DISTRICT COURT, PITKIN COUNTY, COLORADO Pitkin County Courthouse 506 E. Main, Suite 300 Aspen, Colorado 81611	
Plaintiff(s): MARILYN MARKS v. **Defendant(s):** KATHRYN KOCH	**▲ COURT USE ONLY ▲**
Attorney for Plaintiff: Robert A. McGuire Robert A. McGuire, Attorney at Law, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Phone Number: 303-734-7175 FAX Number: 303-734-7166 E-mail: ram@lawram.com Atty. Reg. #: 37134	Case Number: 2009CV294 Div.: 3 Ctrm.:
REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AMENDMENT OF JUDGMENT PURSUANT TO C.R.C.P. 59(a)(4)	

Plaintiff, Marilyn Marks, by and through her undersigned counsel, respectfully submits this Reply Memorandum in Support of Plaintiff's Motion for Amendment of Judgment Pursuant to C.R.C.P. 59(a)(4).

ARGUMENT

I. Colorado law does not allow the presumption that ballots cease to be anonymous once they are voted.

The ballots are alleged by the Complaint to be anonymous. The Defendant makes the novel claim that the Court cannot credit this allegation as true, even though the Court is required to do so under *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996), because the very act of voting supposedly creates a presumption that the voted ballots are no longer anonymous. The

Defendant's argues that some ballots, after being voted by electors, might bear illegal distinguishing marks that could make them identifiable and that all of the voted ballots, as a result, must be presumed by the Court to lack anonymity. Since the TIFF files were created by scanning the voted ballots, the implication is that TIFF files must also be presumed not to be anonymous.

The Defendant's position is completely without merit. Marking a ballot so that it becomes individually identifiable is illegal in Colorado, see § 31-10-1517, C.R.S. (Colorado Municipal Election Code); § 1-13-712(1), C.R.S. (Uniform Election Code of 1992). Moreover, Colorado courts presume as a general matter that laws are obeyed. See *Wilson v. Mosko*, 110 Colo. 127, 134, 130 P.2d 927, 930 (1942) ("But the presumption is that men intend to obey rather than to violate the law.").

Even if some ballots have been illegally rendered by voter markings to be identifiable as the ballots of particular individuals, the Colorado Supreme Court has held that the privilege of secrecy in voting is one that belongs to the individual voter and therefore that the privilege can be waived. See *Mahaffey v. Barnhill*, 855 P.2d 847, 851 (Colo. 1993) ("This privilege is personal, and it is for the voter to determine whether to invoke its protection.").

Preservation of a waived privilege does not become the burden of the government as a result of the waiver. On the contrary, it is the government's responsibility to enforce Colorado's laws against the marking of ballots for identification by prosecuting violations, if necessary, rather than concealing them. The Defendant would have this Court restrict the public's right to inspect *all* ballots in order to protect the anonymity of a hypothetical few who have broken Colorado law by rendering their ballots non-anonymous. This position is divergent from the

position taken by the highest courts of many States, which treat ballots that are marked for identification as voided – not protected – by virtue of their illegality.[1]

The argument that voted ballots may be presumed to be anything other than anonymous is further foreclosed by *Taylor v. Pile*, 154 Colo. 516, 523 (1964) ("[W]hen the undisputed fact was made to appear that all the ballots cast were not secret ballots, it was the duty of the court to declare the election void…."). Since Colorado courts have a duty under *Taylor* to void elections where voter anonymity is compromised, the Defendant's suggested presumption that voted ballots are not anonymous inevitably requires that every election must run afoul of *Taylor*. Since such an outcome cannot be correct, either the Colorado Supreme Court's ruling in *Taylor* is meaningless, or else the Defendant's theory that voted ballots cannot be presumed to be anonymous is erroneous.

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[1] See, e.g., *Stellner v. Woods*, 355 N.W.2d 1 (S.D. 1984); *Wright v. Gettinger*, 428 N.E.2d 1212 (Ind. 1981); *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978); *Opinion of the Justices*, 369 A.2d 233 (Me. 1977); *Dugan v. Vlach*, 237 N.W.2d 104 (Neb. 1975); *Stover v. Alfalfa County Election Bd.*, 530 P.2d 1020 (Okla. 1975); *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303 (Pa. 1974); *Fitzgerald v. Morlock*, 120 N.W.2d 339 (Minn. 1963); *Kalar v. Epperson*, 343 S.W.2d 126 (Ky. 1961); *Griffin v. Rausa*, 118 N.E.2d 249 (Ill. 1954); *Kane v. Registrars of Voters of Fall River*, 105 N.E.2d 212 (Mass. 1952); Courtney *v. Abels*, 17 So.2d 824 (La. 1944); *Evans v. Hood*, 15 So.2d 37 (Miss. 1943); *Mansfield v. Scully*, 29 A.2d 444 (Conn. 1942); *Hansen v. Lindley*, 102 P.2d 1058 (Kan, 1940); *Village of Richwood v. Algower*, 116 N.E. 462 (Ohio 1917). But see *State ex rel. Hammond v. Hatfield*, 71 S.E.2d 807 (W.Va. 1952).

The Complaint alleges that the ballots from which the TIFF files were created are anonymous. Under *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996), this Court must accept the allegations in the Complaint to be true, notwithstanding the Defendant's misplaced argument that otherwise anonymous ballots cease to be anonymous as soon as they are voted.

II. The TIFF files are not "ballots," and they should not be treated as "ballots" for purposes of Section 31-10-616(1), C.R.S.

The Defendant offers up the familiar red herring that, because Ms. Marks is arguing that the TIFF files are not the equivalents of paper ballots, then she must also be arguing that "any protected document becomes unprotected simply by use of a photocopy machine." Def.'s Mem. Opp. Pl.'s Mot. Amend Judgment 3. Ms. Marks has of course argued no such thing. Instead, she has properly noted that ballots are legal instruments which inherently possess an independent significance that is not imparted to a mere copy of the original.

Actual paper ballots obviously constitute "ballots," as that defined term is used in Section 31-10-616(1), C.R.S. It is a truism, however, that the TIFF files are not the literal equivalents of actual paper ballots, and thus they may differ considerably in material ways by comparison to the ballots from which they are derived. The TIFF files are properly viewed as "election records," the term used in Section 31-10-616(2), C.R.S. To the extent that Section 31-10-616(1) and Section 31-10-616(2) impose different storage, preservation and destruction requirements on "ballots," as opposed to other official "election records," it is relevant to note the important differences that do exist between these types of documents. The actual paper ballots, on one hand, were physically touched and marked by the voters, while the corpus of computer TIFF files, on the other hand, was created by the City of Aspen and its vendors as part of a tabulation process that was conducted only after the polls had closed on election night.

The Defendant argues that it is folly to make a distinction between an actual paper ballot and any visual representation of that ballot. This argument begs the question of why the Defendant wishes to impose Section 31-10-616(1)'s storage, preservation and destruction requirements only on the TIFF files in the possession of the City of Aspen, which are electronic scans of ballots, but not on the Grassroots TV video files showing those same ballot images, which the Defendant affirmatively arranged for public viewing and recording on election night. Only the Plaintiff offers a coherent rationale and interpretation of law that allows the Court to treat both the TIFF files and the Grassroots TV images consistently under Section 31-10-616(1), C.R.S. The TIFF files are "election records" subject to Section 31-10-616(2), C.R.S., not "ballots" subject to Section 31-10-616(1), C.R.S.

III. Contests are ***not*** the only circumstance in which Section 31-10-616(1), C.R.S., allows ballots to be removed from the ballot box.

As the Plaintiff has noted in her motion, the removal of ballots from the ballot box for recounts conducted under Section 31-10-1207, C.R.S., is not expressly allowed by the language of Section 31-10-616(1), C.R.S., but recounts are nevertheless obviously permitted. Similarly, public record inspections under the Colorado Open Records Act (CORA) are not expressly allowed by Section 31-10-616(1), C.R.S., either, but should nonetheless be permitted.

The Defendant claims that the absence in Section 31-10-616(1) of an exception for recounts means nothing, because (she argues) a recount is inherently part of "the election," and therefore "an 'election' does not end when all the ballots are cast." See Def.'s Mem. Opp. Pl.'s Mot. Amend Judgment 4. This is a disingenuous misreading of the language of the statute that, intentionally or not, seriously risks misleading the Court.

By its own terms, Section 31-10-1207(1), C.R.S., provides that a recount "shall be completed by no later than the tenth day *following* the election" (emphasis added). The recount provision obviously contemplates that the "election" is an event that must be concluded before the time period for completing a recount begins to run. Yet the Defendant argues that the "election" is not over until the recounts are concluded. These two meanings cannot coexist. Instead, the correct understanding of the word, "election," as used in both Section 31-10-1207(1), C.R.S., and Section 31-10-616(1), C.R.S. – and throughout Title 31 for that matter – can only plausibly refer to one thing, namely, the activities conducted on the *day of* the election. The Defendant is misleading the Court by asserting that tabulation and other steps somehow extend the meaning of what constitutes "the election."

The Defendant's linguistic misdirection cannot alter the fact that Section 31-10-616(1), C.R.S., does not provide for recounts, yet recounts are an obvious exception to a literal reading of the requirement that ballots may not be removed from the ballot box except for contests tried before the district court under Sections 31-10-1301 to -1308, C.R.S. Public records inspections under CORA are another such exception.

IV. "Substantial compliance" is the appropriate standard for the Defendant to observe in performing her duties under Title 31, and allowing a CORA inspection of the TIFF files is consistent with substantial compliance.

Substantial compliance with the provisions of Title 31 is the standard that the Court must use in resolving "*any controversy* between any official charged with any duty or function under this article and any … other person." See § 31-10-1401(1), C.R.S. (emphasis added). Although the Defendant makes the conclusory statement that allowing a CORA inspection would not constitute substantial compliance with the preservation, storage and destruction requirements of Section 31-10-616(1), C.R.S., she offers no analysis of the case using the factors the Court is

required to consider under *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994). Since Ms. Marks has offered such an analysis in her original motion, see Pl.'s Mot. Amendment Judgment Pursuant C.R.C.P. 59(a)(4) ¶¶ 32-34, the Court should deem the Plaintiff's argument on this point to have been confessed by the Defendant.

V. The Court's review of the legislative history of Section 31-10-616(1), C.R.S., is particularly appropriate in view of the Court's decision to interpret the term, "ballots," to include the TIFF files.

Defendant argues that the legislative history of Section 31-10-616(1), C.R.S., is immaterial to whether the requirements of that provision should be applied to the TIFF files in this case. Her argument ignores that the Court's dismissal turns on interpreting the term, "ballots," to encompass the TIFF files, which in turn subjects the TIFF files in the Court's view to the requirements of Section 31-10-616(1), C.R.S., instead of Section 31-10-616(2), C.R.S.

A review of the legislative history of Section 31-10-616(1) is entirely appropriate in this context. As the Colorado Supreme Court held in *Griffin v. S.W. Devanney & Co., Inc.*, 775 P.2d 555, 559 (Colo. 1989),

> To determine legislative purpose we first look to the statutory language itself, giving words and phrases their commonly accepted and understood meaning. …. If, however, statutory language is uncertain as to its intended scope, with the result that the statutory text lends itself to alternative constructions, then a court may appropriately look to pertinent legislative history in determining which alternative construction is in accordance with the objective sought to be achieved by the legislation.

The Defendant argues that, because Section 31-10-616(1), C.R.S., has been amended three times since 1946 without modernizing language that was initially adopted in the context of pre-1946 balloting practices, the Court should therefore conclude that it has been the affirmative intent of the General Assembly to retain the obsolete language. However, it is well established that the legislative intent of a law cannot be inferred from the failure of the General Assembly to change that law. See, e.g., *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 998 n.8

(Colo. 2003) ("[W]e note that of the many sources we may consult to discern legislative intent, reliance on legislative inaction is particularly risky. The reasons for enacting, or not enacting, legislation are too numerous to tally."). Rather, the intent of Section 31-10-616(1), C.R.S., and its obsolescence as a result of changed balloting practices, is most properly gauged by reviewing the context in which the statutory language was initially adopted.

A review of the legislative history from this perspective, as Ms. Marks has already explained, shows clearly that the language of Section 31-10-616(1), C.R.S., was originally intended to protect the anonymity of the ballot in connection with elections held at a time when ballots were required by the Colorado Constitution to be individually identifiable. Because such voting methods are now prohibited by the Colorado Constitution, the application of Section 31-10-616(1), C.R.S., for the purpose of preventing a CORA inspection of TIFF files is inconsistent with the legislative intent underlying the statutory language.

CONCLUSION

For the foregoing reasons and those set forth in the Plaintiff's Motion for Amendment of Judgment Pursuant to C.R.C.P. 59(a)(4), the Plaintiff respectfully requests that the Court reconsider its Order on Pending Motions entered on March 10, 2010, and amend the judgment to vacate the Court's dismissal of the Complaint and to state instead that the Defendant's Motion to Dismiss is denied.

Respectfully submitted this 13th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2010, I served a true and correct copy of the foregoing **Reply Memorandum in Support of Plaintiff's Motion for Amendment of Judgment Pursuant to C.R.C.P. 59(a)(4)** by the method indicated below to each of the following:

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