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| District Court, City and County of Denver, Colorado<br>City and County Building, Room 256<br>1437 Bannock Street<br>Denver, CO 80202 | DATE FILED: April 21, 2020 1:25 PM<br>CASE NUMBER: 2020CV31077 |
| Petitioner: **MICHELLE FERRIGNO WARREN**<br><br>v.<br><br>Respondent: **JENA GRISWOLD, in her official capacity as Colorado Secretary of State** | ▲ COURT USE ONLY ▲<br>Case Number: 20CV31077<br><br>Division Courtroom 280 |

**ORDER REGARDING PETITION FOR DECLARATORY RELIEF**

This matter comes before the Court on a Petition for Declaratory Relief filed by Michelle Ferrigno Warren ("Petitioner" or "Ms. Ferrigno Warren") on March 17, 2020. Ms. Ferrigno Warren seeks to be on the upcoming 2020 Democratic primary ballot as a candidate for United States Senate. To be on the ballot, Ms. Ferrigno Warren is required either to collect by petition at least 1,500 valid signatures from each of Colorado's seven congressional districts (for a total of at least 10,500 valid signatures) or to proceed through the Democratic Party's caucus and assembly process. Ms. Ferrigno Warren chose to proceed by petition. As such, the deadline for submitting her petition to the Colorado Secretary of State ("Respondent" or "Secretary") was March 17, 2020. Ms. Ferrigno Warren timely filed her petition that day but the petition contained only 8,378 "reviewable signature lines." Knowing she presented a deficient number of signatures, Ms. Ferrigno Warren filed for declaratory relief the same day. The Secretary subsequently reviewed the petition and issued a Statement of Insufficiency on April 15, 2020. The Statement reveals Ms. Ferrigno Warren collected 5,383 valid signatures.

In her Petition for Declaratory Relief, Ms. Ferrigno Warren asserts that the COVID-19 pandemic and the resulting state of emergency declared by Governor Jared Polis on March 10,

2020, prevented her from gathering the required number of signatures. Accordingly, Ms. Ferrigno Warren asks the Court for the following relief: 1) to suspend the petition process and extend the filing deadline for one week after Governor Polis lifts the state of emergency; or 2) to find she has substantially complied with the petition requirements based on the number of signatures she submitted and order the Secretary to place her name on the primary ballot. Ms. Ferrigno Warren argues she made a good faith effort to comply with the signature requirement and that technical or strict compliance is not required and runs counter to the statutory requirement that the Election Code be liberally construed to permit ballot access.[1] *See* § 1-1-103(1), C.R.S. In response, the Secretary filed a Hearing Brief on March 30, 2020. In her brief, the Secretary asserts the following: 1) the Court does not have jurisdiction to resolve this dispute under section 1-1-113, C.R.S., because in the face of an obvious deficiency in the number of petition signatures the Secretary's determination of insufficiency is required by the Election Code and, thus, does not amount to a breach or neglect of her duties or other wrongful act under the Code; and 2) if the Court does have jurisdiction to hear this matter, the Court should utilize a proposed mathematical formula that is capable of being applied neutrally and consistently to this and other candidate petitions that may have been affected by the pandemic to determine whether substantial compliance has been met. With these arguments in mind, the Court held an evidentiary hearing on April 16, 2020. The deadline for filing any additional challenges to the Statement of Insufficiency expired yesterday (April 20, 2020) without any new filings by Ms. Ferrigno Warren. The Court, having received and considered the various filings, the testimony of the witnesses, admitted exhibits, arguments presented by counsel, and applicable law, finds and orders as follows:

[1] The Court notes Ms. Ferrigno Warren also asserts an equal protection claim in her Petition for Declaratory Relief but she has withdrawn the claim. *See* Reply at page 12.

## BACKGROUND

In August 2019, Ms. Ferrigno Warren entered the race for United States Senate. During her campaign, Ms. Ferrigno Warren has raised over $100,000.00, participated in many debates and forums, and compiled a distribution list of more than 30,000 individuals with several more thousand contacts on social media. On January 5, 2020, Ms. Ferrigno Warren notified the Secretary of State of her decision to seek access to the primary election ballot as a Democratic candidate for United States Senate via the petition process. Under the Election Code, candidates seeking nomination by petition to the 2020 primary ballot had 57 days (from January 21, 2020 until March 17, 2020) to gather petition signatures. *See* § 1-4-801(5)(a), C.R.S. (2020), and H.B. 20-1359. To be nominated to the ballot, Ms. Ferrigno Warren must obtain valid signatures of at least 1,500 registered Democratic electors in each of the seven congressional districts in Colorado (for a total of 10,500 valid signatures). To this end, Ms. Ferrigno Warren utilized volunteer and paid circulators to gather signatures. Ms. Ferrigno Warren also retained the professional political firm Ground Organizing for Latinos in the hope that paid and experienced circulators would be able to gather at least one-half of the required signatures between March 5, 2020 and the deadline of March 17, 2020. Ms. Ferrigno Warren maintains most of these experienced circulators were unavailable until after "Super Tuesday" (i.e. March 3, 2020) because nearly all circulators in Colorado were working for large and wealthy campaigns such as those for Michael Bloomberg and John Hickenlooper and were being paid far above standard industry rates. On March 5, 2020, these experienced circulators finally were able to work for Ms. Ferrigno Warren's campaign and began to collect signatures in earnest. Such efforts, however, were short lived as the novel coronavirus had found its way to Colorado.

Per their Joint Statement of Stipulated Facts ("Stipulation") filed on April 10, 2020, Ms. Ferrigno Warren and the Secretary agree to the following facts concerning the pandemic for

purposes of resolving this dispute: 1) on December 31, 2019, the World Health Organization received its first report of a pneumonia of unknown cause, which later came to be known as Coronavirus (COVID-19); 2) on March 5, 2020, Colorado officials announced the first two positive cases of COVID-19 in our state; 3) on March 10, 2020, Governor Polis declared a state of emergency due to COVID-19; 4) on March 13, 2020, Colorado reported its first death related to COVID-19; and 5) on March 25, 2020, Governor Polis issued a statewide "stay at home" order. In light of these events, Ms. Ferrigno Warren asserts that starting the weekend of March 7th and greatly accelerating after the Governor's declaration on March 10th multiple circulators (both paid and volunteer) quit her campaign and a few volunteers who had collected signatures refused to turn them in for fear of exposure. In addition, Ms. Ferrigno Warren asserts some of her volunteers and staff began to exhibit symptoms or had family members with symptoms of COVID-19. Ms. Ferrigno Warren thus began to scale back her circulation efforts on March 13th and 14th due to these possible exposures and the health risks to her, her staff, the circulators, and the community. Ms. Ferrigno Warren maintains she also reduced her circulation efforts due, in part, to being informed on or about March 12th by the Secretary and the Colorado Democratic Party of pending legislation in the Colorado General Assembly that would include a remedy for petitioning candidates.[2] Ms. Ferrigno Warren ultimately decided to suspend circulation on the afternoon of March 14th even though she had gathered less than the required number of signatures.

On March 17, 2020, Ms. Ferrigno Warren submitted her petition to the Secretary for review. The Secretary's initial review of the petition showed 7,734 reviewable signature lines. After completing a closer review of the petition, the Secretary determined Ms. Ferrigno Warren

[2] The final product of this pending legislation is House Bill 20-1359. Governor Polis signed the bill at 5:29 p.m. on March 16, 2020. The bill is attached as Exhibit B to the Secretary's Hearing Brief.

actually submitted 8,378 reviewable signature lines. Per section 1-4-908(1), C.R.S., the Secretary subsequently reviewed all petition information and compared it against the voter registration records. On April 15, 2020, after the Secretary completed the required petition review, the Secretary notified Ms. Ferrigno Warren of the number of valid signatures and issued a "Statement of Insufficiency." These results are described below. In addition, on the same day, the Secretary provided Ms. Ferrigno Warren with the master record of each accepted and rejected signature entry. The master record contains the reason code for each rejected entry and the date on which the signature was collected.

## FINDINGS OF FACT

1. The Court adopts the stipulated and admitted facts set forth in the Joint Statement of Stipulated Facts filed by the parties on April 10, 2020, as established facts in this matter.

2. Ms. Ferrigno Warren is the policy/advocacy director for a non-profit organization. Although Ms. Ferrigno Warren has never sought elective office before, she has considerable experience working within the political system.

3. Family, friends and colleagues encouraged Ms. Ferrigno Warren to run for United States Senate in the upcoming 2020 election. On August 6, 2019, Ms. Ferrigno Warren entered the race for United States Senate. During her campaign, Ms. Ferrigno Warren has worked seven days a week for a total of 40-50 hours per week just on her campaign, has raised over $100,000.00, participated in many debates and forums, and compiled a distribution list of more than 30,000 individuals with several thousand more contacts on social media.

4. On January 5, 2020, Ms. Ferrigno Warren notified the Secretary of State of her decision to seek access to the primary election ballot as a Democratic candidate for United States Senate via the petition process. Under the Election Code, candidates seeking nomination by

petition to the 2020 primary ballot had 57 days (from January 21, 2020 until March 17, 2020) to gather petition signatures. Ms. Ferrigno Warren took a two-month leave of absence from her job during this window to focus on her campaign and collecting signatures. Ms. Ferrigno Warren must obtain valid signatures of at least 1,500 registered Democratic electors in each of the seven congressional districts in Colorado (for a total of 10,500 valid signatures). Ms. Ferrigno Warren and approximately 100 volunteers thus began collecting signatures on the first day of the collection window (i.e. on January 21, 2020).

5. Ms. Ferrigno Warren and her campaign team developed a sound strategy for collecting the required number of signatures. Ms. Ferrigno Warren planned to use a combination of both volunteers and paid circulators to collect signatures. Ms. Ferrigno Warren decided to use the paid circulators to help gather signatures in the 3rd, 4th, 5th, and 7th congressional districts given she had a large group of volunteers to gather signatures in the other three districts.

6. In mid-December 2019, Ms. Ferrigno Warren consulted with John Edward Soto about hiring his firm to gather signatures. Mr. Soto is the owner of Ground Organizing for Latinos, a field and petition company that specializes in collecting signatures for ballot initiatives and for candidates in national, state, and local elections. Mr. Soto is experienced in such collection efforts as he has been providing this service since at least 2004.

7. Ms. Ferrigno Warren and Mr. Soto entered into a $40,000.00 contract for Mr. Soto's firm to acquire 10,000 valid signatures. Mr. Soto advised Ms. Ferrigno Warren that based on his professional experience he expected the signature collection to follow a "hockey stick" model – collection would start at a slow pace in the first two months and then increase significantly during the final two weeks before the filing deadline. This model is based, in part, on the fact that signature collection in colder months like January and February can be tempered

by the weather and fewer potential electors being outdoors. In addition, Mr. Soto was unable to hire a large number of circulators until after "Super Tuesday" (March 3, 2020) because most paid circulators in the state were working for other campaigns (such as Michael Bloomberg, Bernie Sanders, and John Hickenlooper) and being paid three to four times the average rate of pay.

8. During her testimony, Ms. Ferrigno Warren acknowledges she had between January 21, 2020 and March 17, 2020, to gather signatures and that there were risks unrelated to the COVID-19 pandemic in waiting until the last two weeks to gather most of her signatures, including the risk an elector would sign her petition after signing an earlier petition (which would invalidate the signature on her petition) or a blizzard hitting Colorado and impeding travel, keeping electors indoors, and inhibiting public gatherings.

9. Based on his past experience with other campaigns, Mr. Soto nonetheless expected to gather at least one-half of the required signatures during the last two weeks before the deadline. To accomplish this goal, Mr. Soto planned to use 39-40 circulators on Ms. Ferrigno Warren's campaign beginning March 5, 2020.

10. A circulator working for Mr. Soto is compensated for each signature he or she obtains. On average, a circulator is able to gather 80 signatures per day. Accordingly, on any given day with 39 paid circulators, Mr. Soto expected to gather approximately 3,120 signatures. Over the course of the twelve days between March 5, 2020 and March 17, 2020, Mr. Soto could expect to gather over 37,000 signatures. Some of these signatures, of course, likely would be declared invalid by the Secretary during her review but given the volume of signatures expected to be collected Mr. Soto and Ms. Ferrigno Warren believed they would gather more than enough valid signatures to meet the requirement.

11. Mr. Soto provides credible and unchallenged testimony that collection efforts on

the Thursday through Saturday (March 5th through March 7th) following "Super Tuesday" (March 3rd) proceeded as planned, i.e. circulators collected an average of 80 signatures per day. Circumstances, however, began to change for the worse on Sunday (March 8th). On Sunday, Mr. Soto spoke with one of his circulators about a possible exposure to COVID-19. This and other circulators employed by Mr. Soto had worked on the campaign of Reverend T. Hughes in his bid for a House seat in the Colorado General Assembly. Unfortunately, Reverend Hughes had been diagnosed with the virus and was in the intensive care unit.

12. Mr. Soto and some of the circulators gathering signatures for Ms. Ferrigno Warren had been in direct contact with Reverend Hughes and all were concerned they may have been exposed to the virus. On Sunday (March 8th), Mr. Soto told his circulators about his possible exposure. Many of the circulators began expressing safety concerns for themselves and their families, especially circulators who were at a higher risk of complications from exposure (i.e. older circulators and those with underlying health conditions) or who had family members at a higher risk. As a result, about one-half of the circulators working for Mr. Soto "said no more" and stopped working. Mr. Soto ultimately lost 24 or 25 out of 39 circulators.

13. Per the credible testimony of Mr. Soto, on Sunday (March 8th) his best circulators were only able to gather 20-25 signatures apiece because potential electors were not opening their doors, especially since the circulators were wearing face masks. In addition, Mr. Soto credibly describes how on the following Saturday (March 14th) one of his very best circulators was working the City Market parking lot in Pueblo and gathered only 12 signatures in four hours. This particular circulator routinely collected about 125 signatures per day.

14. Exhibit 1 reveals that on the following Friday (March 13th) at 10:57 a.m., Jeffrey Mustin, the Petitions Lead for the Elections Division for the Secretary of State, emailed Ms.

Ferrigno Warren regarding pending legislation, i.e. HB 20-1359, that if passed in its current form would "push back the statutory deadline for major party candidate petitions 14 days." According to the credible testimony of Ms. Ferrigno Warren, the email and the possibility of an extension allowed her and her team to "pause and exhale" and to think about how to move forward.

15. On Saturday (March 14th), however, Ms. Ferrigno Warren learned there would be no "remedy" in the legislation that would give her additional time beyond the current deadline to collect signatures. Ms. Ferrigno Warren thus decided to continue her circulation efforts but described "bad dynamics" that weekend given the Governor's declared state of emergency the previous Wednesday (March 10th) and the public's concern with getting food, toilet paper, etc.

16. On Saturday (March 14th) Ms. Ferrigno Warren decided to "pull the plug" and suspend her circulation efforts out of concern for the health of her staff, her volunteers, the circulators, and the community. Ms. Ferrigno Warren also was concerned about her own health and the health of her son since both have asthma.

17. On March 17, 2020, Ms. Ferrigno Warren timely filed her petition with the Secretary. The Secretary reviewed the petition in accordance with § 1-4-908(1), C.R.S.

18. The Secretary issued a Statement of Insufficiency on April 15, 2020. The Statement shows Ms. Ferrigno Warren gathered a total of 5,383 valid signatures from across the state. This represents 51.2% of the total number of valid signatures required by § 1-4-801(2)(c)(II), C.R.S.

19. The Statement further shows there were 35 "signature mismatches" on the petition that Ms. Ferrigno Warren may cure by affidavits filed before 5:00 p.m. on April 20, 2020.

20. Ms. Ferrigno Warren submitted 2,995 invalid signatures. Per § 1-4-909(1.5),

C.R.S., Ms. Ferrigno Warren "may petition the district court within five days for a review of the [insufficiency] determination pursuant to section 1-1-113." Such a review may reveal that some of the invalid signatures are, in fact, valid signatures. However, even if all invalid signatures were somehow declared to be valid (thus bringing the total number of valid signatures to 8,378), Ms. Ferrigno Warren would still need to collect an additional 2,122 valid signatures to meet the threshold set forth in § 1-4-801(2)(c)(II), C.R.S.

21. The Statement provides a breakdown of valid signatures from each congressional district: 1) 1,036 in the 1st congressional district; 2) 1,502 in the 2nd congressional district; 3) 315 in the 3rd congressional district; 4) 313 from the 4th congressional district; 5) 490 from the 5th congressional district; 6) 1,139 from the 6th congressional district; and 7) 588 from the 7th congressional district.

22. Ms. Ferrigno Warren collected the required number of valid signatures in one of seven congressional districts (i.e. the 2nd congressional district). In the 1st congressional district Ms. Ferrigno Warren collected 69% of the required number of valid signatures; in the 3rd congressional district 21%; in the 4th congressional district 20.8%; in the 5th congressional district 32.6%; in the 6th congressional district 75.9%; and in the 7th congressional district 39.2%.

23. The Statement further reveals that Ms. Ferrigno Warren submitted less than 1,500 signatures (whether valid or invalid) in six of the seven congressional districts.

24. The Secretary's deadline to deliver the June 30, 2020 primary election ballot order and content to the county clerks is May 7, 2020. The county clerks' deadline to transmit ballots to military and oversees voters is May 16, 2020.

## APPLICABLE LAW

Pursuant to section 1-1-102 of the Colorado Revised Statutes, the "Uniform Election Code of 1992" applies to primary elections. Section 1-1-103(1) of this Code states, "This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." In addition, section 1-1-103(3) states, "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." The Colorado Secretary of State is charged with the duty to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" and to "enforce the provisions of [the election] code." *See* § 1-1-107, C.R.S. When a dispute regarding the application and enforcement of the Election Code arises section 1-1-113 is implicated. This statute provides in part:

> (1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.
>
> . . .
>
> (4) Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

Pursuant to section 1-4-103, "All candidates for nominations to be made at any primary election shall be placed on the primary election ballot either by certificate of designation by assembly or by petition." Section 1-4-502(1) provides in part, "[N]ominations for United States senator . . . may be made by primary election under section 1-4-101 or by assembly or convention under section 1-4-702 by major political parties, by petition for nomination as provided in section 1-4-802, or by a minor political party as provided in section 1-4-1304." Section 1-4-603 states, "Candidates for major political party nominations for the offices specified in section 1-4-502(1) that are to be made by primary election may be placed on the primary election ballot by petition, as provided in part 8 of this article." Section 1-4-801 provides in pertinent part that "Candidates for political party nominations to be made by primary election may be placed on the primary election ballot by petition. . . . (2) The signature requirement for the petition are as follows . . . (c)(II) Every petition in the case of a candidate for the office of governor or the office of United States senator must be signed by at least one thousand five hundred eligible electors in each congressional district. . . ." The Court notes the General Assembly recently revised portions of this statute in response to the COVID-19 pandemic. House Bill 20-1359 was signed by Governor Polis on March 16, 2020, and provides in part: [3]

> **1-4-801. Designation of party candidates by petition – repeal.**
> (5)(a) Party petitions shall not be circulated nor any signatures be obtained prior to the third Tuesday in January. EXCEPT AS PROVIDED IN SUBSECTION (5)(b)(I) OF THIS SECTION, petitions must be filed no later than the third Tuesday in March.
>
> (b)(I) NOTWITHSTANDING SUBSECTION (5)(a) OF THIS SECTION, IN 2020, IF THE DESIGNATED ELECTION OFFICIAL WITH WHOM A PETITION IS TO BE FILED IS UNABLE TO ACCEPT THE FILING BECAUSE OF CLOSURES OR RESTRICTIONS DUE TO PUBLIC HEALTH CONCERNS, THE DESIGNATED ELECTION

[3] As noted at the bottom of the first page of the bill itself, capital letters indicate new material added to existing law.

> OFFICIAL MAY EXTEND THE DEADLINE TO FILE THE PETITION OR DESIGNATE AN ALTERNATE LOCATION FOR FILING THE PETITION OR BOTH; EXCEPT THAT A SIGNATURE GATHERED AFTER THE THIRD TUESDAY IN MARCH IS INVALID AND SHALL NOT BE COUNTED.
>
> (II) THIS SUBSECTION (5)(b) IS REPEALED, EFFECTIVE DECEMBER 31, 2020.

The Court notes the following provisions also are relevant to this dispute and remain unchanged by House Bill 20-1359. First, section 1-4-902(1) states, "The signatures to a petition [for candidacy] need not all be appended to one paper, but no petition is legal that does not contain the requisite number of names of eligible electors whose names do not appear on any other petition previously filed for the same office under this section." Second, section 1-4-907 provides, "The petition, when executed and acknowledged as prescribed in this part 9, shall be filed . . . [w]ith the secretary of state if it is for an office that is voted on by the electors of the entire state . . . ." Third, section 1-4-908 describes the review and notification process the Secretary must execute once she receives the petition. Finally, section 1-4-909 states:

> (1) A petition or certificate of designation or nomination that has been verified and appears to be sufficient under this code shall be deemed valid unless a petition for a review of the validity of the petition pursuant to section 1-1-113 is filed with the district court within five days after the election official's statement of sufficiency is issued, or, in the case of a certificate of designation, within five days after the certificate of designation is filed with the designated election official.
>
> (1.5) If the election official determines that a petition is insufficient, the candidate named in the petition may petition the district court within five days for a review of the determination pursuant to section 1-1-113.
>
> (2) This section does not apply to any nomination made at a primary election.

With these statutes in mind, the Court highlights two particular cases it considered in resolving this dispute. First, both parties cite to *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994).

In *Loonan*, the appellees (which included Peggy Loonan) brought an action to challenge the sufficiency of initiative petitions circulated by the appellants (William Woodley and Patricia Miller, hereinafter collectively "Woodley") that would require parental notification of an unemancipated minor's decision to have an abortion. The sole contention of Loonan was that Woodley collected an insufficient number of valid signatures to include the initiative on the November 1994 ballot because the affidavits submitted by Woodley's circulators did not include the statement that the circulator "has read and understands the laws governing the circulation of petitions" as required by statute. Notwithstanding the failure to include this language on the affidavits, the Secretary of State found the signatures collected by circulators using deficient affidavits were still valid and issued a statement of sufficiency in Woodley's favor. The district court, however, vacated the Secretary's determination. On appeal to the Colorado Supreme Court, Woodley asserted that compliance with election regulations must be judged using a "substantial compliance" standard rather than according to the strict compliance standard used by the district court. *Id.*, at 1383. The Supreme Court agreed with Woodley concerning the appropriate standard (i.e. substantial compliance not strict compliance is required), but nonetheless affirmed the ruling of the district court to the detriment of Woodley.

In doing so, the Supreme Court stated, "[T]he right to vote and right of initiative have in common the guarantee of participation in the political process. . . . In light of the nature and seriousness of these rights, we have held that constitutional and statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Loonan*, 882 P.2d at 1383-84 (internal

quotations omitted). The Supreme Court further said, "In the voting rights context we have held that the rule of 'substantial compliance' provides the appropriate level of statutory compliance to 'facilitate and secure, rather than subvert or impede, the right to vote." *Loonan*, 882 P.2d at 1384, citing *Meyer v. Lamm*, 846 P.2d, 862, 875 (Colo. 1993). The Supreme Court ultimately held that "[g]iven the similar nature of the right to vote and the right of initiative and referendum, and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights . . . substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum." *Id.*

The Supreme Court in *Loonan* recognized several factors to determine whether a party has substantially complied with statutory requirements: 1) the extent of non-compliance; 2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the non-compliance; and 3) whether there was a good faith effort to comply or whether non-compliance is based on a conscious decision to mislead the electorate. *Id.*; *see also Fabec v. Beck*, 922 P.2d 330 (Colo. 1996). When applying these factors to the facts of its case, the Supreme Court found the second factor was dispositive "because the 1993 statutory amendment [requiring a statement on the affidavit from a circulator that he or she has read and understands the laws governing the circulation of petitions] is so clear, direct and specific, and because the appellants made no attempt to comply with it." It is worth noting that Woodley used circulator affidavits based upon an accepted form used in previous petition campaigns (which apparently were acceptable in all other respects besides not containing the new language required by the 1993 amendment) and there were no other deficiencies cited by the Supreme Court that rendered the petition or signatures invalid. Rather, the Supreme Court focused on the omitted language as proof that the appellants "disregarded or were unaware of the 1993 amendments" and, thus, may

have been unaware "of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan*, 882 P.2d at 1385. In short, the "substantial compliance" standard did not insulate Woodley from his failure to comply with "the very particular requirements as to form, procedure, and disclosures that must be followed by the proponents of a petition." *Id.* With this in mind, this Court observes from the result in *Loonan* that while Ms. Ferrigno Warren suggests the "substantial compliance" standard is a more forgiving standard that favors the candidate in an election dispute, application of the standard by the Colorado Supreme Court indicates the standard is still a rigorous one that can just as easily be used as a sword to strike down a petition as opposed to a shield to protect it.

The Colorado Supreme Court's more recent decision in *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018) further demonstrates this point. In *Kuhn*, incumbent Representative Doug Lamborn sought access to the 2018 primary election ballot in the Fifth Congressional District as a Republican candidate for United States House of Representatives. Mr. Lamborn chose to proceed by petition. To be on the ballot, Mr. Lamborn was required to collect 1,000 valid signatures from registered Republicans in the district. The campaign for Mr. Lamborn hired an organization to circulate petitions and collect signatures which were later submitted to the Secretary of State for review and verification. The Secretary ultimately determined the campaign submitted 1,269 valid signatures and issued a "Statement of Sufficiency." This determination was challenged in the district court by several registered voters of the Fifth Congressional District pursuant to sections 1-1-113(1) and 1-4-909(1), C.R.S. (2017). The protestors argued that several of the circulators were not Colorado residents as required by section 1-4-905(1) of the Election Code and, therefore, the signatures collected by them should have been declared invalid by the Secretary. The district court held an evidentiary hearing and

the argument focused on two particular circulators. The district court concluded one circulator was not a Colorado resident and *in*validated the 58 signatures he collected. No party appealed that ruling. The district court concluded the second circulator was a Colorado resident and validated the 269 signatures he collected. As such, with these 269 valid signatures, the district court found Mr. Lamborn had collected enough signatures to satisfy the statutory threshold and upheld the Secretary's finding of sufficiency. The protestors appealed this ruling to the Colorado Supreme Court and the Court reversed.

In a *per curiam* opinion with no dissent, the Supreme Court concluded that because the second circulator was not a Colorado resident and, thus, did not meet the statutory requirements to be a circulator, all signatures collected by this circulator should have been declared invalid by the Secretary. By declaring these 269 signatures invalid, Mr. Lamborn was left with only 942 valid signatures – 58 signatures short of the threshold. The Supreme Court held that because Mr. Lamborn collected fewer than 1,000 valid signatures the Secretary could not certify him to the primary ballot. In reaching this result, the Court acknowledged the outcome in *Loonan* – "upholding order vacating the Secretary's determination of sufficiency and enjoining the Secretary from certifying proposed initiative to the ballot due to circulator's failure to comply with statutory requirements" – and stated in a footnote that "residency is not a mere technical requirement that is subject to substantial compliance." *Kuhn*, 418 P.3d at 489, n.4, citing *Loonan*, 882 P.2d at 1382. At the end of its opinion, the Supreme Court pointedly stated, "We recognize the gravity of this conclusion, but Colorado law does not permit us to conclude otherwise," *Kuhn*, 418 P.3d at 489, suggesting again to this Court that the "substantial compliance" standard set forth in *Loonan* may not be as forgiving as Ms. Ferrigno Warren asserts it to be, and signifying that the signature threshold itself is not a simple technical

requirement, is inflexible by law, and a "substantial compliance" analysis cannot save a petition with a deficient number of valid signatures. With that said, this Court notes the United States District Court in *Goodall v. Williams*, 324 F.Supp.3d 1184 (D. Colo. 2018) later issued a preliminary injunction ordering the Secretary of State (Wayne Williams at that time) to certify Mr. Lamborn to the ballot because the residency requirement for circulators likely violated the First Amendment. The United States District Court eventually entered a permanent injunction enjoining the Secretary from enforcing those provisions of section 1-4-905(1) that require petition circulators to be registered voters and residents of Colorado. *See Goodall v. Griswold*, 369 F.Supp.3d 1144 (D. Colo. 2019).

## CONCLUSIONS OF LAW

### A. Jurisdiction

The Court first addresses the jurisdictional challenge raised by the Secretary in her Hearing Brief. As noted above, the Secretary asserts the Court does not have jurisdiction to resolve this dispute under section 1-1-113, C.R.S., because in the face of an obvious deficiency in the number of petition signatures collected by Ms. Ferrigno Warren the Secretary's determination of insufficiency is required by the Election Code and, therefore, does not amount to a breach or neglect of her duties or other wrongful act under the Code. In essence, the Secretary maintains that because she properly applied a technical compliance standard in reviewing the petition her "Determination of Insufficiency" is unreviewable under the Election Code. The Court disagrees. In doing so, the Court again looks to the decision of *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018) for guidance. In *Kuhn*, the Colorado Supreme Court addressed a somewhat similar "technical compliance" jurisdictional issue in deciding whether the protestors could challenge the embattled circulator's residency in a section 1-1-113 proceeding. In framing the issue, the Supreme Court first stated, "Here, the protestors do not

dispute that the Secretary followed the appropriate verification procedures to do a facial verification of [the circulator's] information. Instead, they look to the courts for vindication. So, we must address whether judicial review of the Secretary's decision is allowed under section 1-1-113." *Id.*, at 485. The Supreme Court further stated, "Here, the Secretary properly relied on the circulator affidavit and information in the voter registration database to conclude that the Lamborn Campaign's petition appeared sufficient. Thus, the question becomes whether the Secretary has another relevant duty he might be 'about to' breach or neglect, or some other relevant wrongful act in which he might be 'about to' engage." *Id.*

In resolving this question, the Supreme Court first recognized that "Section 1-4-908(3) states that upon determining the petition is sufficient, the Secretary 'shall certify the candidate to the ballot.' [This statute] thus imposes a separate duty on the Secretary to place a candidate's name on the ballot." *Id.* The Supreme Court then considered the language of section 1-4-909(1) that allows for filing a protest of designations and nominations within five days after the Secretary's statement of sufficiency is issued. In light of these two statutes, the Supreme Court said, "[T]he Election Code expressly contemplates that, within a narrow, five-day window after the election official issues a statement of sufficiency, a challenge to the 'validity of the petition' may be brought through a proceeding under section 1-1-113, before the election official certifies a candidate to the ballot. Should the court determine that the petition is not in compliance with the Election Code, the election official would certainly 'commit a breach or neglect of duty or other wrongful action,' § 1-1-113(1), to nonetheless certify that candidate to the ballot under section 1-4-908(3)." *Id.*

From this Court's perspective, the opposite side of this jurisdictional coin is implicated in the present case. Section 1-4-909(1.5) provides, "If the election official determines that a

petition is insufficient, the candidate named in the petition may petition the district court within five days for a review of the determination pursuant to section 1-1-113." Ms. Ferrigno Warren alleges her petition is *not* insufficient and substantially complies with the Election Code despite containing a deficient number of signatures. While the merits of this argument are subject to further analysis by the Court, were the Court to agree with Ms. Ferrigno Warren that her petition is sufficient, the Secretary would commit a breach or neglect of her duty by not certifying the candidate to the ballot. As such, the Court finds Ms. Ferrigno Warren is not precluded by the Election Code from bringing the issue before the Court. This conclusion is consistent with the broad language of section 1-1-113 that provides, in part, "When *any* controversy arises between any official charged with any duty or function under this code and any candidate . . . *alleging* that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act . . . upon a finding of good cause, the *district court* shall issue an order requiring substantial compliance with the provisions of this code." (Emphasis added). As emphasized above, Ms. Ferrigno Warren has alleged the Secretary is in violation of the Election Code. Therefore, based on this allegation, the Court has jurisdiction to hear and resolve the dispute.

Finally, although Ms. Ferrigno Warren filed her Petition for Declaratory Relief before the Secretary issued her Statement of Insufficiency, the Court sees no reason to require Ms. Ferrigno Warren to file a second lawsuit raising the same or similar issues in order to somehow trigger a review under section 1-1-909(1.5) and section 1-1-113. Ms. Ferrigno Warren's filing on March 17, 2020 properly anticipated the Secretary's insufficiency determination and in no uncertain terms informed the Court and the Secretary that a review of that forthcoming determination was being requested. Accordingly, the Court finds the Petition for Declaratory relief is a timely filing

that requires district court review of the insufficiency determination in accordance with section 1-1-909(1.5) and section 1-1-113.

**B. One-Week Extension**

The Court next considers Ms. Ferrigno Warren's request to suspend the petition process and extend the filing deadline for one week after Governor Polis lifts the state of emergency. The Court rejects this request. In doing so, the Court first notes Ms. Ferrigno Warren's statement in her Reply that "she is still willing to accept an Order granting an additional seven days in order to complete petition signature gathering, however, she recognizes that there is little likelihood of the [Governor's State of Emergency and Stay at Home] Order(s) being lifted prior to the statutory ballot deadline." (Reply, page 12). The Court agrees with this assessment. More importantly, however, the Court notes that House Bill 20-1359 specifically precludes this type of relief. Per the bill, section 1-4-801(5)(b)(I), C.R.S. (2020), now provides in pertinent part that "a signature gathered after the third Tuesday in March is invalid and shall not be counted." The Colorado General Assembly could not have been more clear in this regard.

**C. Substantial Compliance**

The crux of this dispute is whether the Court should order the Secretary to place Ms. Ferrigno Warren on the 2020 Democratic primary ballot as a candidate for United States Senate even though she failed to collect the required number of valid signatures to petition onto the ballot. The Court has struggled with this question. As an initial matter, section 1-4-902(1), C.R.S., says "no petition is legal that does not contain the requisite number of names of eligible electors whose names do not appear on any other petition previously filed for the same office under this section." This language is clear and unequivocal and perhaps should end the Court's inquiry right here. The Secretary herself, however, does not make this argument but instead

asserts that "a reviewing court with jurisdiction under Section 113 is authorized to apply a less rigorous 'substantial compliance' standard under which it may liberally construe the Election Code in favor of ballot access." (Hearing Brief, page 7). In short, the Secretary appears to accept that the signature threshold in section 1-4-801(2)(c)(II) is not an inflexible requirement, that section 1-4-902(1) is not fatal to Ms. Ferrigno Warren's petition, and that further inquiry by the Court is warranted.

The Court, therefore, continues its analysis by considering Colorado Supreme Court precedent in this area. In going down this road, the Court is not sure whether the Supreme Court's decision in *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018), is a speedbump or a brick wall to further inquiry. The decision could be read by this Court to find that the signature threshold is inflexible by law and cannot withstand a "substantial compliance" analysis. In other words, no further inquiry is needed. Again, however, the Secretary does not make this argument but instead asks the Court to utilize a proposed mathematical formula that would require candidates like Ms. Ferrigno Warren "to still demonstrate significant public support before accessing the primary ballot, while still relaxing the statutorily required level of support due to COVID-19." (Hearing Brief, page 13). The Court observes that the Secretary cites *Kuhn* in her Hearing Brief for the proposition that a district court in a section 1-1-113 proceeding lacks jurisdiction to consider the constitutionality of state laws but does not rely on the opinion to argue Ms. Ferrigno Warren should be excluded from the primary ballot because she provided a deficient number of signatures.

In light of the position taken by the Secretary, the Court continues its analysis but with some reservation. The plain language of section 1-4-902(1), C.R.S., and the Supreme Court precedent considered above, give the Court pause whether further inquiry is permissible. The

Court, however, is mindful that it is reading and interpreting the Election Code and Colorado Supreme Court precedent in a nearly empty courthouse while a global pandemic is unfolding outside its windows. By almost any measure, ordinary life for the citizens of this state has been altered by the arrival of COVID-19 to our community. How and when life returns to normal are still open questions as the Court writes this order. This case shows the political process is not immune from the virus. Candidates, voters, and government officials have encountered a primary election season unlike any other in our history. It is within these circumstances, and in light of the arguments presented by Ms. Ferrigno Warren and the Secretary, that the Court concludes strict adherence to the signature requirement for primary petitions must yield to this unprecedented public health emergency. To interpret and apply the Election Code with a business-as-usual mindset seems injudicious at a time when our community and its citizens have been asked to adapt in profound ways to this new and (hopefully) temporary reality.

Fortunately, the Election Code by its own terms contemplates some level of flexibility in its application. First, section 1-1-103(1) of the Code states, "This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." In addition, section 1-1-103(3) states, "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." With that said, the Court recognizes that even though the Election Code may not require its provisions to be applied in a rigid manner during an election dispute, the flexibility the Code affords is not unrestrained as evidenced by the Colorado Supreme Court decisions of *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996). The Supreme Court in *Loonan* requires a district court to consider the following factors to determine

whether a party has substantially complied with the Code's statutory requirements: 1) the extent of non-compliance; 2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the non-compliance; and 3) whether there was a good faith effort to comply or whether non-compliance is based on a conscious decision to mislead the electorate. *Loonan*, 882 P.2d at 1384; *Fabec*, 922 P.2d at 341. The Court addresses each of these factors in turn.

First, concerning the extent of non-compliance in this matter, Ms. Ferrigno Warren collected a total of 5,383 valid signatures from across the state. This represents 51.2% of the total number of valid signatures required by section 1-4-801(2)(c)(II). Ms. Ferrigno Warren collected the required number of valid signatures in one of seven congressional districts (i.e. the 2nd congressional district). In the 1st congressional district Ms. Ferrigno Warren collected 69% of the required number of valid signatures; in the 3rd congressional district 21%; in the 4th congressional district 20.8%; in the 5th congressional district 32.6%; in the 6th congressional district 75.9%; and in the 7th congressional district 39.2%. The Court is mindful that Ms. Ferrigno Warren had a well planned strategy to use paid circulators during the final twelve days of the collection window to gather signatures in the 3rd, 4th, 5th, and 7th districts. She planned to use a large group of volunteers to gather signatures in the other three districts. To this end, Ms. Ferrigno Warren and Mr. Soto entered into a $40,000.00 contract for Mr. Soto's firm to acquire 10,000 valid signatures. Unsurprisingly, the numbers lag in the four districts that stood to benefit the most from the circulation efforts cut short by the pandemic.

Second, concerning whether the purpose of the signature requirement was substantially achieved despite the non-compliance, the Court is mindful that Ms. Ferrigno Warren had to collect petition signatures in the shadow of a global pandemic and looming public health

emergency. While a persuasive argument could be made that in more tranquil times collecting just over half the required number of valid signatures is not enough to show a candidate vying to appear on a primary ballot has a "significant modicum of support," *Utah Republican Party v. Cox*, 892 P.3d 1066, 1089 (10th Cir. 201), the Court would be remiss to ignore the on-the-ground and in-the-street realities of signature collection during this pandemic. Per the credible testimony of Ms. Ferrigno Warren, signature collection is a "very personal activity" and potential electors were "more cautious" about interacting with circulators beginning about one week before Governor Polis declared a state of emergency. In the best of times, engaging strangers in public, holding their attention, and acquiring their signatures on a petition is challenging. In a climate of social distancing to mitigate the spread of a communicable disease, it is even more so. During a declared state of emergency, it becomes almost futile.

Nonetheless, despite the changing social dynamics associated with the pandemic and foregoing three days of circulation (which included a Sunday), Ms. Ferrigno Warren still managed to gather more than 50% of the required total number of valid signatures. This achievement suggests Ms. Ferrigno Warren has a "significant modicum" of support for her candidacy. In the Court's judgment, a 50% threshold is a reasonable line to draw in this particular case as it strikes a balance between still requiring Ms. Ferrigno Warren to demonstrate significant public support *and* acknowledging that through no fault of her own Ms. Ferrigno Warren was forced to operate within an environment much more onerous to contacting (let alone persuading) potential electors to express that support. The Court recognizes this 50% standard has its shortcomings when applied to a campaign that has collected a lot more than 1,500 valid signatures in only one or a handful of congressional districts while collecting a minimal amount of signatures in the remaining districts. In such a situation, a candidate could claim to have

substantially complied with the petition requirements by gathering at least 5,250 valid signatures while garnering little or no support in some districts. In short, a candidate could inflate the numbers by loading up on signatures in his or her home district while ignoring the other districts. Such is not the case in the present matter. Ms. Ferrigno Warren met the district minimum in only the Second Congressional District, and she exceeded that minimum by just two votes. She collected slightly more than 1,000 signatures in each of two other districts. In the remaining districts – the districts she planned to use paid circulators in the final twelve days of the collection window – she collected a comparable number of valid signatures in each district (i.e. 315, 313, 490, and 588). These results demonstrate that as a candidate for statewide elective office, Ms. Ferrigno Warren made an honest effort to collect signatures in every congressional district, obtained legitimate support for her candidacy in each district, and when combined demonstrates a "significant modicum" of support across our electorate.

The Court declines to utilize the mathematical formula proposed by the Secretary. The Court notes the proposed formula is well thought out and easily applied in this case and others. The Court also understands why the Secretary would want all district courts in our state to utilize the same formula. However, the formula does not account for the reality that signature collection often starts slow and builds in intensity as the deadline nears. This is the "hockey stick" model that Mr. Soto describes using in previous elections with success. The "per-day average" analysis proposed by the Secretary is the converse of this model and in the Court's judgment unfairly penalizes Ms. Ferrigno Warren for having to wait to hire most of her paid circulators until after "Super Tuesday" and for settling on a signature collection strategy that could not anticipate the havoc COVID-19 would wreak in our community. To the extent Ms. Ferrigno Warren should have anticipated and planned for a potential disruption to her collection

efforts during the final two weeks of the collection window (e.g. the March blizzard), the Court notes such a "typical" disruption usually impacts our community for no more than a day or two and then life returns to normal. By contrast, the arrival of COVID-19 to our state has disrupted our community much more deeply and for much longer than anyone could have predicted. Bottom line, the Court is not convinced the proposed "one size fits all" mathematical formula is the proper method to judge whether this candidate under these circumstances has substantially complied with the provisions of the Election Code.

Finally, concerning whether there was a good faith effort to comply or whether non-compliance was based on a conscious decision to mislead the electorate, the Court is convinced Ms. Ferrigno Warren made a good faith effort to comply with the signature requirements. Ms. Ferrigno Warren and her campaign team developed a sound strategy for collecting the required number of signatures. In mid-December 2019, Ms. Ferrigno Warren consulted with Mr. Soto about hiring his firm to gather signatures and they entered into a $40,000.00 contract for Mr. Soto's firm to do so. Although most paid circulators in the state were working for other campaigns and unavailable to Ms. Ferrigno Warren until after "Super Tuesday," she did not wait until the final two weeks to begin her collection efforts. Rather, Ms. Ferrigno Warren and approximately 100 volunteers began collecting signatures on the first day of the collection window (i.e. on January 21, 2020). This shows Ms. Ferrigno Warren was eager to get into the community and start collecting signatures, and the Court has heard nothing in this proceeding to suggest this enthusiasm or effort waned during the collection window. To the contrary, Ms. Ferrigno Warren provided credible testimony she took a two-month leave of absence from her job during this time and worked 40-50 hours per week just on her campaign, all with the obvious purpose of meeting the signature requirement and getting on the ballot.

## CONCLUSION

After considering the three factors set forth in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996), the Court finds all three factors weigh in favor of granting the relief requested by Ms. Ferrigno Warren. The Court thus concludes that Ms. Ferrigno Warren has substantially complied with the Election Code's signature threshold, distribution, and validity requirements. Accordingly, the Court orders the Secretary of State to place Ms. Ferrigno Warren on the 2020 Democratic primary ballot as a candidate for United States Senate.

IT IS SO ORDERED on this Tuesday, April 21, 2020.

BY THE COURT:

Christopher J. Baumann,
District Court Judge