

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

1437 Bannock Street
Denver, CO 80202

Plaintiffs,

VET VOICE FOUNDATION, RANDY EICHNER, JOHN ERWIN, and AMANDA IRETON,

v.

Defendant,

JENA GRISWOLD, in her official capacity as Colorado Secretary of State.

and

Intervenor Defendants,

VERA ORTEGON and WAYNE WILLIAMS.

▲ COURT USE ONLY ▲

Case No. 2022CV33456

Ctrm./Div.: 215

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MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

I. INTRODUCTION

Plaintiffs respectfully request, pursuant to C.A.R. 4.2(b), that the Court certify for interlocutory appellate review its order that signature matching is not severable from the statute authorizing Colorado's mail balloting.

Plaintiffs brought this lawsuit because nearly 100,000 Colorado voters have had—and thousands of future voters will have—their ballots rejected based on the fundamentally flawed process of signature matching. To be clear, Plaintiffs neither challenge the constitutionality of Colorado's entire vote-by-mail system nor seek to dismantle it. Just the opposite. Plaintiffs support Colorado's mail voting system because it allows voters greater flexibility and increases access to the franchise. Plaintiffs' lawsuit seeks instead to ensure that the vote by mail system fully complies with state constitutional requirements by eliminating the unconstitutional practice of invalidating ballots cast by fully qualified Colorado citizens based on nothing more than perceived signature variations.

The Court's recent order concluding that signature matching is not severable from Colorado's vote-by-mail system puts Plaintiffs in the untenable position of arguing for a result (a declaration that rejecting ballots based on signature matching is unconstitutional) that would lead to an outcome they don't want—the striking down of mail voting in Colorado.

As a result, Plaintiffs seek certification of the Court's order for interlocutory appeal. Appellate resolution of this key novel issue now will afford the parties certainty about the implications of proceeding to trial.

II. CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

Counsel for Plaintiffs conferred with counsel for the Secretary and Intervenors regarding the relief sought in this motion. The Secretary and Intervenors take no position on this motion.

III. FACTUAL BACKGROUND

On November 20, 2023, the Secretary filed a Motion for Determination of a Question of Law Under C.R.C.P. 56(h) asking the Court to hold that the statutory requirement for signature matching in § 1-7.5-107.3, C.R.S (2023), is not severable from the rest of Article 7.5.

Secretary's Mot. for Determination of a Question of Law Under C.R.C.P. 56(h) (Nov. 20, 2023).

Plaintiffs opposed that motion, arguing that the "signature matching requirement is a small, discrete subsection in the larger mail-in ballot system" and it "is not, and has never been, integral to the structure or function of Colorado's mail-in ballot system."¹ Plfs.' Opp'n to the Secretary's Mot. for Determination of a Question of Law Under C.R.C.P. 56(h) (Dec. 11, 2023).

On January 3, 2024, the Court issued its order agreeing with the Secretary that signature matching is not severable from the broader statute establishing Colorado's mail ballot system. Order on Mot. for Determination of Law (Jan. 3, 2024) ("Order"). Plaintiffs now request to certify the Order for interlocutory review by the Colorado Court of Appeals.

IV. LEGAL STANDARD

Under section 13-4-102.1(1), C.R.S. 2023, and C.A.R. 4.2(b), a district court may certify an order for interlocutory appellate review, and an appellate court may accept such review, where "(1) immediate review may promote a more orderly disposition or establish a final

¹ Plaintiffs also argued that severability was not yet ripe for determination. Plaintiffs do not intend to advance such an argument on appeal.

disposition of the litigation; (2) the order involves a controlling question of law; and (3) that question of law is unresolved.” *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 12. The Order satisfies all three elements.

V. ARGUMENT

A. Immediate Review of the Order Will Lead to a More Orderly Disposition of this Case.

Interlocutory review of the Order will lead to a more orderly disposition of this case because it will provide a final answer prior to trial about the broader implications of an outcome in Plaintiffs’ favor, allowing the parties to tailor their presentation of evidence and both their merits and remedial arguments in light of that disposition.

To be certifiable under C.A.R. 4.2(b), an issue need not be the primary merits question of the case; “issues collateral to the merits may be the proper subject of an interlocutory appeal.” *See Triple Crown at Observatory Vill. Ass’n, Inc. v. Vill. Homes of Colo., Inc.*, 2013 COA 144, ¶ 20 (holding enforceability of arbitration clause was proper subject of interlocutory appeal). While the Order does not on its face resolve the case, it plays a “central role” in resolving a key issue (the relief available at trial), and appellate resolution of that issue would promote a more orderly disposition of this litigation. *Affiniti Colo.*, ¶ 16 (granting discretionary review on issue of applicable privilege that would not “resolv[e] the entire litigation” but played a “central role” because it could substantially affect the case’s disposition).

Now that the Court has ruled that the signature matching procedure is not severable from Colorado’s vote-by-mail system, Plaintiffs are in the untenable position of proceeding to trial and arguing for a result that would lead to an outcome they don’t want. Interlocutory review thus offers a more orderly disposition of this case. Should Colorado’s appellate courts agree that

signature matching is inseparably linked to Colorado’s entire vote-by-mail system, the parties will have certainty about the matter and Plaintiffs will be able to more fulsomely assess their options, including whether to amend their complaint, revisit the remedy sought, and/or proceed to trial. On the other hand, should Colorado’s appellate courts hold that signature matching *is* in fact severable, the parties can tailor their evidence and both merits and remedial arguments accordingly. Finally, Plaintiffs do not seek this interlocutory appeal for the purposes of delay but rather for clarity on a key issue that affects whether and how trial will occur.

B. The Order Involves a Controlling Question of Law.

The question of the severability of signature matching from the vote-by-mail statute is also a controlling question of law appropriate for interlocutory review. “[W]hether an issue is ‘controlling’ depends on the nature and circumstances of the order being appealed.” *Indep. Bank v. Pandy*, 2015 COA 3, ¶ 9. Factors to be considered in determining whether an order involves a controlling question of law include: “(1) whether the issue is one of widespread public interest; (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is case dispositive; and (4) whether the case involves extraordinary facts.” *Affiniti Colo*, ¶ 17 (internal quotation marks and citations omitted). All of these factors need not be present, *see id.* ¶ 18–20, but the issue must present a “‘pure’ question of law, as opposed to a mere application of settled legal principles to the facts.” *Rich v. Ball Ranch P’ship*, 2015 COA 6, ¶ 10.

These factors strongly indicate that severability is a controlling question of law. First, as the Court has already acknowledged, the question of severability “is purely a legal one.” Order at 2. And Colorado courts regularly certify questions rooted in statutory interpretation, including

orders on Rule 56(h) motions. *See Trudgian v. LM Gen. Ins. Co.*, 2020 COA 147, ¶¶ 4–6 (trial court certified order on 56(h) motion relating to issue of statutory interpretation); *Legro v. Robinson*, 2015 COA 183, ¶¶ 10, 12–13 (trial court certified order on 56(h) motion determining duty of care owed to plaintiff); *Cummings v. Arapahoe Cnty. Sheriff's Dept.*, 2018 COA 136, ¶ 1 (interlocutory appeal of denial of summary judgment motion based on trial court's interpretation of statute); *Hickman v. Catholic Health Initiatives*, 2013 COA 129, ¶ 1 (allowing interlocutory appeal to determine retroactivity of statute); *In re M.D.E.*, 2013 COA 13, ¶ 8 (interlocutory appeal to determine meaning of the word “grandparent” in statute). This Court's order is based almost exclusively on statutory interpretation, and legislative intent analysis, *see* Order at 4–5, which weighs heavily in favor of review.

Second, Colorado's mail voting system, signature matching, and whether the two are severable are indisputably matters of *statewide* public interest of the highest order. *See Bickel v. City of Boulder*, 885 P.2d 215, 225 (Colo. 1994) (“[C]itizens have the right to be free from restrictions that deny the franchise or render its exercise so difficult and inconvenient as to amount to the denial of the right to vote.”); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)) (“This right to vote is fundamental to our democracy . . . Other rights, even the most basic, are illusory if the right to vote is undermined.”).

Third, this case involves extraordinary facts—nearly 100,000 otherwise lawfully cast ballots have been rejected for non-matching signatures *in the last five years alone*. Plaintiffs seek to vindicate the constitutional rights of those who were wrongfully disenfranchised and the many future voters who will have their ballots rejected should signature matching continue.

C. Severability of Signature Matching Is an Unresolved Question of Law.

An unresolved question of law “is a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court.” C.A.R. 4.2(b)(2). The issue addressed by the Order is an unresolved question of law because while Colorado courts have recognized a general framework for analyzing severability, neither the Colorado Supreme Court nor the Colorado Court of Appeals have applied that framework to Colorado’s mail voting statutes, let alone decided—or even considered—whether signature matching is severable from the remainder of the mail voting statutory scheme. Indeed, neither the parties nor the Court have cited any such authority.

VI. CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that the Court should certify the Order for interlocutory appeal because immediate review may promote a more orderly disposition or establish a final disposition in this case; the Order involves a controlling question of law; and that question of law is unresolved.

DATED this 17th day of January, 2024.

Respectfully submitted,

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By: s/ Kevin J. Hamilton

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CERTIFICATE OF SERVICE

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