IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-370-CMA-MJW

CITIZEN CENTER, a Colorado nonprofit corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State,
SHEILA REINER, in her official capacity as Mesa County Clerk & Recorder
SCOTT DOYLE, in his official capacity as Larimer County Clerk & Recorder
PAM ANDERSON, in her official capacity as Jefferson County Clerk & Recorder
HILLARY HALL, in her official capacity as Boulder County Clerk & Recorder
JOYCE RENO, in her official capacity as Chaffee County Clerk & Recorder,
TEAK SIMONTON, in her official capacity as Eagle County Clerk & Recorder,

Defendants.

COUNTY CLERKS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Mesa County Clerk & Recorder Sheila Reiner, Larimer County Clerk & Recorder Scott Doyle, Jefferson County Clerk & Recorder Pam Anderson, Boulder County Clerk & Recorder Hillary Hall, Chaffee County Clerk & Recorder Joyce Reno, and Eagle County Clerk & Recorder Teak Simonton (collectively the "Clerks"), by and through their respective counsel, hereby move to dismiss the First Amended Complaint for Declaratory and Injunctive Relief [Doc. #37] (the "Complaint") filed by Plaintiff Citizen Center ("Plaintiff" or "Citizen Center") pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).[1] In support of the Motion to Dismiss, the Clerks state as follows:

[1] The Clerks previously filed a Joint Motion to Dismiss the "Original Complaint" [Doc. # 1]. Rather than directly responding to the defenses raised in the Joint Motion to

Conferral

D.C.COLO.LCivR. 7.1A Certification: Undersigned counsel contacted counsel for Citizen Center who indicated Citizen Center opposes the relief sought in this Motion.

Overview

Citizen Center asserts numerous federal and state law official capacity claims against the Clerks, all of which stem from the underlying allegation that the Clerks have adopted some policies, practices, and systems that might enable election staff to track ballots to individual voters, not that any member of Citizen Center has had his or her ballot identified or disclosed. While the First Amended Complaint contains supplemental allegations specific to each defendants' alleged policies, practices, and customs, the First Amended Complaint fails to address the lack of any injury-in-fact sufficient to support a claim. Absent from the First Amended Complaint are any allegations that the Clerks have traced how any of Citizen Center's members voted; any allegation that the Clerks have threatened to trace how any Citizen Center member will vote in an upcoming election; or any allegation that there is reason to believe Citizen Center's members may be targeted or intimidated in the course of voting. Plaintiff's theoretical harms are just that and are not sufficient to confer standing on to Citizen Center as an organization. Moreover, the fundamental rights Citizen Center alleges it is seeking to protect, i.e. the right to a secret ballot, is not a right that has ever been recognized by the United States Supreme Court or codified in federal law. The

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Dismiss, Plaintiff filed its First Amended Complaint [Doc. #37], mooting the Clerk's Motion to Dismiss the Original Complaint. [*See* Doc. #40]. Thus, the Clerks are now moving to dismiss the Amended Complaint.

Complaint, therefore, fails to cure the deficiencies of the Original Complaint and the additional facts alleged do not establish Article III standing or the deprivation of any fundamental rights.

Specifically, Plaintiff objects to two distinct practices allegedly engaged in by the Clerks. First, Plaintiff alleges that Mesa County, Larimer County, Jefferson County, and Boulder County include batch reports with voter identification information with corresponding ballots in their sealed ballot boxes after tabulating votes. Second, Plaintiff alleges that Boulder County, Chaffee County, and Eagle County have unique numbers and/or bar codes on each ballot that could be used to identify voters. While these supplemental allegations are more specific, they still fail to include any allegations that the batch reports have been released publicly with ballots or that, if ballots were released, they would be produced in the same batches, nor are there any allegations about any present intention of the Clerks to release that information. Similarly lacking is any allegations that the unique identifiers on the Boulder, Chaffee, or Eagle County ballots have ever been used to identify a voter. These hypothetical harms are insufficient to establish an injury-in-fact.

Plaintiff seeks declaratory relief finding that the Clerks' policies and procedures are unconstitutional, and generic injunctive relief ordering the Clerks to administer elections in a manner such that the tracking of individual ballots is not possible. Complaint, pp. 37-38 (request for relief). The relief requested indicates Plaintiff, in essence, seeks to anoint Citizen Center as the de facto Secretary of State so it may demand particular procedures for conducting elections in Colorado under threat of

federal contempt of court proceedings. Such a request for broad, generic injunctive and declaratory relief exceeds the Court's power, usurps the authority of Colorado's executive branch, and violates the tenets of federalism.

Argument

I. Plaintiff lacks standing to assert its claims

"'[A] showing of standing is an essential and unchanging predicate to any exercise of a court's jurisdiction.'" Nader v. Democratic Nat'l Comm., 555 F.Supp.2d 137, 147 (D. D.C. 2008) (citations omitted). To satisfy the case or controversy requirement of Article III of the United States Constitution, a plaintiff must have standing to invoke federal court jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). The United States Supreme Court recognizes three elements to the constitutional standing requirement: (1) an injury in fact, defined as an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561. On its face, the Complaint fails to satisfy any of the three elements of the constitutional standing requirement.

The Complaint focuses on the alleged ability of the Clerks to trace voted ballots to individual voters in their respective counties and claims this ability constitutes a violation of the right to a secret ballot under the Colorado Constitution. Complaint at ¶¶24-81. However, no constitutional or statutory provision bars election officials from

inadvertently discovering how an individual voter voted. In fact, Article VII, § 8 of the Colorado Constitution specifically contemplates that election officials during the course of an election may learn how a particular voter voted and places a duty on them to not to disclose that information. *See* Colo. Const., Article VII, § 8 ("The election officers shall be sworn or affirmed not to inquire or *disclose* how any elector shall have voted.") (emphasis added)*; see also* C.R.S. §§ 1-6-114(1) (oath of election judges not to disclose voter choice); 1-7-108(1) (oath for election watchers); 1-10-101 (oath for canvass board); and 1-13-712(3) (criminalizing the disclosure of voter choice). Because the Colorado Constitution and the Colorado statutes governing elections contemplate that election workers might discover how an individual voter voted, the statutes contain built-in safeguards against disclosure. Thus, an election system that makes it impossible for election officials to learn how a voter may have voted is not guaranteed by the Constitution or by statute.

Even assuming that the Complaint describes a violation of the Colorado Constitution's voting secrecy provision, the Complaint fails to establish Citizen Center's standing to challenge the purported violation. Initially, the Complaint fails to describe any injury-in-fact that is concrete, particularized, actual, and imminent. Lujan, 504 U.S. at 560. The Complaint does not assert that any member of Citizen Center ever had their vote in any election exposed to public review. Instead, the Complaint offers only vague and conclusory assertions that some members of Citizen Center may at some point in the future have their votes exposed. Complaint at ¶¶ 94-102. However, allegations of theoretical future injury do not satisfy Article III's standing requirement,

and instead the threatened injury must be "certainly impending" to constitute an injury in fact. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); *see also* Whitmore, 495 U.S. at 155-56 ('injury in fact' must be concrete in both a qualitative and temporal sense, and must allege an injury that is "distinct and palpable"); Nader, 555 F.Supp.2d at 147 ("[N]o standing exists if plaintiff's allegations are purely speculative…. Nor is there standing where the court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury [with the alleged conduct].") (citations and internal quotations omitted).

Plaintiff offers no allegations to support the notion that the possibility of public exposure of any of the ballots of its members is actual or imminent, and the purported injury is on its face conjectural and hypothetical. Lujan, 504 U.S. at 560; Renne v. Geary, 501 U.S. 312, 320-21 (1991) (challenge to state constitutional provision barring political parties from endorsing candidates in certain elections not ripe for review, as general allegations that parties refrained from endorsing in the past and wished to endorse in the future not sufficient). In fact, Citizen Center has already undermined any claim of imminent exposure of the votes of any member of Citizen Center by asserting that the Clerks denied Citizen Center's requests, pursuant to CORA, for copies of voted ballots that could allegedly expose the identities of the voters. Original Complaint at ¶¶24, 26, 27, 28, 29.

Finally, under the third prong of the constitutional standing requirement, Citizen Center does not describe specifically what relief is sought in order to address its purported concern with ballot secrecy. Instead, it offers only generalized requests that

the Clerks be prohibited from implementing systems that will allow them to trace individual ballots to specific voters in future elections. Complaint, pg. 37-38 (request for relief). Citizen Center assumes the election practices used by the Clerks in upcoming future elections will be identical to those used in the past, asking the Court to enjoin practices that may or may not take place. Further, Citizen Center does not explain how any of the Clerks can satisfy their constitutional and statutory obligations to verify the qualifications of voters, ensure the integrity of elections, and oversee election procedures under the vague restrictions demanded by Citizen Center. As a result, the Complaint fails to explain how Citizen Center's purported injuries will be redressed by a favorable decision from this Court. Lujan, 504 U.S. at 561.

Failing to address any of the three elements of the constitutional standing requirement, Citizen Center in reality appears to be asking this Court to issue an order requiring the Clerks to comply with the Colorado Constitution. Even if Citizen Center had described a violation of the Colorado Constitution, this generalized request for relief, which could apply to any citizen in any of the named counties, does not state a case or controversy under Article III of the United States Constitution.

To the contrary, the United States Supreme Court consistently holds that "a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy." Lujan, 504 U.S. at 573-74; *see also* Lance v. Coffman, 549 U.S. 437, 441 (2007) (four Colorado voters

lacked standing to challenge a re-districting decision, as allegation that Elections Clause of the U.S. Constitution was not followed "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past"); Allen v. Wright, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 483 (1982) ("But assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."). Thus, Citizen Center has failed to meet their burden of proving jurisdiction over their claims and the case should be dismissed.

II. Even assuming Citizen Center has standing, its claims against the Clerks fail to state a claim upon which relief may be granted

A. Citizen Center fails to state a substantive due process claim because the facts alleged in the Complaint do not demonstrate a likely deprivation of a fundamental right

Citizen Center's first, second, and third claims for relief are Fourteenth Amendment substantive due process claims. Complaint, ¶¶ 125-144. The Supreme Court has described two strands of substantive due process protections. "One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." Seegmiller v. Laverkin City, 528 F.3d 762, 767 (10th Cir. 2008). The allegations in the Complaint are focused on the first strand as Citizen Center alleges various potential violations of "fundamental

rights."

A fundamental rights analysis requires two steps. First, the court must carefully describe the asserted fundamental liberty interest. Seegmiller, 528 F.3d at 769. Second, the court must decide "whether the asserted liberty interest, once described, is 'objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" Id. The allegations in the Complaint fail to show the deprivation or likely deprivation of a fundamental liberty interest.

1. The right to election procedures that make it impossible for a Clerk to identify how any individual voted is not a fundamental right protected by the United States Constitution.

The Clerks agree with and support the concept that every citizen is entitled to a fair and equal opportunity to participate in the election process. In fact, the electorate selected the individual Clerks, at least in part, because of their ability to ensure the proper conduct of elections within their jurisdiction. This case, however, is not about taking away anyone's right to vote. No allegation in the Complaint indicates that any clerk has prevented or will prevent any member of Citizen Center from voting in an upcoming election.

Citizen Center alleges that "some or all" of its unidentified members may choose not to vote because they are concerned future election procedures employed by the Clerks may make it possible for the Clerks to identify how individual members of Citizen Center voted. Complaint at ¶108. However, a plaintiff cannot transform a case about past election procedures into a voting rights case simply by indicating he or she may

choose not to vote in the future. Otherwise, any quibble regarding the election process could turn into a federal case. *See, e.g.* Leyva v. Bexar County Republican Party, 2002 U.S. Dist. Lexis 25916, *22 (W.D. Tex. December 5, 2002) ("cases in which a constitutionally-recognized claim is found involve either intentional conduct or a situation where an entire election process fails to afford fundamental fairness").[2] Thus, in fulfilling its obligation to "carefully describe" the asserted liberty interest at stake, the Court should conclude that the interest Citizen Center asserts is a future election process that makes it impossible for an elected clerk to determine how a particular voter cast his or her vote.

Citizen Center's members have no fundamental right to a future state election process that satisfies their preferences when it comes to a particular balloting or election system. "[S]tates have wide latitude in determining how to manage election procedures." ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1321 (10th Cir. 2008)*; see also* Am. Constitutional Law Found. v. Meyer, 120 F.3d 1092, 1097-98 (10th Cir. 1997) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections. The Supreme Court has upheld generally-applicable and evenhanded restrictions that protect the integrity of the electoral process.") (citations and internal quotations omitted). This is because "[t]he Constitution provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the [Supreme] Court therefore has recognized that States retain the power to regulate their own

[2] Copies of all unpublished opinions cited herein are attached as **Exhibit A-1**.

elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992). Thus, it is elected officials like the Clerks and the Secretary of State—rather than federal courts—that must "weigh the pros and cons of various balloting systems." Weber v. Shelley, 347 F.3d 1101, 1107 and n.2 (9th Cir. 2003) (citing cases).

In its Complaint, Citizen Center cherry-picks a few words from federal cases and bookends them with its own language, creating the false impression that federal courts have ruled that the issue of ballot secrecy from election officials necessarily implicates fundamental rights. However, "the Supreme Court has never recognized secrecy in voting as a constitutionally guaranteed right." Thompson v. Dorchester County Sheriff's Dept., 280 Fed. Appx. 328, 329 n. 2 (4th Cir. 2008)*; see also* Doe v. Reed, 130 S.Ct. 2811, 2832 (2010) (Scalia, J., concurring) ("We have acknowledged the existence of a First Amendment interest in voting, but we have never said that it includes the right to vote anonymously. The history of voting in the United States completely undermines that claim.") (citations omitted). The cases cited by Citizen Center are not to the contrary. On page 2 of the Complaint is Reynolds v. Sims, 377 U.S. 533, 554-555 (1964), which addressed Alabama's failure to reapportion itself, and does not mention ballot secrecy; and McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1995), which is about the distribution of anonymous campaign literature, and the quote on ballot secrecy is dicta from a footnote. Am. Constitutional Law Found., 120 F.3d at 1101-1102, considers the requirement that petition circulators should wear an identifying badge. Complaint at ¶2. Rogers v. Lodge, 458 U.S. 613 (1982) mentions ballot secrecy in a footnote from the dissent regarding the difficulty of discerning the

motives of voters. Id. at ¶3. The case is actually about whether an at-large system of elections violates the Fourteenth Amendment rights of African-American citizens. Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997), Complaint at ¶139, is an assisted suicide case that makes no mention of ballot secrecy. Thus, none of the cases cited by Citizen Center in its Complaint establish or define the alleged interests at stake here.

Citizen Center's claimed right also fails the second prong of the fundamental rights analysis. Citizen Center cannot show that a particular degree of ballot secrecy is objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *See* Seegmiller, 528 F.3d at 769. "The history of voting in the United States completely undermines that claim." Reed, 130 S. Ct. at 2834 (Scalia, J., concurring). In fact, the secret ballot is of purely *state* creation and all voting was public until 1888 when the States began to adopt the Australian secret ballot. Id. *at* 2834-2837.[3] Because the Complaint does not implicate a fundamental right, Citizen Center's substantive due process claims should be dismissed. *See* Kendall v. Balcerzak, 650 F.3d 515, 523 (4th Cir. 2011) (dismissing substantive due process claim because the state-created right of referendum is not itself a fundamental right).

[3] The Australian system adopted by the various states over time called for an official ballot that included all candidates of all parties on the same ticket, to replace the often very distinctive ballots produced by political parties; the erection of polling booths; and restricted access to voting areas by candidates and others. Burson v. Freeman, 504 U.S. 191, 200-204 (1992).

2. Citizen Center's asserted interest in a particular election process does not implicate the First Amendment

In addition to claiming that the election processes at issue burden its members' voting rights, Citizen Center argues that the facts alleged implicate their speech and associational rights under the First Amendment. Complaint at ¶¶111-121. However, Citizen Center's First Amendment arguments are simply variants on the same theme. As it does with its other fundamental rights claims, Citizen Center bootstraps its arguments about state election procedures into an argument about the ability to vote and then tacks on the assertion that the right to vote implicates First Amendment rights. Citizen Center's approach does not state a First Amendment claim.

Citizen Center's First Amendment argument that the Clerks' future election procedures will deter some of its members from voting and therefore affect their ability to express their political preference is similar to the First Amendment argument raised in Initiative & Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006). In Walker, an advocacy group launched a First Amendment challenge to a Utah law requiring a supermajority for wildlife initiatives. The group argued that the supermajority requirement "deterred wildlife advocates from *threatening* to launch a petition . . . and it has cowed proponents of initiatives on *other subjects* who fear similarly harsh treatment by the state legislature and the Governor." Id. at 1105 (emphasis in original). Like Citizen Center, the plaintiff in Walker argued that the challenged policy had a foreseeable side-effect of discouraging people from participating in the political process. The Tenth Circuit rejected the plaintiff's argument in Walker for the simple reason that "the supermajority requirement does not regulate speech" and therefore had "no

application in the case." Id. Likewise, because Citizen Center has failed to allege facts showing that its First Amendment rights—or any other fundamental rights—are violated or threatened, its substantive due process claims should be dismissed.

B. Citizen Center fails to state a procedural due process claim because it has not pled facts showing the deprivation of a state-protected liberty interest or the absence of an adequate state law remedy

In its fourth claim for relief, Citizen Center argues it will be deprived of its Fourteenth Amendment right to procedural due process. Complaint at ¶¶145-152. A person alleging he has been deprived of his right to procedural due process "must prove two elements: that he possessed a constitutionally protected liberty or property 'interest such that the due process protections were applicable,' and that he was not 'afforded an appropriate level of process.'" Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1256 (10th Cir. 2008). Citizen Center fails to allege facts sufficient to state a claim under either of these elements.

1. Citizen Center has failed to establish a liberty interest in a state election process that makes it impossible for an election official to determine the identity of a voter

Citizen Center asserts that it has a liberty interest created by article VII, section 8 of the Colorado Constitution, which states in part that "no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it." This section further states that: "Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved." Citizen Center broadly describes these constitutional provisions as a state-

created right to secrecy in voting. Complaint at ¶122. The Complaint, however, contains no allegations that any of the Clerks have publicly disclosed the votes of Citizen Center's members. Instead, the factual basis of alleged injury is that a locally-elected clerk may violate his or her oath of office—along with several provisions of Colorado criminal law—and reveal how a particular voter will vote in a future election. *See* C.R.S. §1-13-104 (perjury for those under oath); §1-13-107 (violation of duty); §1-13-701 (interference with election official); §1-13-712 (disclosing or identifying vote); §1-13-713 (intimidation); §1-13-723 (neglect of duty). According to Citizen Center, the only acceptable "cure" to this alleged potential injury is an election system that makes it impossible for an elected official to determine how any particular voter voted. Complaint, pg. 37 at ¶a (request for relief). This is not a liberty interest established by Colorado or federal law.

In essence, Citizen Center is asking this federal court to overrule a prior determination by the Colorado Court of Appeals that interprets the secrecy provisions in article VII, section 8 of the Colorado Constitution as protecting votes from *public* disclosure. Specifically, the Colorado Court of Appeals determined that under Article VII, § 8 of the Colorado Constitution "[a]n individual voter's identity is to be protected from *public disclosure*." Marks v. Koch, 2011 WL 4487753, *4 (Colo. App. 2011) (emphasis added).[4] In deciding this issue, the state court reasoned that Article VII, § 8 of the

[4] Certiorari has been granted on this issue by the Colorado Supreme Court in Koch v. Marks, 11SC816. Specifically, the Colorado Supreme Court granted certiorari on the issue of whether article VII, section 8, of the Colorado Constitution prohibits making cast election ballots available for public inspection pursuant to the Colorado Open Records Act, sections 24-72-200.1, *et seq.,* C.R.S. The determination by the Colorado Supreme

Colorado Constitution explicitly "in its second sentence states that election officials 'shall be sworn or affirmed not to inquire or disclose how any elector shall have voted'" which "coincides with the election officials' viewing of the marked ballots." Id. (emphasis removed, citations omitted). The Colorado Constitution, thus, specifically contemplates election officials reviewing ballots and, in some circumstances, determining how an elector voted. Otherwise, the oath provision would be superfluous.

The Colorado Court of Appeals is not unique in determining that ballot secrecy relates to public disclosure of individual votes rather than the review of ballots by election officials in the course of their official duties. For example, the Sixth Circuit analyzed the issue of whether a state law that allowed individuals to assist blind voters in marking ballots violated a state constitutional provision regarding voter secrecy. Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999). Deferring to prior legislative determinations of the state legislature, the Sixth Circuit determined that such assistance did not violate secrecy of the ballot. Id. at 653. *See also* Burke v. State Bd. of Canvassers, 107 P.2d 773, 779 (Kan. 1940) (election officials are bound by statute to "keep the fact of such vote and the person for whom the same is recorded and the contents thereof secret and shall not reveal or divulge the same"); Bridgeman v. McPherson, 45 Cal. Rptr. 3d 813, 820 (Cal. App. 3d 2006) (the legislature could authorize voting by fax for citizens outside the country without violating the constitutional secret ballot requirement, even though an election official inspecting an incoming fax

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Court on the scope of the secrecy protections afforded ballots under the Colorado Constitution is an unsettled issue of state law that this Court should abstain from deciding prior to the Colorado Supreme Court. *See* Section II.C.2, *infra*.

ballot would know the identity of the person casting the ballot); Pullen v. Mulligan, 561 N.E.2d 585, 605-606 (Ill. 1990) (because numbered ballots were not actually traced to particular voters at any time during or after the voting process, secrecy of the ballots had not been violated); United States v. Exec. Comm. of the Democratic Party of Greene County, 254 F.Supp. 543, 546-47 (N.D. Ala. 1966) (upholding Section 8 of the Voting Rights Act allowing for federal observers to attend any place for holding an election and aid individuals unable to mark votes against challenge that the presence of observers violated the right to a secret ballot); Peterson v. City of San Diego, 666 P.2d 975, 978 (Cal. 1983) (rejecting challenge to use of mail ballots based on allegations that the use of mail ballots violated state constitutional requirement for secret ballots). Because Citizen Center cannot demonstrate that it has a state-law established liberty interest in an election process that makes it impossible for an election official to identify a particular vote, it has failed to state a procedural due process claim.

2. Even assuming a protected state law liberty interest exists, Citizen Center cannot establish a procedural due process claim because Colorado provides an adequate state law remedy

In addition to pleading a protected liberty interest, Citizen Center must show the absence of adequate state law remedies. Couture, 535 F.3d at 1256. Presumably, Citizen Center's injury claim is premised on an individual clerk knowing how a particular individual voted *and* sharing that information with others. In Colorado, a clerk who publicly discloses how a voter voted violates numerous laws that impose significant criminal penalties for each offense. *See* C.R.S. §1-13-104 (perjury for those under oath with a penalty of imprisonment for up to 18 months and/or $5000); §1-13-107 (violation

of duty with a penalty of 1 year and/or $1000); §1-13-701 (interference with election official); §1-13-712 (disclosing or identifying vote); §1-13-713 (intimidation); §1-13-723 (penalty for neglect of duty). Courts recognize that such laws serve to protect the integrity of the ballot, acknowledging that some records retained by elections officials could be traceable to a voter. Turner v. Webster, 637 F. Supp. 1089, 1091 (N.D. Ala. 1986); Burke, 107 P.2d at 779. Thus, any hypothetical future injury to Citizen Center's members would necessarily involve malfeasance by a clerk. When a deprivation results from a "failure of agents of the State to follow established state procedure," then the availability of a post-deprivation remedy precludes a procedural due process claim. Parratt v. Taylor, 451 U.S. 527, 543 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

The post-deprivation remedy available to the individual members of Citizen Center is a state law tort claim against the clerk who violates the law and discloses the vote of an individual. While it would be up to the individual plaintiff to determine the best theory under which to proceed, one possible tort claim would be invasion of privacy. In Colorado, the tort of invasion of privacy is well-recognized. Denver Publ. Co. v. Bueno, 54 P.3d 893, 897 (Colo. 2002). Although a clerk, as a public official, is typically immune from torts under the Colorado Governmental Immunity Act, an exception exists for actions by public employee that are "willful and wanton." C.R.S. § 24-10-118(2)(a). Thus, any mental distress or anguish that a voter may experience as a result of a clerk intentionally exposing how an individual voted could be remedied through a tort claim. *See* Joe Dickerson & Assocs., LLC v. Dittmar, 34 P.3d 995, 999 (Colo. 2001). Indeed,

such a remedy is far more practical than a federal lawsuit such as this one, which is premised on the idea that any number of elected officials may in the future commit a criminal act.

A discussion of "remedy" would be remiss if it ignored the real dispute at the center of this case. Citizen Center has chosen certain county clerks as the targets of its displeasure. It disagrees with past choices these clerks have made about the best way to conduct an election, choices ranging from the types of voting equipment to the format of the ballot to how voted ballots are sorted. These are political and philosophical—not legal—disputes, and Citizen Center's true remedy is found at the ballot box or in the state legislature—not in federal court. *See* Clayton v. Place, 884 F.2d 376, 381 (8th Cir. 1989) ("the proper remedy for plaintiffs' disenchantment with a Board that refused to change a rule . . . is found at the ballot box and not in the Constitution"). Because of the availability of adequate state law remedies, Citizen Center has failed to state a procedural due process claim.

C. Citizen Center's equal protection claim must be dismissed because the allegations do not establish that this is a "fundamental rights" case or that an adequate basis exists for an equal protection claim

Citizen Center's fifth claim for relief is a Fourteenth Amendment equal protection claim. Complaint at ¶¶153-161. "Equal protection jurisprudence has traditionally been concerned with governmental action that disproportionally burdens certain classes of citizens." Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1215-16 (10th Cir. 2011). Citizen Center, however, makes no attempt to allege that its organization is a class, that its members are a part of an identifiable class, or that—individually or as a

whole—its members were treated differently than some other specifically identifiable class. *See, e.g*., Complaint at ¶155. Likewise, Citizen Center does not claim that its organization or its members are a "class of one" that the clerks treated differently than similarly situated individuals for no objectively reasonable basis. *See* Kansas Penn Gaming, 656 F.3d at 1219. Under the Complaint as alleged, there is no greater risk of ballot exposure to a member of Citizen Center as opposed to any other member of the electorate. Thus, the only possible basis for its equal protection claim is the voter rights cases that apply the "fundamental rights" strand of the Fourteenth Amendment. *See* Anderson v. Celebrezze, 460 U.S. 780, 787 n. 7 (1983); *see also* Complaint at ¶157.

1. Citizen Center fails to state a "fundamental rights" equal protection claim because its claim does not implicate the right to vote

Unlike the voter rights cases typically considered by federal courts, Citizen Center's equal protection claim does not involve state limitations on the ability of a voter to cast a vote. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (finding a poll tax unconstitutional on equal protection grounds); City of Herriman v. Bell, 590 F.3d 1176, 1184-85 (10th Cir. 2010) (rejecting an equal protection challenge to a state statute placing residency restrictions on a school district detachment vote). Likewise, the claim does not involve how or whether certain votes will be counted. *See, e.g.,* Bush v. Gore, 531 U.S. 98 (2000). Instead, Citizen Center alleges the different treatment involves "disparate likelihoods [of] . . . ballots being made identifiable." Complaint at ¶156. As discussed in Section II(A) above, states are entitled to substantial deference regarding the particular method of administering their elections. As a result, Citizen Center's allegations do not implicate the fundamental right to

participate equally in elections with other voters in those same jurisdictions. *See also* Angel v. City of Fairfield, 793 F.2d 737, 739-40 (5th Cir. 1986) (rejecting an equal protection challenge to an election because it was no more than a "garden variety" election challenge "promenading in disheveled constitutional dress"). Because this case does not state a "voter rights" equal protection claim and it fails to state the bare elements of any other type of equal protection claim, it should be dismissed.

2. Even if this case implicates the right to vote, Citizen Center failed to state an adequate factual basis for an equal protection claim

Although Citizen Center does not identify the number of individuals its group represents, the facts alleged in support of its equal protection claim show that its argument is based on individual circumstances rather than identifiable categories of voters. Specifically, Citizen Center claims its members are similarly situated to each other and are similarly situated to other "persons" who have voted or will vote. Complaint at ¶155. In essence, Citizen Center is requesting that the Court pick a group of discrete, individual voters and compare them to other individual voters. This is not an accepted approach for an equal protection claim based on voter rights.

> [W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without discriminatory intent, a generally applicable law with a disparate impact is not unconstitutional.

Crawford v. Marion County Election Bd., 553 U.S. 181, 207 (2008) (Scalia, J., concurring).

Indeed, Citizen Center's factual allegations about the odds of a voter being identified by that voter's ballot show that its equal protection complaint is about the different individual impacts of a single, uniform burden on all voters within a particular county. Specifically, all voters within a particular county are exposed to a uniform set of choices regarding when to vote, where to vote, what methodology they will use to vote, and how votes will be tabulated. *See* Complaint at ¶156. Voters' ballot styles may further be limited by the particular jurisdiction they vote in (i.e., what city within a particular county). *See* id. Factual allegations revealing that individual voters experience different impacts as a result of the same burden do not state an equal protection claim. Crawford, 553 U.S. at 205 (Scalia, J., concurring) ("[O]ur precedents refute the view that individual impacts are relevant to determining the severity of the burden [a voting regulation] imposes."); s*ee also* ACLU of N.M., 546 F.3d at 1320-21 (rejecting an equal protection challenge to a law that treated in-person voters differently than absentee voters).

The only attempt to compare actual burden Citizen Center makes is where it alleges voters in one county may be subject to more or less ballot secrecy than those in another. Complaint at ¶156. Such an equal protection claim is defective. County clerks only have jurisdiction in their own counties. *See* Colo. Const. art. XIV, § 8. "[I]n order to state a §1983 claim, a plaintiff must show the defendant 'caused' the constitutional violation…" Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990). Thus, the Boulder County Clerk and Recorder cannot be held liable because she treated a Boulder County voter one way and the Chaffee County Clerk and Recorder treated a Chaffee County

voter differently. *See* Dunn v. Blumstein*,* 405 U.S. 330, 336, (1972*)* ("a citizen has a constitutionally protected right to participate in elections on an equal basis *with other citizens in the jurisdiction."*) (emphasis added); *see also* Angel*,* 793 F.2d at 739-40. Because Citizen Center has failed to state facts supporting its equal protection claim, it should be dismissed. *See* Crider v. Bd. of County Comm'rs of the County of Boulder, 246 F.3d 1285, 1288 (10th Cir. 2001).

C. Plaintiff has failed to state a claim under the Colorado Constitution

Plaintiff's Sixth and Seventh Claims for relief allege a state due process and state secret ballot claims premised on the Colorado Constitution's protection of voter secrecy.

1. The Colorado Constitution does not prevent election officials from discovering how an individual voter voted, it only protects public disclosure of that information

The Colorado Constitution does not establish any prohibitions on election officers from, in the course of conducting an election and tabulating results, learning how an individual voter voted. In fact, the secrecy provision of the Colorado Constitution, Art. VII, § 8, specifically acknowledges that in the course of the election an election officer might discover how a particular voter voted and imposes an affirmative obligation upon the election worker not disclose that information. Thus, Citizen Center bases its Sixth and Seventh Claims for Relief on a protection that is not afforded in the Colorado Constitution and, thus, Art. VII, § 8 cannot serve as substantive basis for this claim.

2. This Court should abstain from ruling on the state law claims pursuant to *Pullman* abstention

The doctrine of Pullman abstention arises out of the traditions of federalism and

comity and is based on the principle that unsettled questions of state law must be resolved by the state courts before a substantial federal constitutional question can be decided. *See* Univ. of Utah v. Shurtleff, 252 F.Supp.2d 1264, 1284 (D. Utah 2003) (*citing* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500, 85 L.Ed. 971, 61 S.Ct. 643 (1941)).

> In Pullman, the Court established that, when a constitutional question is premised on an unsettled question of state law, the federal court should postpone adjudication of the case while a separate action is adjudicated in state court. The Court found that Pullman demonstrates a 'scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.' Thus, the Pullman abstention doctrine 'serves the dual aims of avoiding advisory constitutional decisionmaking, as well as promoting the principles of comity and federalism by avoiding needless federal intervention into local affairs'.

Shurtleff, 252 F.Supp.2d at 1284-85 (citations omitted).

Three prerequisites must be satisfied in order for Pullman abstention to apply, which are as follows: (1) an uncertain issue of state law underlies the constitutional claim; (2) the state law issues are amenable to interpretation and such interpretation may obviate or substantially narrow the need for a federal court ruling on the constitutional issue; and (3) an incorrect decision of state law by the district court would hinder important state policies. *See* Shurtleff, 252 F.Supp.2d at 1285 (*citing* Lehman v. City of Louisville, 967 F.2d 1474, 1478 (10th Cir. 1992)).

With respect to Plaintiff's claims premised on the scope of protections for secret ballots afforded under the Colorado Constitution that is an unsettled issue of law in Colorado. There is very limited case law interpreting the scope of the protection of cast ballot information under Article VII, Section 8 of the Colorado Constitution. As direct

evidence of the unsettled nature of this question, this Court need look no further than the case of Koch v. Marks, 11SC816, currently pending before the Colorado Supreme Court in which the Colorado Supreme Court is considering whether the secret ballot provisions of Art. VII, Sec. 8 of the Colorado Constitution prohibit the release of cast ballot information under the Colorado Open Records Act ("CORA"). This decision in Koch v. Marks, while not exactly the issue before this Court, should provide this Court guidance on the scope of the protections afforded ballots from disclosure under the Colorado Constitution. The issue of whether the Colorado Constitution establishes the right of Colorado citizens to preservation of secrecy in voting and the scope of that right is subject to interpretation and if the Colorado Supreme Court finds that this provision only protects against public disclosure of cast ballot information or that it only protects the act of voting and not the ballot itself, then the claims asserted by Citizen Center would not be premised on an actionable state created right. Complaint at ¶122. In light of the authority given to states to administer and develop their own systems of conducting elections, any decision by this court interpreting the scope of secrecy afforded voters by the Colorado Constitution would infringe unnecessarily on issues of critical importance under state law and are best deferred to the Colorado Supreme Court for determination. Thus, given the weighty and important state law considerations surrounding the scope of protections afforded cast ballots in Colorado, this Court should defer from any rulings on Plaintiff's state law claims until after the Colorado Supreme Court has had the opportunity to interpret the related issue now before it in the case of Koch v. Marks. *Accord*, S & S Pawn Shop, Inc. v. City of Del City, 947 F.2d 432, 442

(10th Cir. 1991) (Pullman abstention prevents a federal court from "basing a constitutional decision on a forecast of state law that may later be displaced by an authoritative state adjudication.").

3. The state law claims should be dismissed for lack of subject matter jurisdiction

Because Citizen Center's federal constitutional claims should be dismissed for the reasons stated above, the Court lacks jurisdiction over the state constitutional claims under 28 U.S.C. § 1367(a). The Complaint must therefore be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

III. Plaintiff has failed to state a claim for injunctive or declaratory relief

A. General requests for injunctive relief ordering a public entity to comply with state law or to fulfill its statutory duties are not appropriate

A request that a defendant be ordered to comply with the law is not an appropriate form of injunctive relief. Monreal v. Potter, 367 F.3d 1224, 1236 (10th Cir. 2004) (injunctions simply requiring the defendant to obey the law are too vague to satisfy Fed. R. Civ. P. 65); Glover Constr. Co. v. Babbitt, 1999 WL 51784, *2 (10th Cir. 1999) ("We add that Glover Construction's request for injunctive relief is nothing more than an artfully phrased prayer for the court to require Cherokee Nation to obey the law in the future. Such injunctions are not appropriately issued."); Atwell v. Gabow, 248 F.R.D. 588, 596 (D. Colo. 2008) (appropriate injunctive relief must be specific in terms and describe in reasonable detail the act or acts sought to be restrained, and injunctions simply requiring defendant to obey the law and prohibiting defendant from violating it are impermissible).

Here, there are no allegations in the Complaint that the Clerks have publicly disclosed cast ballots that are individually identifiable and, thus, the Complaint cannot support a request for injunctive relief. Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir. 1996) ("[A]ppellate courts will not countenance injunctions that merely require someone to 'obey the law.'"); Keyes v. Sch. Dist. No. 1, 895 F.2d 659, 668 (10th Cir. 1990) ("[I]njunctions simply requiring the defendant to obey the law are too vague."). Similarly, injunctions are not an appropriate remedy to stop an individual from committing a future crime, in this case the disclosure of individual voter choice. United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969) ("[C]ourts [except in limited circumstances not relevant here] have no power to enjoin the commission of a crime."); Quinn v. Aetna Life & Cas. Co., 482 F.Supp. 22, 29 (E.D. N.Y. 1979) (same).

Here, the Complaint seeks an injunction prohibiting the Clerks from implementing policies or practices that might permit any voted ballot to be individually identifiable. Complaint, pg. 38 at ¶b (request for relief). Such broad, non specific requests for injunctive relief are not supported under the law. *See* Louis W. Epstein Family P'ship v. Kmart Corp., 13 F.3d 762, 772 (3rd Cir. 1994) ("Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement, however, does not give the restrained party fair notice of what conduct will risk contempt."); Nader, 555 F.Supp.2d at 152 ("[T]he courts do not issue entirely prospective decrees enjoining parties from engaging in 'unlawful conduct' *ex ante* without enunciating the actions contemplated or undertaken, the court denies the request for injunctive relief as

inappropriate.").[5]

B. Plaintiff has failed to state a viable claim for declaratory relief

In order for a Court to issue declaratory relief, there must be an actual controversy. *See* Joslin v. Sec'y of the Dept. of the Treasury, 832 F.2d 132, 134-35 (10th Cir. 1987). "For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'" Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739, 1740 (1977) (citations omitted). Here, for all the reasons addressed in the arguments on standing, Citizen Center's alleged harm-that its members' ballots may possibly be identified and exposed-is too speculative, meaning it cannot satisfy the actual controversy requirement necessary for obtaining declaratory relief. *Accord*, Stamps v. Smith, 2010 WL 901686, *3 (D. Colo. 2010) ("[T]he question in a declaratory judgment action 'is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'").

[5] Citizen Center's request for injunctive relief is also inadequate in that Citizen Center has failed to plead facts sufficient to establish imminent harm. "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (citations omitted). "'[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" Id. (citations omitted). *See also* State of New York v. Nuclear Regulatory Comm., 550 F.2d 745, 755 (2d Cir. 1977) ("[T]he award of preliminary injunctive relief can and should be predicated only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are actual and imminent."). Here, vague allegations that a ballot might be exposed in the future are insufficient to establish actual and imminent harm.

Moreover, even if Citizen Center had stated a justiciable declaratory judgment claim, to the extent it seeks to have the federal court decide the scope of the Colorado Constitutional protections of ballot secrecy, this Court should decline to exercise jurisdiction over Citizen Center's declaratory judgment claim.

> The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. Whether to entertain a justiciable declaratory judgment action is a matter committed to the sound discretion of the trial court.

Kunkel v. Cont'l Cas. Co., 866 F.2d 1269, 1273 (10th Cir. 1989) (citations and internal quotations omitted). Given the disputed issues of state law underlying Citizen Center's claim for declaratory relief, declaratory judgment by the federal court would not be appropriate.

> A declaration by this Court, based primarily upon its interpretation of disputed state law…would necessarily raise grave concerns about federal interference in state and local affairs.
>
> * * *
>
> Where, as here, the existence of actual controversy depends upon uncertain contingencies directly within the control of a city's legislative body, and the issue presented is primarily one of disputed state law, this Court will exercise its discretion to decline to hear a petition for declaratory judgment.

Pub. Serv. Co. of New Mexico v. City of Albuquerque, 755 F.Supp. 1494, 1503-04 (D. N.M. 1991); *see also* State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994) (amongst the factors the court can consider in deciding to entertain a declaratory judgment action is whether it would improperly encroach on state jurisdiction). Because of the significant state law issues regarding the scope and extent of ballot secrecy,

discussed above, this Court should refrain from entertaining Plaintiff's request for declaratory relief.

WHEREFORE, the Clerks respectfully request that this Court dismiss Citizen Center's Complaint pursuant to Fed.R.Civ.P. 12(b)(1) on grounds that Plaintiff lacks standing to assert its claims and pursuant to Fed.R.Civ. 12(b)(6) on grounds that Plaintiff has failed to state claim for which relief can be granted.

Respectfully submitted this 4th day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of June, 2012, I filed the foregoing **COUNTY CLERKS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT** via the U.S. District Court ECF/PACER system, which will send an electronic copy via email to the following:

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LexisNexis®

GEORGE LEYVA, et al., Plaintiffs, VS. THE BEXAR COUNTY REPUBLICAN PARTY and ROY R. BARRERA JR. in his official capacity as Bexar County Republican Party Chairman, Defendants.

Civil Action No. SA-02-CA-408-EP

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

2002 U.S. Dist. LEXIS 25916

December 5, 2002, Decided
December 5, 2002, Filed

DISPOSITION: [*1] Defendants' motions for parital summary judgment granted. Plaintiffs' Motion for partial summary judgment, denied. Plaintiffs' state law claims dismissed without prejudice. Parties' requests for attorneys' fees denied

COUNSEL: For GEORGE LEYVA, KATHRYN MAUTHE, MARY MENDIAS, BILLIE DEAN, MICHELLE JONES, MIGUEL MARTINEZ, plaintiffs: Andy Taylor, Amanda E. Peterson, Locke, Liddell & Sapp, LLP, Houston, TX.

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JUDGES: EDWARD C. PRADO, UNITED STATES DISTRICT JUDGE. ORLANDO L. GARCIA, UNITED STATES DISTRICT JUDGE. FORTUNATO P. BENAVIDES, UNITED STATES CIRCUIT JUDGE.

OPINION BY: EDWARD C. PRADO; ORLANDO L. GARCIA; FORTUNATO P. BENAVIDES

OPINION

ORDER REGARDING SUMMARY JUDGMENT

On this date, the Court considered the parties' motions for summary judgment, responses and replies. These motions include the following: (1) Plaintiffs' Motion for Partial Summary Judgment, filed June 25, 2002, and Defendants' response and Cross-Motion for Summary Judgment as to Plaintiffs' First Cause of Action, filed July 26, 2002, and Plaintiffs' response; (2) Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Claims Under *Section 2 of the Voting Rights Act*, filed August 5, 2002, Plaintiffs' response, and Defendants' reply; and (3) [*3] Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Claims Requiring Proof of Intentional Discrimination [Third, Fifth and Sixth causes of action], filed July 24, 2002, Plaintiffs' response and Defendants' reply. After careful consideration, the Court will deny Plaintiffs' motion and grant Defendants' motions.

I. Facts and Procedural History

In the days leading up to the March 12, 2002 Republican Party Primary, the Bexar County Republican Party discovered that it was facing an unexpected shortage of volunteer election judges for the primary election. The

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shortage was the result of a combination of factors, including delays in setting precinct lines caused by redistricting, the Democratic Party's decision not to hold a joint primary, and a high number of cancellations by volunteers. Defendants maintain that this shortage was not discovered until Sunday, March 10, 2002, when a number of election judges failed to pick up their poll packages. The election staff called the absentee judges through Monday, March 11, 2002, to confirm their status and to try to find replacements.

When the Republican Party realized there would be a shortage of election judges, it decided [*4] to co-locate the polling places with absentee election judges to the Bexar County Republican Party headquarters. Fifty-six polling sites, representing 163 precincts, were re-located to the Republican Party headquarters. Some precincts were also co-located to places other than the Republican Party headquarters. The Republican Party election staff contacted the San Antonio Express News and had volunteers place signs at many of the unopened polling places in an effort to notify the public as to which polling locations were changed. As a result, the polling locations published in the newspaper on election day were markedly different than those published on the day before the election.

On election day, many voters experienced problems finding their polling locations. That day, a temporary restraining order was issued by State District Judge Michael Peden, pursuant to which certain polling locations in Bexar County, both Republican and Democrat, were ordered to remain open until 10:00 P.M. The order was intended to give voters affected by the problems related to the polling locations additional time to cast their ballots.

Plaintiffs allege that Defendants' actions violated *section 2* and [*5] *section 5 of the Voting Rights Act.* Plaintiffs further allege that Defendants' actions disproportionately affected racial minorities in violation of state and federal law. On April 24, 2002, Plaintiffs filed this lawsuit and moved for a temporary restraining order, which the Court denied on April 29, 2002. On May 21, 2002, Defendants filed a preclearance submission with the Department of Justice, and on July 22, 2002, the Department of Justice granted retroactive preclearance. After a short discovery period, the parties filed several dispositive motions, including the four summary judgment motions considered in this order.

II. Summary Judgment Standard

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. *See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990)*; *Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).* [*6] To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. *See Celotex Corp., 477 U.S. at 325*; *Lavespere, 910 F.2d at 178.*

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. *See Fields v. City of South Houston, 922 F.2d 1183, 1187 (5th Cir. 1991).* The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists. *See Celotex, 477 U.S. at 324*; *Fields, 922 F.2d at 1187.* In order for [*7] a court to find there are no genuine material factual issues, the court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Liberty Lobby, 477 U.S. at 249-50*; *FED. R. CIV. P. 56(e).*

III. *Section 5 of the Voting Rights Act*

Plaintiffs allege that there is no genuine issue of material fact as to whether Defendants violated *§ 5 of the Voting Rights Act.* Defendants, in their cross-motion, allege that because Plaintiffs' claim has been precleared by the Department of Justice, summary judgment should be granted in Defendants' favor.

"[A] three-judge court convened under *Section 5* is a court of limited jurisdiction and limited authority." *Campos v. City of Houston, 968 F.2d 446, 451 (5th Cir. 1992)* (per curiam). The three-judge court determines "(1) whether a change [is] covered by *§ 5*, (ii) if the change [is] covered, whether *§ 5*'s approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate. [*8] " *City of Lockhart v. United States, 460 U.S. 125, 129 n. 3, 74 L. Ed. 2d 863, 103 S. Ct. 998 (1983).* In entertaining an action under *Section 5 of the Voting Rights Act*, a three-judge court does not consider the merits of a plaintiff's claim that the proposed changes are discriminatory.

United States v. Bd. of Supervisors, 429 U.S. 642, 51 L. Ed. 2d 106, 97 S. Ct. 833 (1977); *Perkins v. Matthews, 400 U.S. 379, 385, 27 L. Ed. 2d 476, 91 S. Ct. 431 (1971)*.

A. Retroactive Preclearance

Defendants maintain that the Court should grant summary judgment in their favor because Plaintiffs' claim regarding *§ 5 of the Voting Rights Act* has been approved by the Attorney General. In a letter dated July 22, 2002, Joseph D. Rich, Acting Chief of the Voting Section of the Department of Justice, stated that the Attorney General "does not interpose any objection to the specified changes." The changes referred to in the letter include the polling place closures and consolidations and the establishment of a polling place at the Republican headquarters.

The United States Supreme Court has not directly addressed the issue of retroactive preclearance [*9] in *Voting Rights Act* cases. However, in *Berry v. Doles, 438 U.S. 190 (1978)*, the Supreme Court allowed the appellees 30 days in which to submit the changes in election procedure to the Attorney General for approval and found that approval would end the case. "We adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under *§ 5*. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election." *Id. at 192-193*. In *East Flatbush Election Committee v. Cuomo, 643 F. Supp. 260, 264 (E.D.N.Y. 1986)*, the voting procedures had been retroactively approved at the time the court was reviewing the *§ 5* claim. The three-judge court in *East Flatbush* held that "retroactive federal approval satisfies the preclearance requirements of *§ 5*." *Id.* Because the new procedures were eventually approved, the *East Flatbush* court held that the changes did not violate *§ 5*.

[*10] *The Voting Rights Act of 1965* was enacted to effectuate the provisions of the *Fifteenth Amendment* and to ensure that no citizen's right to vote is denied or abridged on account of race or color. In his July 22, 2002 letter, Mr. Rich indicated that the Attorney General approved the election-day changes. Thus, the Attorney General's retroactive preclearance constitutes a finding that this change did not abridge citizens' right to vote. As a result, the polling closures, consolidations and the opening of a polling place at Republican headquarters does not violate *section 5 of the Voting Rights Act*. Accordingly, Defendants are entitled to summary judgment on this issue.

B. Subsequent Litigation to Enjoin Enforcement

In their response to Defendants' motion, Plaintiffs note that while preclearance case law suggests that preclearance ends a *§ 5* enforcement action, it does not bar subsequent civil litigation to enjoin enforcement of the covered changes. Plaintiffs continue to pursue their claims for injunctive relief to enjoin such action from occurring again in the future.

In *Morris v. Gressett,* the Supreme Court stated, "This Court has recognized that 'once the State [*11] has successfully complied with the *§ 5* approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by *§ 5*.'" *Morris v. Gressett, 432 U.S. 491, 53 L. Ed. 2d 506, 97 S. Ct. 2411 (1977)* (quoting from *Allen v. State Bd. of Elections, 393 U.S. 544, 549-550, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969)*). Thus, Plaintiffs cannot pursue their claim to enjoin the enforcement of Defendants' actions under *§ 5*.

C. New Election

The Court also finds setting aside the March 12, 2002, election is not an appropriate remedy under *§ 5*. Defendants' actions to relocate and consolidate polling places was a hasty response to alleviate unforeseen election-day problems -- not a deliberate attempt to circumvent the preclearance requirements of *§ 5*. Because setting aside a local election is a drastic remedy, the Court will not impose such a remedy in relation to Plaintiffs' *§ 5* claims.

D. Attorneys' Fees

Both parties have also moved for attorneys' fees under § 5. *Section 1973l(e)* provides in relevant part:

> In any action or proceeding [*12] to enforce the voting guarantees of the *fourteenth* or *fifteenth amendment*, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973l(e).

The Supreme Court in *Farrar v. Hobby* explained that a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby, 506 U.S. 103, 111-12, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992)*; *see also TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705, 711 (5th Cir. 1994)*. The

Court further observed that "no material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Farrar, 506 U.S. at 113.*

The Court has determined that Plaintiffs cannot prevail on their claims under *§ 5 of the Voting Rights Act.* Although Plaintiffs contend that they are entitled to attorneys fees because their [*13] suit caused Defendants to make a preclearance submission, the Court finds that Plaintiffs' lawsuit did not cause Defendants to make a preclearance submission. Defendants made a voluntary "preclearance" submission after the relevant voting change had taken effect. In this particular instance, the Attorney General retroactively ratified the change, finding that it did not abridge citizens' right to vote. Whether Plaintiffs would have been entitled to attorneys' fees had the Attorney General not retroactively approved the change remains an open question. Similarly, the Court need not decide the question of whether Plaintiffs would have been entitled to attorneys' fees had Plaintiffs' suit caused Defendants to submit the change for preclearance in advance of the implementation of the change. On the facts at hand, the Court finds Plaintiffs are not a prevailing party under *§ 5 of the Voting Rights Act.*

The Court also finds that Defendants are not entitled to attorneys' fees on this claim. Had Defendants filed their preclearance submission with the Department of Justice immediately after the election, this matter would have been resolved in a more timely fashion. As a result, the Court [*14] finds that each party shall pay its own costs as to Plaintiffs' claim under *§ 5 of the Voting Rights Act.*

IV. *Section 2 of the Voting Rights Act*

Section 1973(a) applies to any "voting qualification or prerequisite to voting or standard, practice or procedure." *42 U.S.C. § 1973(a).* In their motion for summary judgment, Defendants argue that *§ 1973* is not implicated because their actions do not constitute a standard, practice or procedure. Plaintiffs disagree, maintaining that *§ 1973* applies to non-permanent barriers to voting as long as the standard, practice or procedure results in denial of equal access to the electoral process. *See* S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.S.C.A.N. 177, 207.

The Eleventh Circuit decided a case involving similar facts in *United States v. Jones, 57 F.3d 1020 (11th Cir. 1995)* and held that an inadvertent error does not constitute a standard, practice or procedure. In *Jones*, the County Commission of Dallas County, Alabama adopted a new redistricting plan which provided for five single-member districts, three with African-American majorities and two with Caucasian majorities. *Id. at 1021.* [*15] Prior to the election, county officials attempted to notify voters who were to vote in a new district, but much confusion resulted. As a result, some residents voted in the wrong district in both the primary election and the general election. *Id. at 1021-22.* In the District 2 County Commission election, the Caucasian candidate defeated the African-American candidate by 10 votes. *Id. at 1022.* The United States filed a lawsuit under *§ 2 of the Voting Rights Act*, alleging that election officials had permitted 52 Caucasian voters who lived outside District 2 to vote in the District 2 election, therefore depriving African-American voters of an equal opportunity to elect their preferred candidate and participate effectively in the political process. *Id. at 1022.*

The Eleventh Circuit found that this situation did not constitute a "standard, practice or procedure" for purposes of *§ 2.* To support this finding, the court noted that "the misallocation of voters was not the result of any deliberate act by defendants." *Id.* The court agreed with the district court's conclusion that the misallocations were "no more than the type of errors [*16] one would expect in the normal course of any election, and especially in the circumstances surrounding the necessity of the Board of Registrars focusing in a very short time on relocating some 2,000 to 3,000 voters in the new District 2 alone." *United States v. Jones, 846 F. Supp. 955, 962 (S.D. Ala. 1994).* The appellate court also noted that two of the three members of the Board of Registrars, including its chairman, were African-American. *Jones, 57 F.3d at 1024.* The court "found no case holding that an inadvertent error can constitute a standard, practice, or procedure under *Section 2.*" *Id.*

Plaintiffs submit that Defendants' actions are more analogous to *Brown v. Dean, 555 F. Supp. 502, 503 (D.R.I. 1982).* In *Brown*, a district polling place was moved between the primary and general elections from a local community center to a location that plaintiffs alleged was less convenient for minority voters. The court held that the location of a polling place was a "standard, practice or procedure" which violated *§ 1973. Id. at 505* (citing *Perkins v. Matthews, 400 U.S. 379 (1971)* (holding that a change [*17] in polling location requires preclearance under *§ 5 of the Voting Rights Act*)). The *Brown* court noted that the *Perkins* Court "specifically held that the use of polling places at locations remote from black communities, or at places calculated to intimidate blacks from entering (when alternatives were available), was a practice or procedure which violated *Section 1973.*" *Id.*

The Court finds that Defendants' reactions to the problems that arose in the course of the March Republican primary do not constitute standards, practices, or procedures. The Court finds that the relevant distinction between *Brown* and the instant case is that the Bexar County officials were responding quickly to problems

that arose in the course of several days, whereas in *Brown*, the plaintiffs were able to challenge the polling location before the election was held. If there had been a standard, practice or procedure in place related to the change in polling locations, Plaintiffs in this case could have challenged that standard, practice or procedure before the election took place. Defendants have testified that the changes in polling locations took place because the Bexar County Republican [*18] Party suffered an unexpected shortage of election judges. This situation is similar to the mistakes made in *Jones*, where the county had a limited time to accomplish redistricting and mistakes were made in the carrying out of the redistricting plan. As in *Jones*, this Court finds that hurried changes in response to problems that could keep many polling places from opening are not a standards, practices or procedures under *§ 2 of the Voting Rights Act. Consequently, Defendants* are entitled to summary judgment on Plaintiffs' *§ 2* cause of action.

V. Third and Fifth Causes of Action

In their third cause of action, Plaintiffs allege that Defendants intentionally switched polling place locations with the purpose of denying and abridging the right to vote on account of race, color and membership in a language minority group in violation of the *Fourteenth* and *Fifteenth Amendments to the United States Constitution.* In their fifth cause of action, Plaintiffs allege that Defendants' actions had the effect of denying or abridging the right to vote under color of state law in violation of *42 U.S.C. § 1983*. Defendants allege that Plaintiffs must have proof [*19] of intentional or purposeful discrimination to be successful on each of these claims.

The Supreme Court held that claims under the *Fourteenth* and *Fifteenth Amendments* require proof of discriminatory intent in *Rogers v. Lodge, 458 U.S. 613, 616-17, 73 L. Ed. 2d 1012, 102 S. Ct. 3272 (1982)*. The Fifth Circuit, in *Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980)*, issued the following guide for determining whether a challenge to a state election practice rises to a level deserving of federal protection:

> As *Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)*, requires in tort cases, the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of a pattern that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process and whether state officials have succumbed to 'temptations to control ... elections by violence and by corruption ....'

Gamza, 619 F.2d at 453 [*20] (quoting *Ex parte Yarbrough, 110 U.S. 651, 666, 28 L. Ed. 274, 4 S. Ct. 152 (1884))*.

The language from *Gamza*, while not focused exclusively on intentional or purposeful conduct, distinguishes between actions constituting constitutional deprivations, including intentional conduct, patterns of behavior and actions involving violence and corruption, and non-actionable behaviors such as accidental conduct and solitary negligent actions. *See id.* Other circuits have also distinguished cases requiring federal intervention using these same concepts. In *Powell v. Power, 436 F.2d 84 (2d Cir. 1970)*, the Second Circuit rejected the argument that *§ 1983* protects against "dilution by illegal voting whether or not the dilution was wilful or knowing." *Id. at 86.* In *Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975)*, the Seventh Circuit distinguished "irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent" from "wilful conduct which undermines the organic processes by which candidates are elected." *Id. at 864.* The courts in *Powell* and *Hennings* both found that [*21] the violation in question did not rise to the level of a constitutional deprivation.

The *Gamza* court addressed the intent requirement for equal protection cases more specifically, as follows:

> Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the *equal protection clause*. The unlawful administration by state officers of a non-discriminatory state law, 'resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.'

Gamza, 619 F.2d at 453 (*citing Snowden v. Hughes, 321 U.S. 1, 8, 88 L. Ed. 497, 64 S. Ct. 397 (1944))*.

Intentional or purposeful discrimination or denial of rights is more evident in cases where courts have found constitutional deprivations. For example, in *Carrington v. Rash, 380 U.S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965)*, the Supreme Court found a violation where servicemen stationed in Texas were prevented from voting in state elections. In *Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978),* [*22] the First Circuit found a

violation where voters relied on absentee voting procedures announced by state officials only to later have their votes disqualified. The *Griffin* court found federal intervention justifiable "where the entire election process - including as part thereof the state's administrative and judicial corrective process - fails on its face to afford fundamental fairness." *Id.* Similarly, in *Smith v. Cherry, 489 F.2d 1098, 1102 (7th Cir. 1973)* the Seventh Circuit found a conspiracy by ward officials which "effectively disenfranchised the entire electorate." In summary, cases in which a constitutionally-recognized claim is found involve either intentional conduct or a situation where an entire election process fails to afford fundamental fairness.

Plaintiffs cite *Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981)*, to support their proposition that a showing of intent is not required where substantive due process under the *Fourteenth Amendment* is violated. In *Duncan*, voters challenged a decision by state officials to appoint Georgia Supreme Court justice to fill a vacancy, rather than hold a special election [*23] as required by state election law. The Fifth Circuit held that this constituted a deprivation of federally-protected rights. *Id.* Plaintiffs urge the finding that intent is not required in such a case. However, *Duncan* involved wilful conduct by state officials that resulted in the deprivation of voters' rights. The state officials appointed the justice with the intent that citizens would be denied the right to vote in an election to fill the vacancy.

The intent to deny a group of people the right to vote is not present in the instant case. Defendants consolidated polling places in reaction to the shortage of election judges that would be available to conduct the primary election. Defendant Barrera has attested that he had no intent to discriminate against any minority group and had no intent to deny the right to vote of the Hispanic population or any other minority population. Barrera Aff. P 8. The Honorable Cyndi Taylor Krier attested that she saw no indication of intentional discrimination by any of the Defendants. *See* Deposition of Cyndi Taylor Krier, p. 93-94. Similarly, Bexar County Republican Party employees charged with conducting the primary election also deny that [*24] any intentional discrimination took place. *See* Affidavits of Carol Van DeWalle and Marian Stanko. Further, individual plaintiffs have conceded that they are not aware of any facts to support an allegation of intentional discrimination. *See* Deposition of Billie Dean, p. 52, ll. 12-16 and 17-25; Deposition of Miguel Martinez, p. 86, ll. 11-17 and p. 89, ll. 1-6; Deposition of Michelle Jones, pp. 47-51; Deposition of Kathryn Mauthe, p. 66, ll. 8-20. Because no evidence of intentional discrimination exists, and the entire election process did not fail to afford fundamental fairness, Defendants are entitled to summary judgment on Plaintiffs' third and fifth causes of action.

VI. State Election Law Claims

In their sixth cause of action, Plaintiffs allege Defendants violated the Texas Election Code, which had the result of depriving Plaintiffs of their constitutional right to vote in the March 12, 2002, Republican primary. Defendants allege that the sole means of complaining about violations of the Texas Election Code is through an election contest in state court. As a result, Defendants request that Plaintiffs' claims be dismissed.

Section 1367(a), which confers supplemental [*25] jurisdiction, provides:

> The district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

Section 1367(c) provides that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

A federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in *§§ 1367(c). United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*. Because the Defendants' [*26] are entitled to summary judgment on each of Plaintiffs' federal claims, the Court declines to exercise supplemental

jurisdiction over Plaintiffs' state election law claims. *See 28 U.S.C. § 1367(c)(3)*. Accordingly, the Court dismisses without prejudice the claims raised in Plaintiffs' sixth cause of action.

VII. Conclusion

For the reasons discussed above,

(1) The Court GRANTS Defendants' motion for summary judgment as to Plaintiffs' *§ 5* claim and DENIES the parties' requests for attorneys' fees. The Court DENIES Plaintiffs' Motion for Partial Summary Judgment (docket entry # 23) and GRANTS Defendants' Cross-Motion for Summary Judgment as to Plaintiffs' First Cause of Action (docket entry # 52). Each party will pay its own costs as to Plaintiffs' first claim.

(2) The Court GRANTS Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Claims Under *Section 2 of the Voting Rights Act* (docket entry # 57).

(3) The Court GRANTS Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Claims Requiring Proof of Intentional Discrimination (docket entry # 47), such that Plaintiffs' claims under the *Fourteenth* and *Fifteenth* [*27] *Amendments* and *42 U.S.C. § 1983* are DISMISSED.

(4) The Court DISMISSES without prejudice Plaintiffs' state law claims.

SIGNED this 5th day of December 2002.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

ORLANDO L. GARCIA

UNITED STATES DISTRICT JUDGE

FORTUNATO P. BENAVIDES

UNITED STATES CIRCUIT JUDGE

280 Fed.Appx. 328, 2008 WL 2337554 (C.A.4 (S.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 280 Fed.Appx. 328, 2008 WL 2337554 (C.A.4 (S.C.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
Jeffrey THOMPSON; John J. Smith, Plaintiffs-Appellants,
v.
DORCHESTER COUNTY SHERIFF'S DEPARTMENT; Dorchester County; Ray Nash, Individually and in his official capacity; John Barney Barnes; William French; Tim Stephenson, Defendants-Appellees.

No. 07-1548.
Argued: May 13, 2008.
Decided: June 9, 2008.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:06-cv-00968-DCN).
ARGUED: John Allen O'Leary, O'Leary & Associates, Inc., Columbia, *329 South Carolina, for Appellants. Caroline Wrenn Cleveland, Charleston, South Carolina; Alissa DeCarlo, Barnwell, Whaley, Patterson & Helms, LLC, Charleston, South Carolina, for Appellees. **ON BRIEF:** M. Dawes Cooke, Jr., John William Fletcher, Barnwell, Whaley, Patterson & Helms, LLC, Charleston, South Carolina, for Appellee Tim Stephenson.

Before WILLIAMS, Chief Judge, SHEDD, Circuit Judge, and CLAUDE M. HILTON, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished PER CURIAM opinion.
Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

**1 Appellants Jeffrey Thompson and John J. Smith appeal the district court's order denying relief on their complaint under 42 U.S.C.A. § 1983 (West 2003 & Supp.2007). Appellants, both former deputy sheriffs with the Dorchester County, South Carolina Sheriff's Department, contend that Dorchester County Sheriff Ray Nash and county staff members William French, John Barney Barnes, and Tim Stephenson (collectively "Appellees") violated their First Amendment rights by engaging in a pattern of harassment and intimidation because Appellants supported Nash's opponent in the sheriff's election. Applying the two-step framework set forth in *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the district court first concluded that Appellants had properly alleged a violation of a constitutional right to be free from harassment based on their support of Sheriff Nash's opponent in the election but then also concluded that such right was not clearly established at the time of Appellees' alleged actions.[FN1] Accordingly, the court granted Appellees' motion to dismiss on the basis of qualified immunity.[FN2]

FN1. To be clear, the district court *did not* find a constitutional violation to the extent that Appellants' claims were predicated on job termination. *See Jenkins v. Medford*, 119 F.3d 1156 (4th Cir.1997) (en banc) (holding that sheriff's patronage dismissals of deputy sheriffs did not violate the First Amendment because deputy sheriffs were policymakers).

FN2. Appellants also allege a claim based on their right to a "secret ballot." As the district court recognized, however, the Supreme Court has never recognized secrecy in voting as a constitutionally-guaranteed right.

We have reviewed the record, the district court's thorough opinion, and heard oral argument in this case, and find no reversible error. Accordingly, we affirm based substantially on the reasoning of the district court. *See Thompson v. Dorchester County Sheriff's Dep't*, No. 2:06-cv-00968-DCN (D.S.C. May 4, 2007).

AFFIRMED.

280 Fed.Appx. 328, 2008 WL 2337554 (C.A.4 (S.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 280 Fed.Appx. 328, 2008 WL 2337554 (C.A.4 (S.C.)))

C.A.4 (S.C.),2008.
Thompson v. Dorchester County Sheriff's Dept.
280 Fed.Appx. 328, 2008 WL 2337554 (C.A.4 (S.C.))

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--- P.3d ----, 2011 WL 4487753 (Colo.App.)
(Cite as: 2011 WL 4487753 (Colo.App.))

C
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals,
Div. III.
Marilyn MARKS, a resident of the City of Aspen, Colorado, Plaintiff–Appellant,
v.
Kathryn KOCH, Clerk of the City of Aspen, Colorado, Defendant–Appellee.

No. 10CA1111.
Sept. 29, 2011.

Background: Unsuccessful candidate for mayor brought action against city clerk to enforce her request, under Colorado Open Records Act (CORA), for digital images of ballots cast in the election. The District Court Pitkin County, James B. Boyd, J., granted clerk's motion to dismiss for failure to state claim upon which relief could be granted. Candidate appealed.

Holdings: The Court of Appeals, Furman, J., held that:
(1) release of digital images of anonymous ballots would not violate State Constitution's secrecy in voting requirement;
(2) computer files containing digital photographic images of ballots were not themselves ballots within meaning of statute governing storage and destruction of ballots; and
(3) candidate was entitled to appellate attorney fees.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿919

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k919 k. Striking out or dismissal. Most Cited Cases

In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, the appellate court must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. Rules Civ.Proc., Rule 12(b)(5).

[2] Pretrial Procedure 307A ⚿623.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak623.1 k. In general. Most Cited Cases

Motions to dismiss for failure to state a claim upon which relief can be granted are viewed with disfavor, and a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief. Rules Civ.Proc., Rule 12(b)(5).

[3] Records 326 ⚿63

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k63 k. Judicial enforcement in general. Most Cited Cases

In evaluating a claim based on a request under Colorado Open Records Act (CORA), courts do so

with the understanding that precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions. West's C.R.S.A. § 24–72–203(1)(a).

[4] Records 326 54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In general. Most Cited Cases

Exceptions to Colorado Open Records Act (CORA) should be narrowly construed. West's C.R.S.A. § 24–72–203(1)(a).

[5] Elections 144 28

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k23 Power to Regulate Conduct of Election
144k28 k. Secrecy as to vote. Most Cited Cases

Records 326 55

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k55 k. Exemptions or prohibitions under other laws. Most Cited Cases

Release of digital images of ballots cast in mayoral municipal election under Colorado Open Records Act (CORA) would not violate State Constitution's "secrecy in voting" requirement; content of a ballot was not protected when the identity of the voter could not be discerned from the face of that ballot. West's C.R.S.A. Const. Art. 7, § 8; West's C.R.S.A. § 24–72–203(1)(a).

[6] Constitutional Law 92 580

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k580 k. In general. Most Cited Cases

In giving effect to a constitutional provision, courts employ the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, courts start with the words, give them their plain and commonsense meaning, and read applicable provisions as a whole, harmonizing them if possible.

[7] Elections 144 255

144 Elections
144IX Count of Votes, Returns, and Canvass
144k255 k. Preservation or disposition of ballots. Most Cited Cases

Records 326 55

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k55 k. Exemptions or prohibitions under other laws. Most Cited Cases

Computer files containing digital photographic images of paper ballots were not themselves "ballots" within meaning of statute governing storage and destruction of ballots, and thus, files that did not contain images of ballots that disclosed identity of voters were eligible for public inspection under Colorado Open Records Act (CORA), at request of unsuccessful mayoral candidate; files were created after voters had used paper ballots to indicate their voting preferences and after polling places were closed, and files were wholly or partially displayed to the public through multiple media. West's C.R.S.A. Const. Art. 7, § 8; West's C.R.S.A. §§ 24–72–203(1)(a), 31–10–616.

[8] Statutes 361 181(1)

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361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases

Statutes 361 ⚷223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In general. Most Cited Cases

In interpreting a statute, a court's objective is to effectuate the legislative intent, and all related provisions of an act must be construed as a whole.

[9] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

To ascertain a statute's legislative intent, courts look first to the provision's plain language, giving that language its commonly accepted and understood meaning.

[10] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

When a statute does not define its terms but the words used are terms of common usage, courts may refer to dictionary definitions to determine the plain and ordinary meanings of those words.

[11] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity. Most Cited Cases

Statutes 361 ⚷212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other matters. Most Cited Cases

Because courts may presume that the General Assembly meant what it clearly said, where the statutory language is unambiguous, courts do not resort to further rules of statutory construction to determine the statute's meaning.

[12] Records 326 ⚷68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and fees. Most Cited Cases

Candidate who prevailed on appeal of her action to enforce her request, under Colorado Open Records Act (CORA), for release of digital images of ballots cast in mayoral municipal election was entitled to appellate attorney fees. Rules App.Proc., Rule 39.5; West's C.R.S.A. § 24–72–204(5).

Robert A. McGuire, Attorney at Law, LLC, Robert A. McGuire, III, Denver, CO, for Plaintiff–Appellant.

John P. Worcester, City Attorney, James R. True, Special Counsel, Aspen, CO, for Defendant–Appellee.

--- P.3d ----, 2011 WL 4487753 (Colo.App.)
(Cite as: 2011 WL 4487753 (Colo.App.))

Opinion by Judge FURMAN.

*1 In this proceeding under the Colorado Open Records Act (CORA), sections 24–72–200.1 to –206, C.R.S.2011, plaintiff, Marilyn Marks, appeals the district court's judgment dismissing her case for failure to state a claim upon which relief can be granted, pursuant to the motion filed by defendant, Kathryn Koch, the City Clerk of Aspen (Clerk). We reverse and remand for further proceedings.

I. The Public Records at Issue

Because of this case's procedural posture, all facts set forth below are derived from Marks's complaint and viewed in the light most favorable to her.

The public records Marks seeks to have released under CORA are 2544 digital copies of ballots cast in the May 2009 Aspen mayoral municipal election, in which Marks was a losing candidate. The copies were created as part of a computerized ballot tabulation system designed for the new instant runoff voting (IRV) procedures of the City of Aspen (City). The IRV procedures were intended to avoid the need for subsequent runoff elections by having voters rank all the candidates and not simply vote for one particular candidate, and then using computer software to determine the winner in a manner simulating an extended runoff voting process.

City engaged TrueBallot, Inc. (TBI), a Maryland corporation, to tabulate the paper ballots under the IRV procedures mandated by City. The new system required Clerk to bring all paper ballots cast by voters to a central location and give them to TBI for tabulation using software designed by TBI to meet the IRV procedures.

TBI's tabulation process had four steps: (1) each paper ballot had to be scanned and the resulting digital photographic image saved as a single computer file in tagged image file format (TIFF) using TBI's software; (2) the software was then used to detect each individual TIFF file's ballot markings to create a raw data string of the voter's rankings of the candidates; (3) the raw data strings were developed into clean data strings; and (4) the clean data strings were interpreted by TBI's software to determine the winner of each race using City's new IRV procedures. Essentially, then, the TIFF files were digital copies of the corresponding paper ballots that voters used to rank the candidates. It is these digital TIFF files that Marks seeks to have released under CORA.

City and TBI took several precautionary steps to assure the integrity of the new computerized tabulation process. They briefly displayed, in whole or in part, each of the 2544 TIFF files on large, public video monitors at the tabulation center at City's city hall; broadcasted selected TIFF files over local television for greater public scrutiny; compared some of the original voter ballots to the data strings those ballots generated, a process open to members of the public; and publicly released both the raw and the clean data strings created by TBI's IRV computer tabulation program.

The record reflects that Clerk, who was then the incumbent clerk for City, was aware of the precautionary measures in place—including the public displaying and broadcasting of the individual TIFF files created from the paper ballots—yet took no action to prevent or alter those measures. Clerk, rather, assisted in the tabulation process by delivering the paper ballots to TBI in a previously agreed-upon manner so that portions of the TIFF files, once created, could be publicly displayed.

*2 Clerk subsequently disclosed that there was a discrepancy between the manual tallies of the paper ballots and TBI's computer-generated data, such that the winner of the mayoral race received more votes than initially stated. Clerk, however, did not publicly disclose this information until nine days after she learned of it—which also happened to be almost a week after the expiration of the statutory deadline to contest the election.

Once Clerk disclosed this information, Marks sought release of all the TIFF files by filing a CORA request with Clerk. Clerk denied Marks' request, asserting that (1) the TIFF files, being duplicates of ballots, were in fact ballots themselves, to be treated in the same manner as the original paper ballots from which they were created; (2) releasing the TIFF files would violate the Colorado Constitution's secrecy in voting requirement, which Clerk interpreted to bar the public disclosure of the contents of ballots; and (3) releasing the TIFF files would also violate section 31–10–616, C.R.S.2011—the ballot storage and destruction provision of the Colorado Municipal Election Code, sections 31–10–101 to –1540,

C.R.S.2011—which required Clerk to hold ballots in the ballot box for six months after an election, after which they were to be destroyed.

Marks amended her CORA request to exclude those TIFF files that contained either a write-in candidate or ballot markings Clerk thought might identify a particular voter. Marks' subsequent CORA request was again denied by Clerk for the same reasons as her initial request.

Marks sought a court order to enforce her CORA request. Marks succeeded in obtaining a preliminary injunction preventing the destruction of the TIFF files pending the resolution of her complaint. The preliminary injunction was extended at Clerk's request to include the paper ballots as well as the TIFF files.

The district court granted a motion by Clerk dismissing Marks' complaint for failing to state a claim upon which relief could be granted. The district court accepted Clerk's argument that (1) the TIFF files were ballots; (2) releasing the TIFF files was prohibited by the Colorado Constitution's secrecy in voting provision; and (3) because the TIFF files were ballots, releasing them was prohibited by the Colorado Municipal Election Code's ballot storage and destruction provision.

Marks appeals the district court's judgment dismissing her claim. Both parties also request appellate attorney fees.

II. Standard of Review

[1][2] In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), we must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo.1996). Such motions are viewed with disfavor, and "a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Id.*

***3** [3][4] Marks' appeal challenging the dismissal is based on her CORA request seeking release of the TIFF files. In evaluating a claim based on a CORA request, we do so with the understanding that "[o]ur precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions." *Ritter v. Jones*, 207 P.3d 954, 959 (Colo.App.2009). Moreover, exceptions to CORA should be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo.App.1998).

CORA's section 24–72–203(1)(a), C.R.S.2011, states in relevant part that "[a]ll public records shall be open for inspection by any person at reasonable times, except as provided ... by law." Section 24–72–204, C.R.S.2011, states in relevant part:

> (1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds ...:
>
> (a) Such inspection would be contrary to any state statute.

Marks contends the right to inspect the TIFF files was not contrary to either (1) the secrecy in voting requirement of article VII, section 8 of the Colorado Constitution; or (2) the Colorado Municipal Election Code. We address each contention in turn.

III. The Colorado Constitution's "Secrecy in Voting" Requirement

[5] Marks contends that because the Colorado Constitution's secrecy in voting requirement extends only to protect the identity of a voter and not the content of his or her ballot—assuming the voter's identity could not be discerned from the content of the ballot—it does not bar the latter from release under CORA. We agree.

Article VII, section 8 of the Colorado Constitution provides in relevant part:

> All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Noth-

> ing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

[6] In giving effect to a constitutional provision, "we employ the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, we start with the words, give them their plain and commonsense meaning, and read applicable provisions as a whole, harmonizing them if possible." *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo.2006).

The constitutional provision in its fourth sentence uses, but does not define, the phrase "secrecy in voting" by stating that "secrecy in voting" must be preserved, regardless of how the votes cast at any election are received and registered. Because we must read the constitutional provision as a whole, *see Danielson*, 139 P.3d at 691, we look to the prior clauses of the provision, upon which the phrase is dependent, to ascertain the phrase's definition.

*4 The constitutional provision in its first sentence states that "no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the *person* casting it." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "person," clearly indicates that the identity of an individual voter, and any markings on the ballot that could identify that voter, are to be kept secret. *See Danielson*, 139 P.3d at 691.

The constitutional provision in its second sentence states that election officials "shall be sworn or affirmed not to inquire or disclose how any *elector* shall have voted." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "elector," again indicates that an individual voter's identity is to be protected from public disclosure, because this clause coincides with the election officials' viewing of the marked ballots.

Hence, we conclude that the phrase "secrecy in voting," when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter's ballot that could identify the voter. *See Danielson*, 139 P.3d at 691. The content of a ballot is *not* protected, however, when the identity of the voter cannot be discerned from the face of that ballot. To the extent the TIFF files do not reveal a particular voter's identity, then, permitting the right to inspect the TIFF files would not be contrary to the "secrecy in voting" provision of article VII, section 8.

IV. The TIFF Files Are Not "Ballots"

[7] Marks also contends that, because the TIFF files are not ballots, releasing them would not be contrary to the Colorado Municipal Election Code's ballot storage and destruction provision. We agree.

The Colorado Municipal Election Code's provision for the storage and destruction of "ballots" is outlined in section 31–10–616, which provides:

> (1) The ballots, when not required to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial, or by any other method approved by the executive director of the department of personnel. If the ballot boxes are needed for a special election before the legal time for commencing any proceedings in the way of contests has elapsed or in case such clerk, at the time of holding such special election, has knowledge of the pendency of any contest in which the ballots would be needed, the clerk shall preserve the ballots in some secure manner and provide for their being kept so that no one can ascertain how any voter may have voted.
>
> *5 (2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.

[8][9] In interpreting a statute, our objective is to effectuate the legislative intent, and all related provisions of an act must be construed as a whole. *Foiles v. Whittman*, 233 P.3d 697, 699 (Colo.2010). To ascertain the legislative intent, we look first to the provision's plain language, giving that language its commonly accepted and understood meaning. *Id.*

[10][11] When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meanings of those words. *People v. Daniels*, 240 P.3d 409, 411 (Colo.App.2009). Because we may presume that the General Assembly meant what it clearly said, however, where the statutory language is unambiguous, we do not resort to further rules of statutory construction to determine the statute's meaning. *Foiles*, 233 P.3d at 699.

Because the May 2009 Aspen mayoral municipal election used paper ballots, we turn to section 31–10–902(1), C.R.S.2011. It states in relevant part: "The clerk of each municipality using paper ballots shall provide printed ballots for every municipal election. The official ballots shall be printed and in the possession of the clerk at least ten days before the election." Therefore, paper "ballots," as the term is used in section 31–10–616, are those paper documents that are to be printed and then possessed by the clerk at least ten days prior to the election. *See Foiles*, 233 P.3d at 699 (concluding that all related statutory provisions must be construed as a whole).

We conclude the TIFF files do not meet these criteria. The TIFF files were created after voters had used paper ballots to indicate their voting preferences and after the polling places were closed. In addition, the TIFF files were wholly or partially displayed to the public through multiple media. Only after this process was completed did Clerk take possession of them.

Other provisions of the Colorado Municipal Election Code bolster our analysis. Section 31–10–902(3)(a)–(c), C.R.S.2011, states:

> (a) The ballots shall be printed to give each voter a clear opportunity to designate his choice of candidates by a cross mark (X) in the square at the right of the name. On the ballot may be printed such words as will aid the voter, such as "vote for not more than one".
>
> (b) At the end of the list of candidates for each different office shall be as many blank spaces as there are persons to be elected to such office in which the voter may write the name of any eligible person not printed on the ballot for whom he desires to vote as a candidate for such office; but no cross mark (X) shall be required at the right of the name so written in.
>
> (c) When the approval of any question is submitted at a municipal election, such question shall be printed upon the ballot after the lists of candidates for all offices. The ballots shall be printed to give each voter a clear opportunity to designate his answer by a cross mark (X) in the appropriate square at the right of the question.

***6** The plain language of these provisions indicates that voters are to use the paper ballots to indicate their voting preferences for both candidates and ballot initiatives. The TIFF files, however, were used solely by election officials who, after having created them, retained exclusive possession of them. In contrast with how voters must use paper ballots to indicate their preferences, pursuant to the Colorado Municipal Election Code, the voters in Aspen's May 2009 election did not use the TIFF files for any purpose whatsoever.

Clerk nevertheless contends that section 31–10–616 constitutes a "contrary state statute" pursuant to which the TIFF files must not be released. *See* § 24–72–204(1)(a). We disagree. The first subsection of section 31–10–616, which concerns "ballots," requires (among other things) that the ballots be both retained for six months after the election in which they were cast and destroyed by fire, shredding, or burial, or by any other method approved by the appropriate public officials, when the six months are complete. In contrast, the second subsection, which concerns "other official election records," does not contain such details but rather requires only that such records be "preserve[d] ... for at least six months." § 31–10–616(2). We decline to read into this subsection of the statute any of the intricate procedures required by the first subsection. *See Foiles*, 233 P.3d at 699.

Given our reasoning that (1) section 24–72–204 authorizes the release of public records under CORA absent a constitutional or statutory exception; (2) "secrecy in voting," as used in article VII, section 8 of the Colorado Constitution, does not exempt the TIFF files from release under CORA, because that constitutional provision protects only the identity of an individual voter and any content of the voter's ballot that could identify the voter; and (3) section

31–10–616 does not exempt the TIFF files from release under CORA because the TIFF files are not "ballots," we conclude the TIFF files are eligible for public inspection under CORA, with the narrow exception of any TIFF file containing content that could identify an individual voter and thereby contravene the intent of article VII, section 8. *See Freedom Newspapers, Inc.*, 961 P.2d at 1154; *cf.* § 31–10–1517, C.R.S.2011 (stating in relevant part, "No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed upon the ballot to identify it after it has been prepared for voting," the violation of which is a misdemeanor).

On remand, the district court shall release the TIFF files to Marks for inspection pursuant to CORA, with the exception of those TIFF files that contain either a write-in candidate or ballot markings that could identify an individual voter. Whether a TIFF file contains ballot markings that could identify an individual voter is a matter within Clerk's discretion to determine.

V. Parties' Requests for Appellate Attorney Fees

*7 [12] Marks requests appellate attorney fees pursuant to C.A.R. 39.5 and section 24–72–204(5), C.R.S.2011. Marks has prevailed on appeal and has stated a proper basis on which fees may be awarded to her. C.A.R. 39.5; *see* § 24–72–204(5) ("prevailing applicant" may receive award of attorney fees); *Town of Erie v. Town of Frederick*, 251 P.3d 500, 506 (Colo.App.2010)("A statutory award of attorney fees may include reasonable appellate attorney fees."); *see also Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 506 (Colo.App.2003). Accordingly, Marks is entitled to her reasonable appellate attorney fees. On remand, and upon Marks' application, the district court shall determine the reasonableness of Marks' appellate attorney fees.

Clerk requests appellate attorney fees in the event she successfully defends the C.R.C.P. 12(b)(5) dismissal. Because her defense was unsuccessful, she is not entitled to such fees. *See Wheeler*, 74 P.3d at 506.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

Judge ROY and Judge LICHTENSTEIN concur.

Colo.App.,2011.
Marks v. Koch
--- P.3d ----, 2011 WL 4487753 (Colo.App.)

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172 F.3d 878, 1999 WL 51784 (C.A.10 (Okla.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 172 F.3d 878, 1999 WL 51784 (C.A.10 (Okla.)))

C
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.
GLOVER CONSTRUCTION CO., INC., Plaintiff-Appellant,
v.
Bruce BABBITT, Secretary of Department of Interior, Defendant-Appellee.

No. 97-7122.
Feb. 5, 1999.

(D.C. No. 95-CV-467-B)

Before EBEL,BRISCOE, and LUCERO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

***1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). Therefore, the case is ordered submitted without oral argument.

Plaintiff Glover Construction Company brought this action alleging defendant failed to require the Bureau of Indian Affairs to require the Cherokee Nation to abide by the provisions of the Federal Acquisition Regulations (FARS), 48 C.F.R. § 1 *et seq.* The district court denied Glover Construction's request for injunctive relief and dismissed the action. We dismiss this appeal on mootness grounds, and do not address the more difficult questions of standing and jurisdiction.

On June 15, 1995, the Cherokee Nation of Oklahoma began soliciting bids for construction of "Greasy Road." Four construction companies responded to the bid: Mouache-Capote Construction, Frix Foster Construction, Hub Construction, and Glover Construction. At the bid unsealing, the bid of Hub Construction was rejected as nonresponsive to the solicitation. The bid of Mouache-Capote was the lowest, followed by the bid of Frix Foster Construction, and then Glover Construction. Although the bid of Mouache-Capote failed to include unit prices, its bid did include the number of units and the total price for each specific item. Thus, the unit price was readily ascertainable from the face of the bid. The Cherokee Nation did not reject the bid of Mouache-Capote as nonresponsive under 48 C.F.R. § 14.301, but allowed it to correct its bid. The contract was awarded to Mouache-Capote.

Glover Construction filed this action, contending defendant, through the Bureau of Indian Affairs (BIA), failed to require the Cherokee Nation to adhere to federal procurement standards. The Cherokee Nation was allegedly bound by such regulations after negotiating for their application in accordance with 25 U.S.C. § 458cc(e). Glover Construction sought injunctive relief requiring defendant to direct the BIA to order the Cherokee Nation to set aside the bid of Mouache-Capote Construction as nonresponsive and to rebid the project in accordance with federal standards. In its amended complaint, Glover Construction alleged that during construction of the road the Cherokee Nation had permitted Mouache-Capote Construction to increase the contract price by over $100,000 without requiring bids, which was not in accordance with the contract modification requirements of FARS and 41 U.S.C. § 254b. The district court held the failure to explicitly list unit prices was not a material alteration, but was a correctable "minor irregularity" under the regulations, and that Glover Construction was not entitled to injunctive relief because it had not shown irreparable harm.

The Greasy Road was completed no later than May 20, 1997. Therefore, Glover Construction's claims for injunctive relief to require rebidding for the contract award and for subsequent contract modifications are moot. *See* Columbian Rope Co. v. West, 142 F.3d 1313, 1316 (D.C.Cir.1998); *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1171-72 (8th Cir.1994).

***2** The only remaining issue is Glover Construction's request for an injunction requiring defendant to direct the Cherokee Nation to abide by the regulations during future bidding of projects. In essence, Glover Construction assumes the situation that occurred here will be exactly replicated in the future and asks that an injunction issue now to insure it is protected later.

These circumstances do not present an ongoing case or controversy over which this court may exercise jurisdiction under Article III. *See* Jones v. Temmer, 57 F.3d 921, 922 (10th Cir.1995). At best, Glover Construction's argument is construed as one invoking the "capable of repetition, yet evading review" exception to the mootness doctrine. *See* Fischbach v. New Mexico Activities Ass'n, 38 F.3d 1159, 1161 (10th Cir.1994). That exception does not save the claim as there is no "reasonable expectation" that Glover Construction will suffer the same injury, *see* West, 142 F.3d at 1317, and no reason for this court to assume the issue is not capable of meaningful review if Glover Construction is subjected to the same allegedly unlawful treatment in the future, *see* Pena, 42 F.3d at 1172. *See also* Jones, 57 F.3d at 923 (rejecting argument that claim is not moot based on possibility that legislature could reinstate law as "too conjectural and speculative to avoid a finding of mootness").

We add that Glover Construction's request for injunctive relief is nothing more than an artfully phrased prayer for the court to require Cherokee Nation to obey the law in the future. Such injunctions are not appropriately issued. *See* Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir.1996) ("[A]ppellate courts will not countenance injunctions that merely require someone to obey the law.") (internal quotation omitted); Epstein Family Partnership v. Kmart Corp., 13 F.3d 762, 771 (3d Cir.1994) (recognizing while "an injunction may be framed to bar future violations that are likely to occur, ... [b]road non-specific language that merely enjoins a party to obey the law or comply with an agreement ... does not give the restrained party fair notice of what conduct will risk contempt") (internal quotation omitted).

Glover Construction's appeal is DISMISSED as moot.

C.A.10 (Okla.),1999.
Glover Const. Co., Inc. v. Babbitt
172 F.3d 878, 1999 WL 51784 (C.A.10 (Okla.))

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Not Reported in F.Supp.2d, 2010 WL 901686 (D.Colo.)
(Cite as: 2010 WL 901686 (D.Colo.))

United States District Court,
D. Colorado.
Ivan STAMPS, Plaintiff,
v.
Jeanne SMITH, Defendant.

Civil Action No. 09-CV-02821-BNB.
March 12, 2010.

Ivan Stamps, Delta, CO, pro se.

ORDER OF DISMISSAL

PHILIP A. BRIMMER, District Judge, for ZITA LEESON WEINSHIENK, Senior District Judge.

***1** Plaintiff, Ivan Stamps, is a prisoner in the custody of the Colorado Department of Corrections at the Delta Correctional Center in Delta, Colorado. Mr. Stamps initiated this action by filing *pro se* a Complaint. On December 28, 2009, Mr. Stamps filed an amended complaint on the Court's Prisoner Complaint form. On February 12, 2010, Magistrate Judge Boyd N. Boland ordered Mr. Stamps to file a second amended complaint that complies with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. On March 1, 2010, Mr. Stamps filed a second amended complaint seeking damages and declaratory relief.

Mr. Stamps has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Pursuant to § 1915(e)(2)(B)(i), the Court must dismiss the second amended complaint at any time if the claims asserted are frivolous. A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989). For the reasons stated below, the Court will dismiss the second amended complaint and the action as legally frivolous.

The Court must construe the second amended complaint liberally because Mr. Stamps is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). If the second amended complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. *See id.*

Mr. Stamps complains that defendant impersonated a district attorney for the State of Colorado's Fourth Judicial District and exercised jurisdiction as a district attorney when paperwork was filed against Mr. Stamps in 2003 that caused him to be held in the El Paso County Jail in Colorado Springs, Colorado. Mr. Stamps' complete description of the nature of this case is the following:

> Jeanne Smith, the defendant, under color of state law impersonated a 4th Judicial District Attorney; paperwork was filed under her authority on 11/10/2003 causing the plaintiff damage by being held in the El Paso County jail under a bond set at $100,000.00, and also depriving the plaintiff of the right to interact with a District Attorney who was properly in office under the state law and both constitutions. As a Colorado resident the plaintiff has a constitutional right to interact with elected public officials that qualify for office under the U.S. and State Constitutions. The defendant deprived the plaintiff of his constitutional protections that prevent interaction with a private person impersonating and exercising jurisdiction of a District Attorney. The cause of action and controversy is: (1) Was Jeanne Smith a District Attorney under the laws and Constitutions; (2) was she only a private person fraudulently posing as a District Attorney;
>
> ***2** (3) did she deprive the plaintiff of due process and constitutional protections?

(Second Am. Prisoner Compl. filed 3/1/2010 at 3.) The Court notes that Mr. Stamps is serving a prison sentence pursuant to a conviction in a 2003

case in the State of Colorado's Fourth Judicial District. *See Stamps v. Leyba,* No. 09-cv-00074-ZLW (D.Colo. May 20, 2009).

Mr. Stamps asserts his claim for damages pursuant to 42 U.S.C. § 1983. Under § 1983, Mr. Stamps must allege that Defendant violated his rights under the Constitution and laws of the United States while Defendant acted under color of state law. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150 (1970). Construing the second amended complaint liberally, the Court finds that Mr. Stamps is claiming he was denied due process when he was held in the El Paso County Jail in 2003.

The Court finds that Mr. Stamps' claim for damages challenging his detention in the El Paso County Jail is barred by *Heck v. Humphrey,* 512 U.S. 477 (1994). In *Heck,* the United States Supreme Court held that if a judgment for damages favorable to a prisoner in a 42 U.S.C. § 1983 action necessarily would imply the invalidity of his criminal conviction or sentence, the § 1983 action does not arise until the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by the issuance of a federal habeas writ. *See Heck,* 512 U.S. at 486-87. Although Mr. Stamps is not challenging his conviction or sentence, the rule in *Heck* is not limited solely to claims challenging the validity of criminal convictions and sentences, but also applies to claims seeking to invalidate the results of other forms of detention. *See Edwards v. Balisok,* 520 U.S. 641 (1997) (applying *Heck* to prison inmate's claims challenging procedures used to deprive him of good time credits); *Crow v. Penry,* 102 F.3d 1086, 1087 (10th Cir.1996) (per curiam) (stating that *Heck* applies to proceedings related to parole and probation); *see also Cohen v. Clemens,* 321 F. App'x 739, 741-42 (10th Cir.2009) (applying *Heck* to claims for damages by immigration detainee challenging legality of his detention).

Mr. Stamps does not allege, and there is no indication in the Court's file, that he has invalidated the legality of his detention in the El Paso County Jail in 2003. Therefore, the constitutional claim for damages is barred by *Heck* and will be dismissed as legally frivolous. Furthermore, even if Mr. Stamps' claim for damages could be construed in a manner that does not implicate the validity of his detention in the El Paso County Jail in 2003, the Court finds that the claim would be barred by the statute of limitations because the claim arose more than two years before the instant action was filed in 2009. *See Blake v. Dickason,* 997 F.2d 749, 750-51 (10th Cir.1993) (finding that a two-year statute of limitations applies to § 1983 actions in Colorado).

***3** As noted above, Mr. Stamps also seeks declaratory relief in this action. Assuming the claim for declaratory relief would not be barred for the same reasons discussed above with respect to Mr. Stamps' claim for damages, the claim for declaratory relief still must be dismissed because Mr. Stamps fails to identify any actual controversy as required pursuant to 28 U.S.C. § 2201(a). Magistrate Judge Boland specifically advised Mr. Stamps that "a declaratory judgment plaintiff must present the court with a suit based on an 'actual controversy.' " *Surefoot LC v. Sure Foot Corp.,* 531F.3d 1236, 1240 (10th Cir.2008). Magistrate Judge Boland also explained to Mr. Stamps that the question in a declaratory judgment action "is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 1244 (internal quotation marks omitted). Despite these instructions, Mr. Stamps fails to identify any actual controversy that exists today based on his detention in the El Paso County Jail in 2003. Therefore, the claim for declaratory relief also will be dismissed as legally frivolous. Accordingly, it is

ORDERED that the Prisoner Complaint and the action are dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

D.Colo.,2010.
Stamps v. Smith
Not Reported in F.Supp.2d, 2010 WL 901686 (D.Colo.)

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