

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Court Address: 101 West Colfax Ave., Suite 800 Denver, Colorado 80202</p>	<p style="text-align: center;">COURT USE ONLY</p>
<p>Trial Court: District Court, Jefferson County, State of Colorado Hon. John Smith Case No.: 12 CV 212</p>	
<p>Plaintiff-Appellants: CBS News, et al., v. Defendant-Appellees: Jefferson County Clerk, et al.</p>	<p>Case Number: 12 CA 2012</p>
<p>Attorney for Defendant-Appellee: Martha Tierney, Esq.</p>	
<p><u>EDWARD PERLMUTTER'S MEMORANDUM IN SUPPORT OF DEFENDANT- APPELLEES' MOTION TO DISMISS*</u></p>	

* This hypothetical case was created for the September 11, 2012 Colorado Election Law Program War Game. The scenario derives from teaching and scholarship conducted at William & Mary Law School with the assistance of Edward Foley and Steve Huefner at Moritz College of Law of the Ohio State University. *None of the real-world candidates named in these hypotheticals (or their representatives) were consulted on the content of these hypotheticals or are in any way responsible for it.* The two attorneys arguing each side of the hypothetical cases are doing so as part of the exercise and do not actually represent their hypothetical clients in this hypothetical matter. True to their commitment to professional norms and to the spirit of this exercise, for purposes of this war game, the attorneys will argue zealously as if the named parties were in fact their clients.

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I. ISSUE PRESENTED FOR REVIEW

Whether § 24-72-205.5, C.R.S. exempts election ballots and copies of ballots from public inspection during a recount, conducted pursuant to § 1-10.5-101, C.R.S., that has commenced after the end of the canvassing period.

II. STATEMENT OF THE CASE

A. Nature of the Case.

CBS News, et al., appeal the lower court's dismissal of their Complaint filed under the Colorado Open Records Act, § 24-72-291, C.R.S. ("CORA"). CBS News initiated the underlying civil action after the Jefferson County Clerk denied a CORA request for copies and images of voted ballots cast in the November 6, 2012 congressional election. The district court granted the County Clerk's Rule 12(b)(5), C.R.C.P. motion to dismiss.

B. Statement of the Facts.

On November 6, 2012, voters in the 7th Congressional District of Colorado, which comprises parts of Jefferson and Adams counties, went to the polls to elect a member of Congress, choosing between Democrat Edward Perlmutter ("Perlmutter") and Joseph Coors Jr. ("Coors"). On Election Day, initial tallies showed Perlmutter and Coors neck and neck. A few days later, statewide tallies showed Perlmutter leading by 1,258 votes. At the close of the canvass period on November 23, election officials declared Perlmutter leading by 1,268 votes, or .9 percent of the difference between the 138,796 votes cast for Perlmutter and the 137,528 votes cast for Coors, divided by 138,796 total votes cast for Perlmutter. This exceeded the one half of one percent margin necessary to trigger an

automatic recount under § 1-10.5-101, C.R.S. After the close of the canvass period, a group of local Colorado activists, Democracy in Action (“DIA”) filed a public records request under the Colorado Open Records Act (CORA), §§ 24-72-200.1 to – 206, C.R.S., seeking access to TIFF images of the ballots that were cast on e-voting machines on Election Day and copies of voted paper ballots, including mail-in and provisional ballots. The county clerks in Adams county granted this access, pursuant to § 24-72-205.5, C.R.S.; the Jefferson County Clerk did not grant such access.

On December 5, several national media outlets including CBS, Fox News Channel, and NBC (“National Media Outlets”) requested access to the TIFF files of the electronic ballots and to the TIFF images and copies of the paper and mail-in ballots with the offices of the Adams and Jefferson County Clerks pursuant to § 24-72-205.5(3)(a), C.R.S.. The Jefferson County Clerk once again refused to provide the information; the Adams county clerk disclosed the requested files and copies. Two days later, on December 7, at 4:30 p.m., Coors filed for recount in accordance with § 1-10.5, C.R.S. The Jefferson County Clerk continued to deny access to the records sought by the National Media Outlets.

III. SUMMARY OF THE ARGUMENTS

On behalf of the Defendant-Appellees, we request that this Court sustain the trial court’s ruling and deny Plaintiff-Appellants’ request to release voted ballot images after the beginning of the recount period on December 7, 2012 and before the conclusion of the recount. The Jefferson County Clerk’s release of these records during the recount period would be in contravention of § 24-72-205.5, C.R.S. Thus, these records are exempt from CORA, pursuant to § 24-72-204(1)(a), which states that an official should

not allow public inspection of records if “such inspection would be contrary to any state statute.”

In addition, § 24-72-204(6)(a), C.R.S. exempts public records from public inspection when such public inspection would be contrary to public policy. Public inspection during the recount period would jeopardize the integrity of this election and interfere with the ability of the Defendant-Appellees to efficiently and accurately determine the winner of the election. Public inspection should therefore be denied pursuant to §24-72-204(6)(a), C.R.S.

IV. ARGUMENTS

A. Section 24-72-203(1)(a), C.R.S. allows public inspection “except as provided...by law”; Section 24-72-205.5, C.R.S. prohibits release of the records under CORA.

The Defendant-Appellees are prohibited by law from releasing the requested ballots at this time. CORA, as codified under § 24-72-203(1)(a), C.R.S., allows public inspection of all “public records” “except as provided...by law.” Section 24-72-204, C.R.S. states that the “custodian of any public records shall allow any person the right of inspection of such records...except [in those cases in which] [s]uch inspection would be contrary to any state statute.” In this case, § 24-72-205.5, C.R.S. expressly prohibits public inspection of ballots during a recount period; thus, such CORA requests are banned by state law and the public has no right to inspect ballot material after the recount period commenced on December 7 at 4:30 pm. According to the statute, the right to inspect does not recommence until the recount concludes.

Colorado statute prohibits public access to voted ballots during the recount process. Section 24-72-205.5, C.R.S. prescribes under what conditions the public may

have access to voted ballots. Section 24-72-205.5(2)(a), C.R.S. defines “ballot” as including “any digital image or electronic representation of votes cast.” The TIFF files requested by the National Media Outlets constitute “digital image[s] or electronic representation[s].” § 24-72-205.5(2)(a), C.R.S.

Section 24-72-205.5, C.R.S. prohibits an election official from granting access to ballots during the period beginning 45 days before the election until the date by which the canvass board is required to complete the canvass – 17 days after the election. § 1-10-102, C.R.S. Alternatively, the law prohibits public access before a recount is completed if that date is later than the end of the canvassing period. § 24-72-205.5, C.R.S. (“The designated election official shall not fulfill a request... for the public inspection of ballots during the period commencing with the forty-fifth day preceding Election Day and concluding with the date either by which the designated election official is required to certify an official abstract of votes cast for the applicable candidate contest..., or by which any recount conducted in accordance with Article 10.5 of Title 1, C.R.S., is completed, as applicable, whichever date is later.”).

The exceptions to CORA should be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). A narrow reading of § 24-72-205.5, C.R.S. prohibits public inspection of ballots before the completion of a recount. Thus, this statute prevents the Jefferson County Clerk from disclosing the ballots under CORA. Colorado law also has established that when a court evaluates a CORA request, it must do so with the understanding that “[its] precedent eschews strict attention to form and mandates a content-based inquiry into disclosure exceptions.” *Ritter v. Jones*, 207 P.3d 954, 959 (Colo. App. 2009). Although the text of § 24-72-205.5, C.R.S. does not

expressly contemplate a situation such as this one in which a CORA request is filed before a recount petition is filed, even a narrow, content-based reading of the statute supports prohibiting disclosure during the recount period. This statutory exception to CORA clearly intends to prohibit public access to ballots while the winner of the election is under challenge; Coors' petition filing a recount reopened the counting process, and while the counting process is open—i.e., beginning on December 7 when the recount petition is filed—§ 24-72-205.5, C.R.S. prohibits public access.

This recount, which began after the canvassing period expired, is unusual, and the General Assembly may not have contemplated this scenario in drafting § 24-72-205.5, C.R.S. When there is a recount that meets statutory requirements, however, the plain language of the statute prohibits disclosure of voted ballots to the public within that recount period. A content-based inquiry supports such a reading of the statute. The General Assembly contemplated that the recount could outlast the canvassing period, and thus it prescribed that access must be prohibited as long as the recount proceeds. *Bill Summary*, Colorado SB12-155 (March 14, 2012), *available at* <http://www.leg.state.co.us/clics/clics2012a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/aa25b9f8266aa888872579c1006cb2f5?OpenDocument> (noting that during a committee meeting, Colorado State Senator Rollie Heath (D-Boulder), sponsor of the bill, explained that the recount language was added to ensure that CORA disclosure would be stayed during recount proceedings).

There are many instances in which public policy and administrative efficiency allow policy-makers to draw lines so that an act, petition, or request that is valid one day is no longer valid the next. For example, statutes of limitations are one form of

legislative line-drawing that promotes efficiency and fairness. The U.S. Constitution grants the states the power to regulate elections. U.S. CONST. art. I § 4. Inherent to this power is the authority to set deadlines and restrictions to efficiently administer elections. *Marston v. Lewis*, 410 U.S. 679, 680 (1973). In *Marston v. Lewis*, for example, the Supreme Court found that states have the power to set deadlines requiring voters to register to vote by a certain date in advance of the election. *Id.* (finding that voter registration deadlines reflect the legislature’s judgment as to how much time the state needs to prepare for an election). Similarly, although Colorado statute allows any voter to contest the results of an election, it sets limits on when the voter can contest these results. *See, e.g.*, § 1-11-208, C.R.S (allowing voters to contest the results of a state senate or representative election within ten days after the official abstract of votes cast has been completed). The power for states to set such deadlines is rooted in the need for states to efficiently administer elections and produce finality in determining election results.

In this case, the administrative “line” that the legislature has drawn is the filing of the recount petition. Once Coors filed the petition for recount, the goals and requirements of the state of Colorado, as well as the County Clerk, changed. As soon as the recount petition was filed, the primary goal of the County Clerk’s office became efficiently and accurately administering the recount. Defendant-Appellees demonstrated to the district court that preparing the requested files would be time-consuming and administratively burdensome, thus detracting from the ability of the Clerk’s office to ascertain an accurate recount in a timely fashion. (“The principal object of the rules of procedure prescribed by statute for conducting an election is to protect the voter in his

constitutional right to vote in secret; to prevent fraud in balloting and secure a fair count.” *Littlejohn v. Desch*, 121 P.2d 159 (Colo. 1912) (quoting from *Young v Simpson*, 42 P. 666, 667 (Colo. 1895))).

Public policy also supports limiting disclosure. The text of the bill enacting § 24-72-205.5, C.R.S. demonstrates the legislature’s careful policy decision to balance state goals: access to ballots, the integrity of the election process, and voter privacy and preservation of secrecy in voting. 2012 Colorado HB12-1036. (“By enacting this section, the General Assembly intends to permit the inspection of ballots under the conditions specified in this section and to protect the integrity of the election process while protecting voter privacy and preserving secrecy in voting in accordance with provisions of Section 8 of Article VII of the State Constitution.”) The purpose behind § 24-72-205.5, C.R.S., as stated by the legislature itself, is to limit public inspection when it jeopardizes voter privacy and the integrity of the election process. In order to achieve this goal while still enabling open government, the General Assembly sought balance in this law, which limits public access while counting is still in progress. It is undisputed that a recount is underway; Coors filed the petition for a recount on December 7, thus reopening the counting process and triggering the limits on public inspection as prescribed by § 24-72-205.5, C.R.S.

B. Preserving the integrity of the election process outweighs public interest in public disclosure.

Even when state or federal statute does not prohibit disclosure, CORA implements a balancing test between public policy and the interests of disclosure: “The custodian may deny the right of inspection of the following records, unless otherwise

provided by law, on the ground that disclosure to the applicant would be contrary to the public interest.” § 24-72-204(6)(a), C.R.S. The public’s interest in the secret ballot, finality in elections, and integrity in the recount process outweighs the public interest in disclosure.

1. The privacy interests of voters outweigh the public interest in disclosure to the National Media Outlets.

Unfettered disclosure during the recount would put the interests of voter privacy and ballot secrecy in jeopardy. In determining whether to provide CORA access, Colorado courts have found that “[a]gainst the privacy interests at stake must be weighed the Act’s general presumption in favor of public access.” *Denver Post Corp. v Univ. of Colorado*, 739 P.2d 874 (Colo. App. 1987). When weighing the competing interests of privacy and disclosure, Colorado courts have applied a three-part test: “(1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure of otherwise protected information, how disclosure may occur in a manner least intrusive with the respect to the individual’s right of privacy.” *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 879 (Colo. Ct. App. 1987) (citing *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980)).

In applying this three-part test, the court must first look to the expectations of the voters. Voters in Colorado have an expectation of privacy when they head to the polls; the Colorado Constitution guarantees such a protection. COLORADO CONST., art. 7, § 8. The U.S. Supreme Court has established a right to secret ballot, “the hard-won right to vote one’s conscience without fear of retaliation.” *McIntyre v. Bd. of Elections*, 514 U.S.

334 (1995). This right includes “not only the right to cast one’s vote in private, but also the right to maintain the confidentiality of one’s vote following an election.” *Greene v Marin County Flood Control and Water Conservation District*, 91 Cal.Rptr.3d 27 (Cal. App. 2009). Colorado statutory and common law also has recognized a right to a secret ballot. COLORADO CONST., art. 7, § 8; *Taylor v. Pile*, 1964, 391 P.2d 670, 154 Colo. 516.

The next step of the three-part test examines the public’s interest in disclosure. Defendant-Appellees assert that the public interest in disclosure is minimal, at best. The recount process contains several transparency protections to ensure that it is conducted fairly and without bias. Section 24-72-205.5, C.R.S. grants access to ballots to interested parties during the canvassing and recount process. The statute allows interested parties to witness the handling of the ballots to ensure that “the recount is being conducted in a fair, impartial, and uniform manner so as to determine that all ballots that have been cast are accurately interpreted and counted.” § 24-72-205.5(3)(b), C.R.S. Thus, Colorado’s recount statutes ensure an open and transparent process; all interested parties have access to view the files and safeguard the process. Additional public access is not only superfluous, but it endangers the integrity of the process by compromising secrecy and affecting the ability of the Clerk to obtain an accurate recount total.

The final step of the three-part test looks at the ways that disclosure can be completed in a method that would maintain voter privacy. Although ballots may contain no explicitly identifying information, distinguishing marks on the ballots or the batching of ballots during the recount process may compromise anonymity and impinge on the right to a secret ballot and voter privacy. In Colorado, there have been numerous instances in which county clerks have demonstrated their ability to distinguish one ballot

from another and detect the identity of the voter despite the lack of explicitly identifying information on the face of the ballot itself; distinguishing marks or organizational systems implemented by the clerks compromise anonymity. *Citizen Center v. Gessler*, Complaint for Declaratory and Injunctive Relief, 1:12-cv-00370-CMA-MJW (Feb. 13, 2012, D. Colo.). Although, in an August 20th executive order, Secretary Gessler prohibited clerks from applying potentially distinguishing bar codes to ballots, ballots may nevertheless be distinguishable even when they contain no explicitly identifying information. Secretary of State Scott Gessler, Order 12-003, Aug. 20, 2012. For example, election officials organize ballots in batches which make it possible for officials to identify a particular ballot or even trace the ballot to a particular voter. *Citizen Center v. Gessler*, Complaint for Declaratory and Injunctive Relief, 1:12-cv-00370-CMA-MJW (Feb. 13, 2012, D. Colo.). The ballots are organized so that an election official could identify a ballot by the ballot type, the time at which a ballot was cast, or the method by which the ballot was cast. In effect, through the batching system, an election official or other party could trace a ballot to an individual voter.

The disclosure of ballots during a recount period poses problems that disclosure after the completion of the count does not present. When provisional ballots are disclosed during a recount, for example, there is a greater risk of exposure of voter identity. When the recount concludes, election officials will combine all ballots in their jurisdiction; it will therefore be less likely that a given ballot could be identified. Heightened scrutiny of ballots during the recount period renders ballot susceptible to infringement of confidentiality. Disclosing these ballots will shake voter confidence in

the secrecy of their electoral choices. Thus, a CORA balancing test supports limiting access while the recount is being completed.

2. Public interest in finality of elections outweighs public interest in disclosure.

Public interest in the integrity of recounts also outweighs the public interest in disclosure. Defendant-Appellees assert that § 24-72-205.5, C.R.S. reflects the General Assembly's policy decision to limit public inspection during recounts, a time in which public and media speculation and attention distracts from ability of the clerk to administer the recount in an efficient manner. The Supreme Court of Colorado has acknowledged that efficiency in elections is a legitimate object for state policy. *MacGuire v. Houston*, 717 P.2d 948, 951 (Colo. 1986). In addition, Colorado statutes that limit when a voter can file an election contest or when a candidate can file for a recount serve the interest of finality in elections. *See, e.g.*, §§ 1-11-208, 1-10.5-106(2), C.R.S. Unfettered access during the counting and the recount process compromises these goals.

In addition, providing access to the media and general public will require the office of the County Clerk to expend staff resources at a time when crucial resources must be focused on expediently determining the winner of the election. The Clerk's office will need to prepare tens of thousands of copies of ballots, thus removing the ballots, as well as staff resources, from the recount process. Converting electronic voting records into TIFF files, as Plaintiff-Appellants have requested, would be a time-consuming process and a drain on office resources. Colorado courts have established the need for finality in elections; courts, for example, will not order the opening of a ballot

box absent some evidence of fraud or tampering of ballots. *Gray v. Huntley*, 238 P. 53, 56 (Colo. 1925) (“To order the opening of ballot boxes in every election contest, and to order a recount of the ballots in every case merely because it is asked, without a proper basis therefor, would invite a contest after every election, no matter how honestly and efficiently conducted.”). Thus, the timely resolution of this election in order to seat a legitimate representative of the voters of the 7th Congressional District is an important state goal.

3. Public interest in the maintenance of ballots to ensure an accurate recount outweighs the interests of disclosure.

Finally, public interest in ascertaining an accurate recount outweighs the public interest in disclosure. Unfettered public access to ballots in the recount period would compromise the integrity of the election process.

Section 24-72-205.5, C.R.S. aims to preserve the condition of election machines until a candidate is certified as a winner and all recounts are completed. Each time the County Clerk and her staff touch the machines and ballots, make copies, and convert the files, they increase the risk for malfunction or alteration of the machines’ and ballots’ condition. In a concurring opinion granting an injunction to stop the counting of ballots in *Bush v. Gore*, Justice Scalia wrote that “permitting the count to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate.” *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

Colorado law takes several steps to ensure that the integrity of the ballots are maintained during the counting and recount process. For example, § 1-7-307, C.R.S. requires that counties seal all paper ballots after an election. These paper ballots may only be unsealed under special circumstances, such as a recount. § 1-10.5-101, C.R.S. It is essential that during the recount process, the machines and ballots are preserved to ensure the integrity of the process, limit opportunities for alteration of the machines, and ensure as accurate a recount process as possible. The creation of additional voting reports and transfer of the records into TIFF files – for the third time since Election Day - - increases the chances that the recount cannot be accurately completed. Additional handling of the original ballots also increases the chances that they will be compromised or damaged. Determining the accurate winner of the election and preserving the democratic process outweighs the public's interest in obtaining these ballots.

V. CONCLUSION

The Court should deny the Plaintiff-Appellants' request for disclosure. The Plaintiff-Appellants' CORA request is invalid under § 24-72-203(1)(a), C.R.S.; the requested release of information is prohibited by state law. Section 24-72-205.5, C.R.S. prohibits the disclosure of voted ballots or copies of voted ballots during the recount period.

Additionally, public policy prohibits disclosure, pursuant to § 24-72-204(6)(a), C.R.S. If the Jefferson County Clerk were compelled to release the ballots, such a disclosure would detract from the integrity and efficiency of the recount process.