

DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiffs: KATHLEEN CURRY, et al. v. Defendant: BERNIE BUESCHER	
	Case Number: 10CV8191 Courtroom: 18
ORDER TO COUNT ALL WRITE-IN VOTES IN THE HD 61 CONTEST	

THIS MATTER comes before the Court on the Plaintiffs’ Petition for Emergency Relief under § 1-1-113(1), C.R.S., and Complaint for Declaratory Judgment. The Court, having reviewed the related pleadings and relevant portions of its file, finds and rules as follows:

A hearing was held in this matter on October 22, 2010. Pursuant to the agreement of the parties, however, the Court deferred ruling until it was determined whether the outcome of the election could be affected by potentially uncounted write-in votes. As discussed in more detail below, the Secretary of State has submitted a present vote tally which makes the issue in this case ripe for determination.

Factual Background

Plaintiff Kathleen Curry (“Curry”) is an eligible write-in candidate for the office of Representative for Colorado State House District 61 (“HD 61”). In the election held earlier this week, Curry received 9,001 write-in votes, leaving her in second place behind candidate Roger Wilson (“Wilson”), who received 9,496 votes.¹ There are also 2,001 undervotes in the HD 61 race. The undervotes are determined by counting the total number of votes cast in HD 61, and subtracting the number known votes for the candidates. Stated another way, 29,390 ballots were apparently submitted in HD 61. Wilson received 9,496 votes, Curry received 9,001 votes, and candidate Luke Korkowski received 8,892 votes, for a combined total of 27,389 votes. The difference between the 29,390 ballots and the 27,389 votes for the three candidates makes up the 2,001 undervotes.

HD 61 uses paper ballots which are tallied by optical scanners. To cast a vote for a particular, identified candidate, a voter must fill in a box or oval next to the candidate’s name. To vote for an official write-in candidate, a voter may fill in the box or oval next to a line labeled

¹ There are a few provisional ballots that have yet to be counted but not enough to move Curry ahead of Wilson or enough to offset the undervote.

“write-in,” and write the candidate’s name on the line. When a box or oval next to the write-in line is filled in, the ballot is inspected by hand to determine what name the voter wrote on the line.

If a voter does not mark any of the boxes or ovals in a given race, the optical scanner does not record a vote in that race, and an undervote occurs. More importantly, if a voter writes a name on the write-in line, but does not fill in the corresponding box or oval, the optical scanner treats it the same as any other undervote, and the ballot is not reviewed to see if an eligible candidate’s name appears on the write-in line. Accordingly, the 2,001 undervotes in HD 61 could include ballots on which a voter wrote Curry’s name on the write-in line but did not fill in the corresponding box or oval.

Legal Standards

With regard to write-in votes, C.R.S. § 1-7-114(1) provides that eligible electors may cast a write-in vote for a candidate, who has filed an affidavit of intent, by writing the name of the person in the blank space provided for write-in candidates on the ballot. The statute further provides that write-in votes shall be counted only when the intention of the elector is clearly apparent. There is no requirement in C.R.S. § 1-7-114 for any further expression of the voter’s intent.

C.R.S. § 1-7-309 governs circumstances when ballots are improperly marked. Subsection (1) of the statute provides that votes shall not be counted if it is impossible to determine the elector’s choice of candidate. Subsection (2) provides that a defective or incomplete cross mark on any ballot in a proper place shall be counted, so long as no other cross marks on the ballot indicate an intention to vote for a different candidate.

The Secretary of State has also promulgated Election Rules under 8 CCR 1501-1 which set forth, among other things, the procedures to be followed when ballots are inspected by hand. Pursuant to Election Rule 27.4.2(d)(2), overvotes (when more votes are scanned than the maximum number of candidates allowed), blank ballots (including ballots which were consistently marked by a method other than filling in boxes or ovals), and write-in ballots are inspected by hand. In such regard, only write-in ballots in which the voter also filled in the corresponding box or oval are inspected, and counted. If the voter only wrote the candidates name, and did not fill in the box or oval, the ballot is not inspected, and the vote for the write-in candidate is not counted.

Pursuant to C.R.S. 1-10.5-101 a recount of any election shall be held if the difference between the highest number of votes and the next highest number of votes in a contest is less than or equal to one half of one percent of the highest number of votes. In the present matter, the difference between the votes for Wilson and Curry is 495 votes, which is approximately 5% of the votes received by Wilson. To qualify under the one half of one percent standard, Curry would have had to have been within 47 votes of Wilson’s total. Pursuant to C.R.S. § 1-10.5-106, Curry may also request a recount but she would be responsible for paying for the cost of such recount.

In the event of a recount, Election Rule 27.7.4.3 provides that the written name of a candidate in the write-in space shall be counted as a vote whether or not the corresponding box or oval was filled in.

Finally, pursuant to C.R.S. § 1-1-103 the election code is to be liberally construed so that all eligible electors may be permitted to vote and substantial compliance with the provisions or intent of the code is all that is required for a proper election. In this regard, pursuant to C.R.S. § 1-1-113, this Court may issue an order requiring substantial compliance with the code when good cause is shown that an official has breached a duty under the code.

Ruling

The Secretary points to C.R.S. § 1-7-304(1) which provides that, to cast a vote, an eligible elector shall clearly mark the appropriate square opposite the name of a candidate. The provision appears to be in conflict with C.R.S. § 1-7-114(1) which allows a vote for a write-in candidate to be cast simply by writing the name of the person in the blank space provided for write-in candidates on the ballot and which does not discuss any marks next to the candidates name. A primary rule of statutory construction, however, is that a specific statute prevails over more general legislation. *People v. Weller*, 679 P.2d 1077, 1082 (Colo. 1984). The Court finds that C.R.S. § 1-7-304 is the more general provision in that it addresses the broader procedure for casting votes for named candidates and for ballot issues. It does not address the manner in which a vote may be cast for a write in candidate. C.R.S. § 1-7-114, on the other hand, deals only with the specific circumstance of voting for a write-in candidate. The Court also finds that the legislature easily could have included language in C.R.S. § 1-7-114 such as “in addition to the procedures of C.R.S. § 1-7-304 ...” or “... by marking the appropriate square and writing the name of the person in the blank space provided.” The fact that the legislature did not include such language suggests that it did not intend to include the additional requirement.

The Court disagrees with the Secretary’s argument that a provision for write-in votes which does not also require a particular box to be marked would frustrate the legislative intent of the election code or that it would render any part of the code superfluous. The overall intent of the election code is to permit qualified electors to cast their votes for eligible candidates and ballot issues of their choosing, not to thwart the intent of voters by imposing technical obstacles. Permitting write-in votes to be cast without placing a mark by the write-in line does not make C.R.S. § 1-7-304 superfluous because that statute still sets forth the method by which to vote for named candidates and ballot measures.

The Secretary also cites to *Wiley v. McDowell*, 133 P. 757 (Colo. 1913) and *Riley v. Trainor*, 140 P. 469 (Colo. 1914). Although in *Wiley* the Colorado Supreme Court stated that “whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute,” *id.* at 238-9, the manner presently provided by statute to vote for a write-in candidate is to write the name of a qualified candidate in the blank space provided on the ballot, *see* C.R.S. § 1-7-114(1). In *Riley*, the Colorado Supreme Court interpreted a statute similar to today’s version of C.R.S. § 1-7-304 to require a voter to place a cross mark next to the name of any candidate for whom he wished to vote, including write-in candidates. There is no

indication in *Riley*, however, that a provision similar to C.R.S. § 1-7-114 existed in 1914. If C.R.S. § 1-7-304 was the only statutory provision addressing the method by which to cast votes, the Court would agree with the Secretary's argument; however, the analysis of *Riley* is inapplicable to the present statutory scheme which specifically addresses the manner in which votes for write-in candidates may be cast.

The Court additionally notes that it is disingenuous to assert that names of eligible candidates written in the write-in line constitute valid votes for purposes of a recount, *see* Election Rule 27.7.4.3, but that they are not valid votes for purposes of an initial count. In short, the Court agrees with the Secretary's position in practice that when such votes can affect the outcome of the election they should be counted.

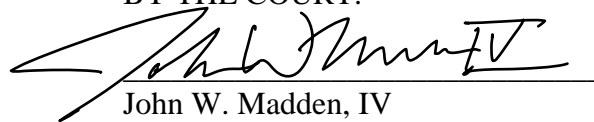
The Secretary expresses a legitimate concern that hand counting ballots involving contests with a write-in candidate could result in every ballot in the State being counted by hand given that the state wide contests for Governor and United States Senator include properly registered write-in candidates. As a general rule, however, even if every undervote included a write-in vote for such a candidate, the write-in candidate could still not receive enough votes to change the outcome of the race. The Court finds that, in such a circumstance, the current method of counting votes which excludes undervotes would be in substantial compliance with the intent of the election code. The method would still have accurately determined the individual who received the greatest number of votes, and the will of the voters would have been carried out. Similarly, in a circumstance in which a write-in candidate wins the election, the failure to count potential, additional write-in votes for that candidate would not change the proper outcome of the election. Only when the failure to inspect undervotes by hand could change the result of the contest has there been a failure to substantially comply with the intent of the election code.

In the present case, there may be write-in votes for Curry which comply with C.R.S. § 1-7-114(1), and, therefore, are valid votes for Curry which have not yet been counted. It is possible Curry may have received the greatest number of votes in the HD 61 race. Refusing to count these votes would thwart the clear intention of the electorate, as well as the intent of the election code. Accordingly, the Court finds that in this particular circumstance, the Secretary has not substantially complied with the election code.

For the reasons stated above, the Secretary of State is ordered to perform an inspection of the ballots constituting the undervote in the HD 61 race, and to include in the vote total for Curry those ballots in which Curry's name has been written on the write-in line for the HD 61 race whether or not the target area designating the selection of a write-in candidate has been marked pursuant to the same procedure as stated in Election Rule 27.7.4.3.

SO ORDERED this 5th day of November, 2010

BY THE COURT:

A handwritten signature in black ink, appearing to read "John W. Madden, IV", written over a horizontal line.

John W. Madden, IV
District Court Judge