ADVANCE SHEET HEADNOTE
May 4, 2020

2020 CO 34

No. 20SA140, *Griswold v. Ferrigno Warren*—Election Law.

In this expedited appeal under section 1-1-113(3), C.R.S. (2019), the supreme court addresses whether the Colorado Secretary of State ("the Secretary") properly declined to place Michelle Ferrigno Warren on the 2020 Democratic primary ballot for the office of United States Senator after Ferrigno Warren was unable to collect 1,500 signatures in six of seven congressional districts.

The supreme court concludes that the district court erred when it found that Ferrigno Warren substantially complied with the minimum signature requirements outlined in 1-4-801(2)(c)(II), C.R.S. (2019), because she made a good faith effort to collect signatures during the outbreak of the COVID-19 pandemic. While substantial compliance is the standard for technical deficiencies in the election law context, the Election Code's minimum-signature mandate requires strict compliance.

Because Ferrigno Warren did not meet the threshold signature requirement, the Secretary properly declined to place her on the ballot.

Accordingly, the order of the district court is reversed.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2020 CO 34

Supreme Court Case No. 20SA140
Appeal Pursuant to § 1-1-113(3), C.R.S. (2019)
District Court, City and County of Denver, Case No. 20CV31077
Honorable Christopher J. Baumann, Judge

Respondent-Appellant:

Jena Griswold, in her official capacity as the Colorado Secretary of State,

v.

Petitioner-Appellee:

Michelle Ferrigno Warren.

Order Reversed
en banc
May 4, 2020

Attorneys for Respondent-Appellant:
Philip J. Weiser, Attorney General
LeeAnn Morrill, First Assistant Attorney General
Emily Buckley, Assistant Attorney General
Noah Patterson, Assistant Solicitor General
Denver, Colorado

Attorneys for Petitioner-Appellee:
KainRios Immigration, LLC
Joy F. Athanasiou
Lakewood, Colorado

Attorneys for Amicus Curiae Lorena Garcia:
Werge Law LLC
Thomas E.M. Werge
Amy L. Padden
Denver, Colorado

PER CURIAM.

¶1 The COVID-19 pandemic has radically altered nearly every aspect of life in Colorado and around the world. One of the unfortunate impacts of the virus, and the one at issue before us, is that it made it unexpectedly difficult for candidates seeking to place their names on the June Democratic primary ballot by petition to collect signatures during the final weeks of the signature collection time period. Michelle Ferrigno Warren, a candidate for the United States Senate, was unable to collect the statutorily required 1,500 signatures in six of the seven required congressional districts.

¶2 Ferrigno Warren now argues that her name should nevertheless be placed on the ballot because, under these unprecedented circumstances, her efforts demonstrate "substantial compliance" with the Election Code's requirements. The Secretary of State disagrees, arguing that "substantial compliance" should be determined by the application of a mathematical formula that discounts the signature requirement by the number of days signature collection was impeded by the pandemic. While we recognize the uniqueness of the current circumstances, we conclude that the legislature alone has the authority to change the minimum signature requirements set out in the Election Code. That a candidate must obtain 1,500 signatures from each of Colorado's seven congressional districts in order to be placed on the primary ballot as a candidate for U.S. Senate is a mandate requiring strict compliance. Because Ferrigno Warren

did not meet the threshold signature requirement, the Secretary properly declined to place her on the ballot. We therefore reverse the district court's order.

I. Facts and Procedural History

¶3 Ferrigno Warren announced her candidacy for U.S. Senate in August 2019. During the ensuing months she raised campaign funds, participated in debates and forums, and raised her profile on social media. In January 2020, she informed the Secretary of State, Jena Griswold, that she intended to seek access to the primary ballot as a Democratic candidate through the petition process provided for in Colorado's Election Code.

¶4 Under the Code, candidates seeking nomination by petition had 57 days, from January 21 to March 17, 2020, to gather petition signatures. *See* § 1-4-801(5)(a), C.R.S. (2019). Candidates for the U.S. Senate are required to collect 1,500 signatures from each of the state's seven congressional districts. § 1-4-801(2)(c)(II). Ferrigno Warren began collecting signatures on January 21, 2020, using a combination of volunteer and paid signature collectors. The firm she hired to handle the paid collection, Ground Organizing for Latinos, planned to conduct minimal signature collection before the March 3, 2020 presidential primary election and to do most of its work between March 5 and the March 17 deadline.

¶5 Unfortunately for Ferrigno Warren, COVID-19 interfered with these plans. On March 5, 2020, Colorado officials announced the first two positive cases of COVID-19 in the state. On March 10, 2020, Governor Jared Polis declared a state of emergency due to the virus, and on March 13, 2020, the first Colorado death related to COVID-19 was announced.

¶6 Ferrigno Warren reports that fears about the highly contagious COVID-19 virus caused multiple signature collectors—both paid and volunteer—to quit her campaign. Some volunteers who had collected signatures were unwilling to turn them in to her office because they feared exposure. Ferrigno Warren slowed her signature collection efforts on March 13 and stopped them entirely on March 14.

¶7 On March 17, 2020, Ferrigno Warren filed her petition sections, containing a total of 8,378 signatures, with the Secretary of State's office. The Secretary reviewed the signatures as required by section 1-4-908, C.R.S. (2019), to determine how many complied with the statutory requirements. After completing that review, the Secretary issued a Statement of Insufficiency on April 15, finding that Ferrigno Warren had submitted only 5,383 valid signatures. The Statement of Insufficiency also broke the valid signatures down by congressional district, demonstrating that Ferrigno Warren had collected:

- 1,036 valid signatures in the 1st congressional district;
- 1,502 valid signatures in the 2nd congressional district;

- 315 valid signatures in the 3rd congressional district;
- 313 valid signatures in the 4th congressional district;
- 490 valid signatures in the 5th congressional district;
- 1,139 valid signatures in the 6th congressional district; and
- 588 valid signatures in the 7th congressional district.

In sum, she reached the 1,500-vote threshold in only one of seven congressional districts.

¶8 On the same day that Ferrigno Warren submitted her petition to the Secretary for review, she filed an action in Denver District Court pursuant to section 1-1-113, C.R.S. (2019), alleging that COVID-19 and the resulting state of emergency prevented her from collecting the required signatures. She asked the court to order the Secretary to put her name on the ballot on the theory that the signatures on her petition represented "substantial compliance" with the minimum signature requirements of section 1-4-801(2)(c)(II).

¶9 The district court ordered briefing and held a hearing on April 16, 2020. Ferrigno Warren argued that she had made a good faith effort to comply with the signature requirement and that the Election Code must be liberally construed to permit ballot access. The Secretary agreed with Ferrigno Warren that only substantial compliance with the signature requirement was necessary but argued that Ferrigno Warren had not substantially complied. The Secretary proposed a mathematical "discount-rate" formula for determining substantial compliance

that could be applied to evaluate not only Ferrigno Warren's signature collection efforts, but also those of the other candidates whose signature collections may have been hampered by the COVID-19 pandemic.

¶10 The Secretary's proposed discount-rate formula would have the court first divide the total number of valid signatures required by the total number of days permitted for collection to establish a per-day average number of valid signatures to be collected. That number would then be multiplied by the total number of calendar days on which the court finds that COVID-19 interfered with signature collection. The remaining total would be the "discount rate" that could be subtracted from the 1,500 required signatures in each congressional district as a "substantial compliance allowance."

¶11 On April 21, 2020, the district court issued its order, directing the Secretary to place Ferrigno Warren's name on the Democratic primary ballot. In a detailed and thoughtful opinion, the district court acknowledged that the language of the Election Code requiring 1,500 signatures to be collected from each congressional district "is clear and unequivocal and perhaps should end the Court's inquiry right here." *Ferrigno Warren v. Griswold*, No. 20CV31077, p. 21 (Denver Dist. Ct. Apr. 21, 2020) (Order Regarding Petition for Declaratory Relief) ("District Court Order"). However, because the Secretary had not made that argument and had instead conceded that the signature requirement was subject to a substantial compliance

analysis, the district court evaluated whether Ferrigno Warren had substantially complied. *Id.* at pp. 21–27.

¶12 In doing so, the court looked to our decisions in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994), and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996). In those opinions, we explained that a district court evaluating substantial compliance should consider the following factors: (1) the extent of the noncompliance; (2) the purpose of the provision and whether that purpose was substantially achieved in spite of the lack of compliance; and (3) whether there was a good faith effort to comply. *Fabec*, 922 P.2d at 341; *Loonan*, 882 P.2d at 1384. Applying these factors, the court concluded that (1) Ferrigno Warren had collected more than 50 percent of the statewide total signature requirement of 10,500; (2) the purpose of requiring 1,500 signatures from each congressional district is to demonstrate that a candidate has a "significant modicum" of support and that the support comes from around the state; (3) Ferrigno Warren did have some signatures from every congressional district, demonstrating support around the state; and (4) Ferrigno Warren made a good faith effort to comply with the law in entirely unprecedented and unforeseeable circumstances. District Court Order, pp. 24–27.

¶13 While acknowledging that the Secretary's proposed formula is "well thought out and easily applied in this case and others," the court declined to use that formula because of "the reality that signature collection often starts slow and

builds in intensity as the deadline nears." *Id*. at p. 26. The court concluded that a formula that treated every day of the signature collection period equally was flawed. *Id*. at pp. 26–27. Instead, the court concluded that, under all of the circumstances, and considering the *Loonan* factors, Ferrigno Warren had "substantially complied" with the Election Code's minimum signature requirements. *Id*. at p. 28.

¶14 The Secretary filed an application for review pursuant to section 1-1-113(3) on April 24, 2020. We accepted jurisdiction, and because the Secretary is required, pursuant to section 1-5-203(1)(c)(I), C.R.S. (2019), to deliver the June 30 primary election ballot order and content to county clerks by May 7, 2020, we directed Ferrigno Warren to respond by April 30. We are now asked to determine whether the district court erred in finding that Ferrigno Warren substantially complied with the signature requirement.[1]

---

[1] We exercised jurisdiction to address the following issue:

> Whether a major party candidate may petition onto the primary ballot for U.S. Senate under a substantial compliance standard if she failed to obtain 1,500 valid signatures in six of seven congressional districts, collected only 21 to 39% of the 1,500 valid signatures needed in four of seven congressional districts, and collected just over half of the total 10,500 valid signatures needed statewide.

II. Analysis

¶15 We begin by setting out the applicable standard of review. Next, we consider whether a substantial compliance standard can be applied to reduce the number of signatures a candidate must collect to petition onto the ballot below the minimum number mandated by the Election Code. We conclude that it cannot. The Election Code mandates that the petition of a candidate for U.S. Senate "must be signed by at least one thousand five hundred eligible electors in each congressional district." § 1-4-801(2)(c)(II). That minimum requires strict compliance. Because Ferrigno Warren's petition did not include the requisite number of valid signatures from each district, the Secretary properly refused to add her name to the Democratic primary ballot.

A. Standard of Review

¶16 We review questions of statutory interpretation de novo. *Blooming Terrace No. 1, LLC v. KH Blake St., LLC*, 2019 CO 58, ¶ 11, 444 P.3d 749, 752. In construing a statute, our goal is to ascertain and give effect to the General Assembly's intent. *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389. "To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *Id.* We read these words and phrases in context, and "we construe them according to the rules of grammar and common usage." *Id.* "If the statutory

language is clear and unambiguous, we apply it as written—venturing no further." *Blooming Terrace No. 1, LLC*, ¶ 11, 444 P.3d at 752.

B. The Election Code's Minimum Signature Provision Requires Strict Compliance

¶17 Three provisions of Colorado's Election Code are relevant to our analysis. First, in order to secure a place on the ballot as a candidate for U.S. Senator by petition, a candidate's petition "must be signed by at least one thousand five hundred eligible electors in each congressional district." § 1-4-801(2)(c)(II). Second, "no petition is legal that does not contain the requisite number of names of eligible electors." § 1-4-902(1), C.R.S. (2019). Third, "Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies." § 1-1-103(3), C.R.S. (2019). We must resolve whether the substantial compliance provision—and our case law relevant thereto—allows the petition signature requirement to be met with fewer than the statutorily prescribed minimum number of signatures.

¶18 In our most recent analysis of the Election Code, we noted that there are some aspects of the Code that simply cannot be subject only to substantial compliance. *See Kuhn v. Williams*, 2018 CO 30M, ¶ 54 n.4, 418 P.3d 478, 488 n.4. In that case, we considered whether a petition signature collector who was not a Colorado resident, but intended to one day become a Colorado resident, could legally collect signatures for a candidate petition. *Id.* at ¶¶ 5–6, 418 P.3d at 480–81.

We concluded that he could not because the Election Code at that time specified that signature collectors had to be residents of Colorado. *Id.* at ¶¶ 49–54, 418 P.3d at 487–88. In reaching this conclusion, we noted that "residency is not a mere technical requirement that is subject to substantial compliance. A person either is a resident for purposes of the Election Code or he is not." *Id*. at ¶ 54 n.4, 418 P.3d at 488 n.4 (citation omitted).[2]

¶19 Like the residency requirement, the mandate that a U.S. Senate candidate's petition include 1,500 signatures from each congressional district is more than simply a "technical requirement." Rather, it is the minimum threshold that the legislature has declared "must" be met for a candidate to petition onto the ballot. The mandatory nature of this threshold is further emphasized by the clear statement in section 1-4-902(1) that, although a petition can be submitted in multiple sections to permit for signature collection by multiple people at one time,

---

[2] In other contexts, we have similarly concluded that even a statute subject to a substantial compliance standard requires strict compliance with mandatory provisions. *Compare Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63, 68–69 (Colo. 1990) (holding that the notice requirement in the Colorado Governmental Immunity Act required only substantial compliance), *with E. Lakewood Sanitation Dist. v. Dist. Court*, 842 P.2d 233, 236 (Colo. 1992) (holding that the 180-day time period for filing notice required strict compliance).

"no petition is legal that does not contain the requisite number of names of eligible electors."

¶20 Even when we adopted our framework for evaluating substantial compliance in *Loonan*, we recognized a specific statutory command could not be ignored in the name of substantial compliance. *Loonan*, 882 P.2d at 1384–86. That case involved a challenge to signatures collected for a petition to put an initiative onto the ballot. *Id.* at 1382. The circulators who had collected the signatures had signed circulator affidavits that "did not include the statement that the circulator 'has read and understands the laws governing the circulation of petitions' as required by [statute]." *Id.* (citation omitted). The appellants argued that their signatures should be deemed "substantially compliant" because their petition was, in all other respects, compliant with the statutory requirements. *Id.* at 1383. This court concluded that the statutory requirement that the omitted language be included was "clear, direct and specific" and that failure to include the language meant that they did not "substantially comply" with the Election Code. *Id.* at 1384–86.

¶21 There certainly are circumstances in which review for substantial compliance can save signatures on a petition that were initially struck by the Secretary. For example, in 2016, Ryan Frazier sought inclusion on the Republican primary ballot as a U.S. Senate candidate. *See Frazier v. Williams*,

No. 2016CV31574, p. 1 (Denver Dist. Ct. May 4, 2016) (Order Regarding Ryan Frazier). The Secretary determined that Frazier had not obtained the statutory minimum number of signatures required to be included on the primary ballot. *Id.* at p. 2. Frazier challenged the Secretary's determination as to a number of different individual signatures and signature sections collected by particular signature collectors. *Id*. at p. 3. With regard to four of the petition circulators, for example, the Secretary had rejected their petition sections because the address provided on the circulator affidavit did not match the address on file with the Secretary for voter registration purposes. *Id.* at pp. 3–4. The district court concluded that the sections were substantially compliant because the circulators in fact met the statutory requirements that they be Colorado residents registered as Republican, even though that was not demonstrated directly by the information on the petition. *Id.* It is this kind of "technical requirement"—that circulators include on their affidavits the address at which they are registered to vote—that is more appropriately subject to a substantial compliance analysis.[3]

¶22 In reaching this conclusion, we note that other state courts whose election laws are generally subject to the substantial compliance standard have similarly

[3] Ferrigno Warren did not make this kind of challenge to the Secretary's determination as to individual signatures in this action.

concluded that minimum signature requirements must be reviewed for strict compliance. As the Illinois Supreme Court explained when confronted with a similar signature shortfall, permitting substantial compliance in this context would "require us to disregard the clear, unambiguous and mandatory language of the statute and graft onto it exceptions and limitations the legislature did not express." *Jackson-Hicks v. E. St. Louis Bd. of Election Comm'rs*, 28 N.E.3d 170, 179 (Ill. 2015); *see also D'Agostino v. Superior Court*, 39 Cal. Rptr. 2d 112, 118 (Cal. Ct. App. 1995) ("In the instant case the lack of 500 valid signatures is not a 'technical deficiency' but rather noncompliance with a substantive requirement for qualification for the ballot."). The Illinois Supreme Court summarized the circumstances that it confronted then in a manner that speaks aptly to what we confront today in concluding that a candidate either meets the minimum signature threshold or does not:

> [T]he case before us does not involve a situation where the candidate met the basic requirements of the Election Code, but did so in a technically deficient manner. Here, the candidate failed to meet a threshold requirement completely. While the signature requirement may have been aimed at showing candidate initiative and minimum voter appeal, showing candidate initiative and minimum voter appeal is not, itself, the standard. As we have explained, the clear and unambiguous standard adopted by the General Assembly requires compliance with a specific numerical threshold determined according to a specific mathematical formula. A candidate either meets that minimum threshold or does not. There is no close enough.

Jackson-Hicks, ¶ 37, 28 N.E.3d at 179–80.

¶23 The same is true here: the General Assembly, in unambiguous terms, has mandated the collection of 1,500 signatures from each congressional district in order to petition onto the ballot as a candidate for U.S. Senate. As the district court recognized, this language is "clear and unequivocal." District Court Order, p. 21. It must be complied with strictly.

¶24 While we recognize that the circumstances that made signature collection more difficult this year are unprecedented, we do not have the authority to rewrite the Election Code in response to the COVID-19 virus. Only the General Assembly can do that. Indeed, the General Assembly passed an emergency election measure to address some of the challenges posed to the election season by the pandemic. On March 14, 2020, the General Assembly passed House Bill 20-1359, titled "An Act Concerning Modifications to Party Candidate Designation Requirements to Accommodate Public Health Concerns." *See* H.B. 20-1359, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2020). The Governor signed that measure into law on March 16, 2020. With regard to the process for petitioning onto the ballot, the emergency measure provides that the Secretary may extend the time for filing petitions if she cannot accept the petitions as a result of "closures or restrictions due to public health concerns." Ch. 23, sec. 6, § 1-4-801, 2020 Colo. Sess. Laws 82, 85. But, significantly, that law did not alter the minimum signature requirements or suggest that they could be altered by the Secretary or a court. In the absence of

legislative change, even when a worldwide pandemic has changed so much, the minimum signature requirements are fixed.

¶25 Ferrigno Warren submitted her petition to the Secretary, and the Secretary found that it contained valid signatures from 1,500 eligible electors in only one of the seven congressional districts. Ferrigno Warren's petition was therefore insufficient.

III. Conclusion

¶26 The Election Code's minimum signature mandate requires strict compliance. Ferrigno Warren did not collect the required 1,500 signatures from each congressional district. We therefore reverse the order of the district court directing the Secretary of State to place Ferrigno Warren's name on the Democratic primary ballot.