

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

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

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I. ISSUE PRESENTED FOR REVIEW

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

II. STATEMENT OF THE CASE

A. Nature of the Case

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

B. Statement of the Facts

Following the November 6, 2012, election between Plaintiff-Appellant Joseph Coors, Jr. ("Coors") and Defendant-Appellee Edward Perlmutter ("Perlmutter") for the 7th Congressional District — which comprises parts of Adams and Jefferson counties — initial statewide tallies showed a 1,268 vote lead for Perlmutter. This margin represented a .9 percent difference between the 138,796 votes cast for Perlmutter and the 137,528 votes cast for Coors. This exceeded the one half of one percent margin which would have triggered an automatic recount under § 1-10.5-101, C.R.S. After the canvass period had closed on November 23, 2012, election officials declared Perlmutter leading by 1,258 votes. Colorado citizens affiliated with the "Democracy in Action" ("DIA") organization filed a request pursuant to CORA, seeking access to TIFF images of ballots cast on e-

voting machines and copies of voted paper ballots, including mail-in, absentee, and provisional ballots. Pursuant to that statute, as codified at § 24-72-205.5, C.R.S., the clerks of Adams county granted the requested access to the counties' ballot images. The Jefferson County Clerk did not comply.

Upon inspection of the ballot images, DIA published a post on its web-blog on December 4, 2012, two days prior to the final day Coors was entitled to file a recount pursuant to § 1-10.5-106(2), C.R.S., listing several alleged irregularities. On December 5, numerous national news media outlets, including NBC, Fox News Channel, and CBS (collectively, "National Media Outlets") filed similar CORA requests to view the ballot images. The Adams county clerk disclosed this information; the Jefferson County Clerk continued to refuse to comply with the requests.

Respondent Coors filed a petition for recount pursuant to § 1-10.5-106, C.R.S., at approximately 4:30 p.m. on Friday, December 7, 2012.

III. SUMMARY OF THE ARGUMENTS

Plaintiff-Appellants brought a civil action under CORA, § 24-72-291, C.R.S., requesting that the Jefferson County District Court order the Jefferson County Clerk to release copies of the ballots and ballot images to the National Media Outlets. The district court granted the Defendant-Appellees' motion to dismiss under Rule 12(b)(5), C.R.C.P., for failure to state a claim upon which relief can be granted. The Plaintiff-Appellants subsequently appealed.

Plaintiff-Appellants request that this Court reverse the trial court's ruling and grant Plaintiff-Appellant's request to release voted ballot images because the request was

made prior to the commencement of the recount period on December 7, 2012. Plaintiff-Appellants argue that § 24-72-205.5, C.R.S., does not explicitly address this situation and that the history of Colorado statutory and common law errs in favor of such access, particularly in instances in which administrative delay beyond the power of the citizen making a request prevented that citizen from receiving the requested information.

IV. ARGUMENTS

A. Colorado law generally supports openness with limited exceptions.

§ 24-72-203(1)(a), C.R.S., states that “[a]ll public records shall be open for inspection by any person at reasonable times.” The law is a clear attempt to provide transparency to the governing process. Because the law favors openness, it provides that access should be granted “except as provided . . . by law.” Similar phrasing has been interpreted to apply only “when a legislative enactment expressly so provides.” *Regents of University of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496, 501 (Colo. 2012) (quoting *Associated Students v. Regents of University of Colorado*, 543 P.2d 59, 61 (superseded by statute, § 24-6-402(1)(d), C.R.S. (2011)) (discussing the Open Meetings Law of the Colorado Sunshine Act)); *see also Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984), *superseded by statute*, § 24-72-202(1.5), C.R.S. (2011). Here, the statute’s meaning is clear and thus should not be inappropriately supplemented with meanings beyond those explicitly provided by the language. *Marks v. Koch*, 2011 WL 4487753 at *5 (Colo. App. Sep. 29, 2011) (“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.

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.”) (internal citations omitted).

B. No exception to ballot access exists in cases in which the CORA request predates the recount.

The relevant statute provides a limited exception for which access to ballot images should be denied once a recount has begun. § 24-72-205.5(3)(a), C.R.S. states:

[T]he designated election official shall not fulfill a request under this part 2 for the public inspection of ballots during the period commencing with the forty-fifth day preceding election day and concluding with the date either by which the designated election official is required to certify an official abstract of votes cast for the applicable candidate contest or ballot issue or ballot question pursuant to section 1-10-102 or 31-10-1205(1), C.R.S., as applicable, or by which any recount conducted in accordance with article 10.5 of title 1, C.R.S., or section 31-10-1207, C.R.S., is completed, as applicable, whichever date is later.

Nowhere does this statute expressly prohibit an election official from denying a request made prior to a recount’s commencement, as is the case here. “Exceptions to [CORA] should be narrowly construed.” *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). This recently enacted law simply did not contemplate the current context, perhaps because of the limited debate surrounding the bill’s passage. *See, John Tomasic, Veto pressure mounts as Hickenlooper reviews open-records elections bill*, THE COLORADO INDEPENDENT, Jun 1, 2012 (“The [] bill . . . was never fully debated in House committees or in the House chamber and has raised alarms across the state.”). The express limitation on the face of the statute envisions only that the CORA requests should be denied *after* the commencement of a recount pursuant to § 1-10.5-106, C.R.S.

But, as in this case, any individual whose request was made prior to the recount petition maintains a statutory right to review ballot images. This right may not be denied due to mere administrative delay. To do so would unduly limit the right CORA enables by an arbitrary question of how quickly state officials respond to requests.

C. The legislative intent weighs in favor of access.

CORA, at § 24-72-205.5(1)(a), C.R.S., in expanding access to ballots, states unequivocally that “[b]y enacting this section, the general assembly intends to permit the inspection of ballots under the conditions specified in this section and to protect the integrity of the election process while protecting voter privacy and preserving secrecy in voting.” Allowing news media outlets access to the requested ballot images fulfills each of the stated goals and causes none of the fears envisioned by this language.

With greater access, the integrity of the election process will not only be left unharmed but will indeed be aided by further inspection. In the flurry of action surrounding recounts, it is often useful to have many parties searching for irregularities and problems with the election process. *See, e.g.*, Ford Fessenden & John M. Broder, *Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001 (discussing a comprehensive study by a media consortium that indicated that vote totals may have been different had more votes been examined).

D. Defendant-Appellee's Privacy concerns are unfounded.

Public oversight serves multiple purposes, including enhancing public confidence in the process and providing more sets of eyes to ensure valid votes are counted and invalid votes are not. *See, e.g.,* MJ Lee, *Wisconsin Recall Livestream Draws Thousands*, POLITICO, Jan. 20, 2012 (describing the Wisconsin Government Accountability Board's live stream of the counting of petition signatures to recall Governor Scott Walker); Marisa Helms, *Political Junkies Flock to Live Streaming of Recount Proceedings*, MinnPost, Dec. 22, 2008 (describing the volume of traffic viewing the Minnesota State Canvassing Board's manual recount in the Senate election of 2008); Ford Fessenden & John M. Broder, *Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001 (discussing a comprehensive study that indicated that vote totals may have been different had more votes been examined). Any possible limitations to access due to privacy concerns are assuaged by the statute's conformity with section 8 of article VII of the state constitution. Specifically, the statute, at subsections (4)(b)(III-IV) provides for the means to ensure ballot secrecy and voter privacy. § 24-72-205.5(4)(b)(III), C.R.S. ("To protect the privacy of particular electors, any ballots cast by electors within groups of discrete individuals who are more susceptible of being personally identified...shall be made available for public inspection only to the extent such ballots may be duplicated without identifying elector information."); § 24-72-205.5(4)(b)(IV), C.R.S.) "To protect the privacy of particular electors, ballots made available for inspection may be presented in random order selected by the designated election official or his or her designee."). To raise such alarms now is past overdue. Furthermore, such fears are too speculative and remote for a

court to grant reasonable relief. Moreover, Secretary of State Gessler’s recent executive order serves to further insulate voters from the sort of privacy concerns raised by Defendant-Appellees. Secretary of State Scott Gessler, Order 12-003, Aug. 20, 2012. Defendant-Appellees’ concerns are further speculative due to the fact that the “batching” method of storing ballots is entirely run at the local level. Clerks could very well have randomized the ballots in a non-automatic recount situation, thus limiting any fears regarding privacy.

Nor does the context of a recount increase voters’ privacy rights or increase the concern that those rights might be ignored. Without support, Defendant-Appellees propose that voters’ privacy concerns are heightened during the recount procedure. But the safeguards put in place by § 24-72.205.5, C.R.S., operate with equal strength in a recount as they would in an unchallenged elections.

E. The equitable tolling doctrine weighs in favor of access.

In the area of statutory tolling, this nation’s courts have long held that where circumstances fall beyond a petitioner’s control, statutory tolling limits should be equitably extended. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1097 (Colo. 1996) (“Other jurisdictions have applied equitable tolling in a . . . category of cases where extraordinary circumstances make it impossible for the plaintiff to file his or her claims within the statutory period” (citing, *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867) (finding extraordinary circumstances tolling statute of limitations where courts in southern states were closed during Civil War))); *Seattle Audubon Soc’y v. Robertson*, 931 F.2d 590 (9th Cir. 1991) (applying equitable tolling where district court’s erroneous

enforcement of an unconstitutional statute barred plaintiff from filing claims in a timely manner), rev'd on other grounds, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992); *Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947) (holding plaintiff's internment by Japan during World War II tolled limitations period on his claim arising immediately prior to his internment)). As the *Dean Witter Reynolds* court explained, "[t]he reasoning underlying these cases is that it is unfair to penalize the plaintiff for circumstances outside his or her control, so long as the plaintiff makes good faith efforts to pursue the claims when possible." *Id.* Admittedly, the current context is unique and the principles of equitable tolling are only useful by analogy. Here, the National Media Outlets filed their CORA requests in accordance with the statutory requirements. The requests were timely made and have been denied merely due to subsequent circumstances beyond the requestor's control. It is unfair to penalize the National Media Outlets for circumstances entirely beyond their control, and principles of equity should protect these citizens' rights from arbitrary invalidation due to the actions of third parties.

F. Public policy favors access.

Millions of voters went to the polls on November 6 in order to make their voices heard and to elect their representative to Congress. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 433 (1992). To deny this fundamental right would be to deny all others. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). In order to fulfill those rights, Colorado must assure itself, its citizens, and the world that all votes have been

counted accurately. In the short time allowed for post-election litigation, it is imperative that all interested parties participate.

G. CRS 24-72-205.5 impermissibly creates two classes of citizens.

CRS 24-72-205.5(3)(a) denies Colorado’s citizens the right to ballot access during the recount period. At subsection (3)(b), however, the statute provides an exception for “interested” parties. § 24-72-205.5(3)(b) C.R.S. (“ . . . an interested party may inspect and request copies of ballots in connection with such recount without having to obtain a court order granting such inspection.”). This exception extends to a limited subgroup of individuals including candidates, petition representatives, governing bodies that referred a ballot issue to the electorate, and the agents of issue committees that must report contributions pursuant to the Fair Campaign Practices Act. § 24-72-205.5(1)(c)(I-IV).

This limited exception violates the Equal Protection Clause of the United States Constitution (U.S. Const. amend. XIV § 2) and conflicts with the spirit of the CORA framework. There is no rational basis for the state to create a bifurcated citizenry as it relates to this fundamental right to access as provided by the state of Colorado.

V. CONCLUSION

Granting fuller ballot access to those who timely requested it pursuant to their statutory right is the best means to ensure a transparent democratic process. To deny access without clear, express statutory authority based upon administrative delay is a perversion of this state’s system of governance. For the foregoing reasons, Plaintiff-Appellant respectfully requests that this court reverse the lower court’s ruling and grant

Plaintiff-Appellant's request to order the Jefferson County Clerk to release the requested ballots pursuant to § 24-72-205.5, C.R.S., for any CORA petitioner duly submitting such requests prior to the commencement of the recount.