DATE FILED: January 12, 2024

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	
VET VOICE FOUNDATION, et al., Plaintiffs, v. JENA GRISWOLD, Defendant, and VERA ORTEGON, et al., Intervenors.	▲ COURT USE ONLY ▲
	Case No.: 2022CV33456 Courtroom: 215

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiffs' Motion for Summary Judgment ("Motion"). The Motion is opposed by Defendant and Intervenors and is fully briefed. Having considered the parties' briefs, relevant case law, the submitted evidence, and the file, the Court finds and orders as follows.

I. INTRODUCTION

Plaintiffs are a veterans' advocacy organization and three individuals. The instant action alleges that Defendant (who is sued in her official capacity as the Colorado Secretary of State) has implemented certain statutorily-mandated signature verification procedures which have deprived the individuals of their ability to cast ballots in past elections and may do so in the future. Plaintiffs seek declaratory and injunctive relief to prevent Defendant from implementing these procedures in future elections.

In connection with the Motion, the parties have filed with the court thousands of pages of depositions, expert reports, declarations, and other matter. Many of the depositions were filed in

their entirety without highlighting; likewise, the expert reports and declarations generally were filed in their entirety. The Court has done its best to review this information, but it has not, and will not, review all of it. It is the parties' job to distill the information for the Court, not the other way around. While the Court has endeavored to give some latitude to the parties given the import of this case's subject matter, that comes to an end now. All future filings shall strictly comply with the page limits contained in C.R.C.P. 121, and the Court will strike filings with overly voluminous attachments and exhibits.

II. STANDARD OF REVIEW

The court may grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999). The court may not grant summary judgment when the pleadings and affidavits show material facts in dispute. *GE Life & Annuity Assurance Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 706 (Colo. App. 2001).

A material fact is one that will affect the outcome of the case. *Struble v. Am. Fam. Ins. Co.*, 172 P.3d 950, 955 (Colo. App. 2007); *Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75 (Colo. App. 1987). The moving party has the initial burden of showing that no genuine issue of material fact exists; the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). This burden has two distinct components: 1) an initial burden of production on the moving party, which, when satisfied, then shifts to the nonmoving party; and 2) an ultimate burden of persuasion, which always remains on the moving party. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The initial burden may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id*. Once the party moving for summary judgment has made a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest upon the mere allegations or denials in his or her pleadings but must demonstrate by specific facts that a controversy exists. *U.S.A. Leasing, Inc. LLC v. Montelongo*, 25 P.3d 1277, 1278 (Colo. App. 2001).

III. UNDISPUTED FACTS

The Court will not attempt to exhaustively review each fact asserted by Plaintiffs and refuted by Defendant. Indeed, except at the margins, there appears to be very little in dispute. The question in large part comes down to whether the signature verification provisions in the statute and Defendant's regulations implementing those provisions are subject to a strict scrutiny standard or some lesser balancing standard under the so-called *Anderson*/*Burdick* test. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *In re Hickenlooper*, 312 P.3d 153(Colo. 2013).

The parties are in agreement that since 2018, Colorado voters have cast more than 17 million ballots by mail. Resp. Ex. 1, ¶ 4.[1] A ballot rejected for a signature discrepancy may be cured via a form which must be sent to the voter within three days of rejection. Id., ¶ 11; C.R.S. § 1-7.5-107.3(2)(a). Voters who receive notification may return the form by mail, or respond by text, with a copy of current identification. The response must be received within eight days after election day. Id., ¶ 13; C.R.S. § 1-7.5-107.3(2)(a).

Nearly 150,000 ballots have been initially rejected for signature discrepancies since 2018. Id., ¶ 14. Over 50,000 voters took measures to correct the initial rejection, which resulted in their votes being counted. Id., ¶ 15. This leaves 100,000 uncounted and uncured ballots since 2018, amounting to one-half of one percent of the total ballots cast since 2018.[2] Plaintiffs have submitted anecdotal evidence from various voters who have had their signatures rejected, though a substantial portion of them simply chose not to avail themselves of the cure process. *Compare* Id., ¶ 19 *with* Resp. pp. 7-8.

IV. ANALYSIS

A. Standard of Review

Before addressing the merits, the Court first must resolve the parties' dispute regarding the level of scrutiny to be accorded the signature verification procedures. Plaintiffs argue that the Court must apply strict scrutiny, while Defendant maintains that some lower level balancing test applies. The problem with Plaintiffs' position here is that it ignores decades of precedent to the contrary.

To be sure, the Legislature may not enact voting restrictions amounting to a denial of the right to vote. *Moran v. Carlstrom*, 775 P.2d 1176, 1180 (Colo. 1989). Similarly, restrictions that require a "a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters" must be subject to strict scrutiny review. *Id*. (internal quotation and citation omitted). However,

> [T]he right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute. Rather, the United States Constitution provides that States may prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. . . . As a result, the United States Supreme Court has crafted a flexible balancing test for considering the propriety of a state election law in light of citizens' First and Fourteenth Amendment rights.

[1] For clarity, the Court adopts the numbering convention applied by Defendant to Plaintiff's statement of undisputed facts as set forth in Exhibit 1 to Defendant's response brief filed November 30, 2023.

[2] Defendant argues throughout her response that this amounts to "0.05% of ballots." *E.g.* Resp. p. 16. This appears to be a math error.

In re Hickenlooper, 312 P.3d 153, 156-157 (Colo. 2013) (certain citations and internal quotations omitted).

This flexible standard requires a balancing of the nature and severity of the alleged constitutional injury against the state's interest in the burden imposed by the challenged restriction. *Id*. "Essentially, the severity of the burden on individuals' voting rights determines the constitutionality of the State's election procedure." *Id*. In assessing this balance, Colorado has adopted the balancing test in in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Colorado Libertarian Party v. Secretary of State*, 817 P.2d 998, 1001-1002 (Colo. 1991). To determine whether a restriction is constitutional, the court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. *See also Bruce v. City of Colorado Springs*, 971 P.2d 679, 683-684 (Colo. App. 1998).

If a challenged regulation "actually limits or hinders the ability of a person to exercise a fundamental right," strict scrutiny applies. *Bruce*, 971 P.2d at 683. If the regulation "imposes reasonable, nondiscriminatory restrictions upon the rights of voters, the state's important regulatory interests generally are sufficient to justify the restrictions. *Id., citing* *Burdick v. Takushi*, 504 U.S. 428 (1992). In fact, the United State Supreme Court has recognized that "government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes'" *Burdick*, at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

The "rigorousness" of the examination depends on the burden imposed by the challenged regulation. *Burdick*, 504 U.S. at 434. Severe restrictions necessitate a narrowly drawn provision that supports a compelling state interest. *Id*. But "reasonable, non-discriminatory restrictions" are generally consistent with a state's "important regulatory interests." *Id.*

B. Strict Scrutiny does not Apply.

Utilizing a lot of hyperbole and a certain amount of flag waving, Plaintiffs argue that Defendant's signature verification requirements must be subject to strict scrutiny. The Court rejects this position for at least three reasons.

First, only a very low percentage of ballots were not counted due to signature verification issues – one-half of one percent of all ballots cast since 2018. Further, the fact that these ballots were not counted does not mean that they were wrongly rejected, an assumption at the heart of Plaintiffs' motion. Neither party has presented evidence on this point or otherwise explained why the ballots were not cured. Moreover, the low percentage itself is evidence that the burden on voting rights is low. A few dozen affidavits do not "rather vividly" prove anything. Reply p. 10. This is particularly so when most of the affiants never bothered to cure their ballots after receiving notification that their ballots had a signature discrepancy.

Second, in the event that a signature is rejected, the statute provides for notification and a right to cure the problem. If a signature deficiency is detected, the voter is entitled to written notice within three days after the deficiency has been identified and in any case no later than two days after election day. C.R.S. § 1-7.5-107.3(2)(a). In addition, the voter may also receive notice via e-mail and/or text message. The voter may cure the problem by responding to the text message or by mailing back the supplied form with a copy of current identification. Id. Thus, the burden to cure is relatively low.

A survey of the case law reveals that in such situations, i.e. where there is an opportunity to cure and notice, signature verification requirements are rarely, if ever, deemed unconstitutional. *See e.g. League of Women Voters v. Schwab*, 63 P.3d 803 (Kan. App. 2023) (striking down signature verification under strict scrutiny where no cure opportunity); *League of Women Voters v. LaRose*, 489 F. Supp. 3d 719 (S.D. Ohio 2020) (upholding signature verification where voters had right to cure); *Richardson v. Texas Secretary of State*, 978 F.3d 220 (5th Cir. 2020) (upholding signature verification even without notice or opportunity to cure); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018) (finding unconstitutional a signature verification procedure which was unreviewable and uncurable); *Frederick v. Lawson*, 481 F. Supp. 3d 774 (S.D. Ind. 2020) (invalidating signature verification where there was no provision to notify voter of a rejected signature); *Self Advocacy Solutions N.D. v. Jaeger*, 464 F. Supp. 3d 1039 (D.N.D. 2020) (invalidating signature verification where no notice or right to cure); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018) (rejecting signature verification where no notice or opportunity to cure); *Alliance for Retired Americans v. Sec. of State*, 240 A.3d 45 (Me. 2020) (upholding signature verification where procedures required notice and cure opportunity).

Third, the State at least arguably has a compelling state interest in its signature verification procedures. Defendant's expert opines that signature verification is a legitimate means of combating election fraud. The same expert also states that these procedures bolster voter confidence in election outcomes and enhance voter turnout. Resp. Ex. 3 (Sten Report). Plaintiffs' experts of course refute these notions. But at the very least there is a disputed issue of

material fact concerning the nature and importance of Defendant's interest in signature verification.

In sum, and at a minimum, there are material questions of fact as to: 1) the level of the burden borne by Plaintiffs in curing a discrepant signature; and 2) how compelling the state's interest is in the signature verification process. In light of these disputes, Plaintiffs are not entitled to summary judgment on their First Claim for Relief.

C. There are Disputed Issue of Material Fact as to County Discrepancies.

Plaintiffs' equal protection claim comes down to the question whether there are impermissible (or any) variations in signature rejection rates among the counties. Defendant argues that the same verification procedures apply to all the counties which results in uniform examination and, presumably, generally consistent rejection rates. Plaintiff maintains that the rejection rates vary unacceptably from county to county.[3]

Whether there are variations, and whether those variations are significant is sharply disputed by the parties' respective experts. Defendant's expert opines that the variations of signature rejections among counties are negligible when other variables are accounted for. Resp. Ex. 14 (Aravikin Report) ¶ 16. Conversely, Plaintiff's expert maintains that there are "considerable" variations among signature rejection rates among the counties. Mot. Gordon Decl. Ex.A (Palmer Report), ¶7.

Whether signature rejection varies among the counties, whether such variation is significant, and the cause of any such variation all are disputed issues of material fact. Summary judgment on Plaintiff's Third Claim for Relief therefore must be denied.

[3] Plaintiffs cite *Bush v. Gore*, 531 U.S. 98 (2000) for the proposition that a state must treat each voter's ballot consistently using uniform statewide standards. Plaintiffs position is that the alleged county variations in signature verifications violate this holding. Plaintiffs do not argue that Defendant's procedures vary. *Bush* addresses only inconsistent procedures, not inconsistent results.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is DENIED.

ENTERED this 12th day of January, 2024.

BY THE COURT:

J. Eric Elliff
District Court Judge