted ballots exceeded the number of voters. Hollister testified that the count was "off by 400," (*Hollister Trial Testimony, 7/11/14*)

and that the number of voters had not been reconciled to the ballots purportedly counted and certified. Testimony suggested that neither the poll book count nor the ballot count is correct, due to likely administrative errors, leaving the district without a verifiable ballot count for a starting point in determining the accurate margin of victory in any of the races, and therefore an error of unknown size in the certification of the abstract by the canvass board. Ballot tallying without reconciliation with the poll book is in direct conflict with 1-13.5-609, C.R.S. requiring that the number of ballots to be counted not exceed the number of voters in the poll book. The failure to comply with this fundamental election integrity step created an unverifiable abstract of results.

If the unknown number of voters impacted by the loss of a secret ballot were required to be measured against the margins of victory in each District contest, the District's recorded certified abstracts and related margins cannot be relied on to provide the starting point for measurement. The material failures to substantially comply with multiple provisions of governing election law are emerging in more detail as the evidence is compounded with the initial, yet incomplete, review of the late-produced video.²

E. VOIDING THE ELECTION IS THE ONLY PROPER REMEDY UNDER TAYLOR V. PILE AND JONES v. SAMORA

The Colorado Supreme Court's holding in Taylor declared that "it was the duty of the court to declare the election void" after declaring the right to a secret ballot had been violated. Taylor, 391 P.2d at 673. This pronouncement is not only logical, but necessary, when one considers that violation of the right to a secret ballot encompasses a systemic procedure, rather than inadvertent mistakes, that affected all the voted ballots. Taylor itself did not deal with a

² Evidence is emerging in the late-produced video (Ex. P45) that the District failed to secure voted ballots in a sealed ballot box; thousands of ballots may have been accepted by employees who were not sworn or trained election officials; an excessive number of ballots were illegally accepted; and there were material violations of the Secretary of State Rules. All such concerns call into question the final certified vote count.

situation in which anyone actually acknowledged learning how an elector voted. To the contrary, the simple fact that voters' private choices were exposed during counting of ballots with their detachable identifying stubs attached inside a locked ballot box was sufficient to void the election. The court could have simply ordered the removable of the stubs under the protection of the court, but the damage had been done by exposing the identifiable ballots to the counting judges. In this case, not only was the identifying stub attached to exposed voted ballots during multiple stages of processing, but the actual names of the voters were simultaneously visible with the voter ballots throughout several stages of ballot processing from the beginning of ballot processing no later than April 25, and possibly earlier. Contrary to the Court's understanding and instructions in the election judges' manual, the identifiable ballots were not kept folded and not placed in a sealed ballot box and hidden from further exposure. Voted identifiable ballots were left out in batches and open trays, exposing the identifiable ballots to all judges handling the ballots and visitors in the processing rooms. (*Ex. P45*).

The Court in Jones did not overrule or limit the holding in Taylor. Rather, the Jones court sought to clarify and explain exactly what constituted the violation of the secret ballot. The Court did this through its analogies to the South Carolina Supreme Court cases described *supra*. As the Court noted “[t]hese cases and our holding today reinforce the line drawn in *Taylor* — that voiding an election may be appropriate where the fundamental integrity of an election is compromised by the lack of a secret ballot.” Jones, 318 P.3d at 471. There is no doubt that the fundamental integrity of the District's election was severely compromised by the multiple compromises to the promised and guaranteed secrecy in voting.

V. CONCLUSION

For the foregoing reasons, Plaintiffs-Contestors respectfully requests the Court find in their favor on their First Claim for Relief- Violation of the Secret Ballot- and set-aside and declare void the May 6, 2014 District Election.

DATED: July 16, 2014

Respectfully submitted,

/s/ Marcus J. Zarlengo

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In accordance with C.R.C.P. 121, Section 1-26(9), a printed copy of this document with the original signature is maintained at counsel's office and available for inspection.

CERTIFICATE OF SERVICE

I certify that on this 16th day of July, 2014, I electronically served via ICCES or sent via email a true and complete copy of the **PLAINTIFFS-CONTESTORS' CLOSING**

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In accordance with C.R.C.P. 121, Section 1-26(9), a printed copy of this document with the original signature is maintained at counsel's office and available for inspection.