District Court, City and County of Denver, Colorado City and County Building, Room 256 1437 Bannock Street Denver, CO 80202	DATE FILED: April 27, 2020 4:58 PM CASE NUMBER: 2020CV195
Petitioner: **DIANA BRAY** v. Respondent: **JENA GRISWOLD, in her official capacity as Colorado Secretary of State**	▲ COURT USE ONLY ▲ Case Number: 20CV195 Division Courtroom 280

ORDER REGARDING PETITION FOR DECLARATORY RELIEF

This matter comes before the Court on a Petition for Declaratory Relief filed by Diana Bray ("Petitioner" or "Dr. Bray") on April 13, 2020. Dr. Bray seeks to be on the upcoming 2020 Democratic primary ballot as a candidate for United States Senate. To be on the ballot, Dr. Bray 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. Dr. Bray 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. Dr. Bray filed her petition on March 16, 2020, but the petition contained only 3,767 "reviewable signature lines." The Secretary subsequently reviewed the petition and issued a Statement of Insufficiency on April 7, 2020. The Statement reveals Dr. Bray collected 2,724 valid signatures.

In her Petition for Declaratory Relief, Dr. Bray 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, Dr. Bray asks the Court for the following relief: 1) to stop all in-person signature gathering for candidates and ballot

initiatives; 2) to permit online signature collection for candidates and ballot initiatives because face-to-face signature gathering during a pandemic and public health emergency is hazardous for circulators, candidates and the public, and does not comply with the mandate by Governor Polis to engage in social distancing; 3) to find she has made "substantial efforts to comply" with the petition requirements based on the number of signatures she submitted and order the Secretary to place her name on the primary ballot; 4) to order the parties to find an equitable resolution to the disparate and inequitable treatment of candidates; or 5) to consider an equitable resolution to this emergency.

In response, the Secretary filed a Hearing Brief on April 21, 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; 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; 3) the Court must not change the Election Code to allow online signature gathering on the eve of the primary election as the Court lacks authority to grant such relief in a section 1-1-113 proceeding and "would throw the election administration process into a state of chaos that significantly prejudices the Secretary's ability to conduct fair and orderly primary and general elections for Colorado's electorate" (Hearing Brief, page nine); and 4) the Court lacks jurisdiction in a section 1-1-113 proceeding to consider Dr. Bray's equal protection claim.

With these arguments in mind, the Court held an evidentiary hearing on April 24, 2020. The Court, having received and considered the various filings, the testimony of the witnesses, admitted exhibits, arguments presented, and applicable law, finds and orders as follows:

BACKGROUND

In April 2019, Dr. Bray entered the race for United States Senate. On January 13, 2020, the Secretary notified Dr. Bray that her candidate petition format had been approved. 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, Dr. Bray 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). Dr. Bray primarily relied upon two part-time staff members and approximately 120 volunteers to gather signatures. Dr. Bray, however, determined professional assistance would be needed to satisfy the signature requirements through rigorous signature gathering in the final two weeks of the collection window because the weather between January 21st and the end of February "had been extremely severe – the snowiest February on record, with significant rain, snow and hail, along with treacherous pathways and roads, encumbering her volunteer circulators, especially seniors, who were the great majority of [her] circulators." Dr. Bray thus hired a "campaign field organizer" on February 25, 2020, to "organize the majority of signature collection for the last [two] weeks of the campaign, beginning March 4th, after [he] completed his work on a presidential primary campaign." (Petition for Declaratory Relief, page two). Despite hiring this experienced circulator, signature collection in the final two weeks of the collection window never materialized given the arrival of COVID-19 to Colorado.

Per their Joint Statement of Stipulated Facts ("Stipulation") filed on April 24, 2020, Dr. Bray 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 verbally 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 an executive order (D 2020 017) ordering Coloradans to stay at home, subject to certain limited exceptions. In light of these events, Dr. Bray asserts that between March 4-7, 2020, she observed that it was becoming extremely difficult to collect signatures as electors stopped opening their doors and often refused to sign the petition with a pen that had been touched by her or others. Dr. Bray asserts many of her circulators began reporting similar issues. For example, one of Dr. Bray's best circulators reported going door-to-door to homes of registered Democrats in Colorado Springs and collecting only two signatures in 75 minutes. Dr. Bray maintains such difficulties in signature gathering increased over the following days and she "began to call off circulation efforts in the first days of March." (Petition for Declaratory Relief, page three). On March 9th, Dr. Bray spoke publicly with the media and stated she had begun to suspend collection efforts with the majority of her circulators. On March 13th, Dr. Bray officially ended circulation for the stated purpose of preserving the health and safety of herself, staff, volunteers, and the public. Dr. Bray notes the Colorado House of Representatives considered legislation to extend the petition and

signature deadline by fourteen days[1] and that she contacted three legislators to object to the proposed extension due to her concerns for public health.

On March 16, 2020, Dr. Bray submitted her petition to the Secretary for review. The Secretary determined Dr. Bray submitted 3,767 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 7, 2020, after the Secretary completed the required petition review, the Secretary notified Dr. Bray 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 Dr. Bray 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. Dr. Bray does not challenge any rejected entries in her Petition for Declaratory Relief.

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 24, 2020, as established facts in this matter.

2. Dr. Bray is a clinical psychologist and mother of four children.

3. Dr. Bray is a self-described "climate activist" for the past ten years, and has worked on previous candidate and ballot initiative campaigns, including presidential campaigns in 2000, 2004, 2008, 2012 and 2016, and three ballot initiative campaigns to regulate the fossil fuel industry in 2014, 2016 and 2018.

4. After spending four months consulting with approximately 70 people within and outside the Democratic party about whether she should seek political office and whether she had

[1] 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 C to the Secretary's Hearing Brief.

"a pathway to the ballot," Dr. Bray decided to run for United States Senate in the upcoming 2020 election. On April 2, 2019, Dr. Bray launched her campaign for United States Senate.

5. During her campaign, Dr. Bray has participated in over 200 political events and over 24 United States Senate forums, been interviewed for about 12 podcasts and news reports, raised approximately $70,000.00, compiled an email distribution list that reaches 13,000 people, and communicates regularly via social media with 2,500 people about her campaign.

6. Dr. Bray provides credible testimony that she has "lived and breathed" her campaign for over one year and is involved in all aspects of the campaign, including gathering signatures. Dr. Bray also provides credible testimony that for eleven months she worked directly on her campaign at least six days a week (on Fridays Dr. Bray still saw patients in her clinical private practice) for about 15 hours per day.

7. On January 13, 2020, the Secretary notified Dr. Bray that her candidate petition format was approved. Under the Election Code, major-party 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. Dr. Bray 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, Dr. Bray primarily relied upon two part-time staff members and approximately 120 volunteers to collect signatures. Most of these volunteers were senior citizens and college students.

8. In September 2019, Dr. Bray advertised for college interns to assist with signature collection. Approximately twenty college students volunteered with the campaign, including two students from Dr. Bray's *alma mater* (Middlebury College) who spent their January 2020 term interning 40 hours per week for the campaign.

9. Dr. Bray and her campaign coordinator created a sound strategy to collect signatures and Dr. Bray used her two full-time interns to help "develop an apparatus" to petition onto the primary ballot by creating "walk-lists" for volunteers, maps of public places to engage potential electors, schedules of events in ten cities across all seven congressional districts for additional engagement, and training videos for circulators. Dr. Bray and her campaign coordinator anticipated signature collection in the 3rd, 4th, and 5th Congressional Districts would present some challenges given there were fewer registered Democrats in those districts compared to the other four districts and, thus, planned to engage in door-to-door circulation and to use their walk-lists, maps, and event schedules to maximize signature collection in these districts.

10. Given her previous experience working on political campaigns, including ballot initiative petitions, Dr. Bray provides credible testimony that she knew there would be obstacles to gathering signatures in January and February due to the likelihood of inclement weather but that signature collection would "ramp up" in March when excitement and enthusiasm often intensifies, "people buckle down and get real serious about collecting," the weather improves, public events increase, and more potential electors are outside.

11. Dr. Bray provides credible testimony that she printed 1,000 petitions (enough for 30,000 signatures) and was "ready to go" when the signature collection window opened on January 21, 2020. Dr. Bray and her staff, interns, and volunteers thus began collecting signatures that first day.

12. In February 2020, Dr. Bray hired a "field organizer" to work full-time on her campaign. This field organizer did not own or operate his own political firm but did have experience in collecting signatures for petitions. On March 4, 2020 (the day following "Super Tuesday"), the field organizer began working on Dr. Bray's campaign after completing his work

on a presidential campaign. Once he started working for Dr. Bray's campaign, the organizer began to recruit additional circulators.

13. During her testimony, Dr. Bray 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).

14. The Ballot Access Manager for the Secretary (Joel Albin) provides credible testimony that he and his two team members reviewed 26 or 27 candidate petitions for the upcoming primary elections and that only four candidates submitted petitions to the Secretary for the Democratic primary ballot for United States Senate. The four candidates in the order of their petition filings are John Hickenlooper, Dr. Bray, Lorena Garcia, and Michelle Ferrigno Warren. Mr. Albin provides credible testimony that the typical validity rate for petition signatures is about 80% and that the validity rate usually goes down the later a petition is submitted.

15. Dr. Bray provides unchallenged testimony that collection efforts in February went "really well" and that on some days her team of circulators collected 400-600 signatures per day. The Court finds this testimony to be somewhat overstated given her assertion that February 2020 was the snowiest February on record and given she submitted a total of only 3,767 signatures. Nonetheless, the Court finds Dr. Bray and her circulators collected signatures in earnest from January 21st to the first week of March, and that Dr. Bray personally collected signatures in all seven congressional districts.

16. Circumstances, however, began to change for the worse beginning in the first days of March. Dr. Bray provides credible testimony that she encountered "serious problems"

with signature collection starting in March, including electors not wanting to communicate with or open doors to circulators, refusing to sign the petition using a pen handled by circulators or others, declining to be close to circulators, and security personnel at grocery stores telling circulators they could not stand in parking lots.

17. Dr. Bray provides credible testimony that because signature collection by necessity requires "close contact" between the circulator and the elector – a circulator must witness an elector sign the petition and sometimes a circulator has to hold the clipboard for an elector to sign it – signature collection "became virtually impossible." By way of example, on Sunday, March 8th, in the Fifth Congressional District, one of Dr. Bray's "most outstanding" circulators (a college student volunteer) collected only two signatures in 75 minutes because potential electors refused to open their doors.

18. At the end of the first week of March, Dr. Bray started telling her senior citizen circulators to stop collecting signatures. Dr. Bray was appropriately concerned for their well-being (and her own given Dr. Bray turned 60 years-old this year) given that seniors are at a higher risk for COVID-19 complications.

19. Dr. Bray provides credible testimony that as circumstances were "rapidly deteriorating day to day" and people in our community were "focused on buying food and looking after their families," she "could not in good conscience" ask her remaining circulators to continue collecting signatures. On Tuesday, March 10th, Dr. Bray decided to suspend signature collection knowing she would have to submit a deficient number of petition signatures to the Secretary. Thereafter, on Friday, March 13th, Dr. Bray officially announced via a media release that she was ending her circulation efforts. Dr. Bray credibly states that even though she was "heartbroken" at ending her circulation efforts, she felt like she did the right thing in the interest

of "protecting health and safety."

20. Exhibit D reveals that on or about March 12th the Colorado General Assembly began considering legislation (HB 20-1359) that if passed would extend the statutory deadline by 14 days for major-party candidates to file petitions. Dr. Bray credibly states she contacted three legislators to object to the proposed legislation and instead advocated to delay the primary.

21. On March 16, 2020, Dr. Bray timely filed her petition with the Secretary. The Secretary reviewed the petition in accordance with § 1-4-908(1), C.R.S.

22. Dr. Bray asserts when she filed her petition with the Secretary she also submitted a letter advising the Secretary that 30 circulators did not return their petitions to the campaign because they did not feel safe getting their petitions notarized "when social distancing mandates were in place in Colorado." Thus, on Saturday, March 14th, Dr. Bray's campaign coordinator who is a notary "spent the entire day driving around to eight counties notarizing and collecting petitions" from circulators who were self-isolating. Dr. Bray did not submit this letter to the Court. The Court finds Dr. Bray's testimony credible concerning the efforts her campaign coordinator made on March 14th to notarize and collect signatures. However, given the state of the evidence, the Court declines to speculate how many petitions, if any, remain uncollected.

23. The Secretary issued a Statement of Insufficiency on April 7, 2020. The Statement shows Dr. Bray gathered a total of 2,724 valid signatures from across the state. This represents 25.9% of the total number of valid signatures required by § 1-4-801(2)(c)(II), C.R.S.

24. Dr. Bray submitted 1,043 invalid signatures. Per § 1-4-909(1.5), C.R.S., Dr. Bray "may petition the district court within five days for a review of the [insufficiency] determination pursuant to section 1-1-113." Dr. Bray does not challenge any rejected entries in her Petition for Declaratory Relief. However, even if Dr. Bray did challenge the rejected entries, and even if the

Court determined all invalid signatures were somehow valid (thus bringing the total number of valid signatures to 3,767), Dr. Bray would still need to collect an additional 6,733 valid signatures to meet the threshold set forth in § 1-4-801(2)(c)(II), C.R.S.

25. The Statement provides a breakdown of valid signatures from each congressional district: 1) 920 in the 1st congressional district; 2) 637 in the 2nd congressional district; 3) 51 in the 3rd congressional district; 4) 267 from the 4th congressional district; 5) 279 from the 5th congressional district; 6) 285 from the 6th congressional district; and 7) 285 from the 7th congressional district.

26. Dr. Bray did not collect the required number of valid signatures in any of the seven congressional districts. In the 1st congressional district Dr. Bray collected 61.3% of the required number of valid signatures; in the 2nd congressional district 42.4%; in the 3rd congressional district 3.4%; in the 4th congressional district 17.8%; in the 5th congressional district 18.6%; in the 6th congressional district 19%; and in the 7th congressional district 19%.

27. The Statement further reveals that Dr. Bray submitted less than 1,500 signatures (whether valid or invalid) in all seven congressional districts. Of particular note, Dr. Bray collected only *62* signatures in the 3rd Congressional District.

28. 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.
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> . . .
>
> (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: [2]

> **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 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.
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> (II) THIS SUBSECTION (5)(b) IS REPEALED, EFFECTIVE DECEMBER 31, 2020.

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

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.
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> (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, the Secretary cites to *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) in her Hearing Brief. 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 an argument can be made that 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 a candidate would want 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 Dr. Bray 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." Dr. Bray alleges that in the face of the pandemic and "in the absence of an explicit statutory remedy, the current number of signatures should be deemed to have met the substantial-compliance standard . . . ." (Petition for Declaratory Relief, page four). In other words, Dr. Bray argues 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 Dr. Bray 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 Dr. Bray 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, Dr. Bray 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.

B. Online Signature Collection

The Court next considers Dr. Bray's request to stop all in-person signature gathering for candidates and ballot initiatives and to permit online signature collection. In making this request, Dr. Bray is really asking the Court to order the Secretary to re-open the signature collection window so Dr. Bray and other major-party candidates can collect and submit signatures beyond the March 17, 2020 deadline. The Court rejects this request. 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. As such, the Court need not address the Secretary's remaining concerns.

C. Substantial Compliance

The crux of this dispute is whether the Court should order the Secretary to place Dr. Bray 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 struggled with this question in a similar case filed by a different candidate (Ms. Ferrigno Warren in 20CV31077) and to some extent continues to do so in this case. In addressing Dr. Bray's request for relief, the Court is mindful of its reasoning in the related case and aims to use a consistent analysis to resolve this dispute. Notwithstanding the outcome in the related case, the Court remains concerned about straying from the signature requirements set forth in the Election Code. 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 arguably 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, pages 7-8). 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 Dr. Bray'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 again, the Court still 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 Dr. Bray "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 Dr. Bray 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 with some unease as the plain language of section 1-4-902(1), C.R.S., and the Supreme Court precedent considered above, suggest further inquiry is unwarranted. The Court, however, recognizes 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 remain uncertain 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 Dr. Bray and the Secretary, that the Court continues to believe that 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, Dr. Bray collected a total of 2,724 valid signatures from across the state. This represents 25.9% of the total number of valid signatures required by section 1-4-801(2)(c)(II). Dr. Bray did not collect the required number of valid signatures in any of the seven congressional districts. In the 1st congressional district Dr.

Bray collected 61.3% of the required number of valid signatures; in the 2nd congressional district 42.4%; in the 3rd congressional district 3.4%; in the 4th congressional district 17.8%; in the 5th congressional district 18.6%; in the 6th congressional district 19%; and in the 7th congressional district 19%. Of particular note, Dr. Bray collected only 51 valid signatures in the 3rd Congressional District. The Court recognizes Dr. Bray and her campaign coordinator created a sensible plan to collect signatures from across the state and that Dr. Bray had assembled a large group of volunteers to assist her, her two part-time staff members, and her full-time field organizer in circulating petitions. The Court further recognizes that Dr. Bray used two full-time interns to create "walk-lists" for circulators, maps of public places to engage electors, and schedules of events in ten cities across all seven congressional districts for additional engagement with electors. Despite her best intentions and planning, Dr. Bray's circulation efforts were cut short by the pandemic and her numbers in every congressional district suffered as a result.

In light of these numbers, the second factor – whether the purpose of the signature requirement was substantially achieved despite the non-compliance – is dispositive of this dispute. The question for the Court is whether collecting only 25.9% of the required total number of valid signatures demonstrates that Dr. Bray has a "significant modicum of support," *Utah Republican Party v. Cox,* 892 F.3d 1066, 1089 (10th Cir. 2018), from the statewide electorate to justify putting her name on the primary ballot. The Court concludes it does not. In reaching this result, the Court understands comparisons will be made between this outcome and the outcome in the related case involving Ms. Ferrigno Warren. The Court is mindful that both candidates had to collect petition signatures in the shadow of a global pandemic and looming public health emergency and that such efforts became almost futile in a climate of social

distancing and declared state of emergency. The Court, however, is unwilling to say that every petition that falls short of the signature threshold nonetheless substantially complies with the Election Code simply because circulation proceeded within this grim environment. To do so would render the "significant modicum of support" benchmark meaningless. Thus, the Court has tried to discern what level of support is enough to justify putting a candidate on the primary ballot knowing this pandemic has upset the most basic of social interactions in our community. This is not an easy line to draw.

Nonetheless, the Court continues to believe that a 50% threshold is a reasonable one in that it strikes a balance between still requiring Dr. Bray to demonstrate significant public support *and* acknowledging that through no fault of her own Dr. Bray was forced to operate within an environment much more onerous to contacting (let alone persuading) potential electors to express that support. In the Court's judgment, a candidate who still manages to collect at least one-half of the required number of valid signatures from an electorate absorbed within a global pandemic has shown he or she enjoys enough public support to justify putting the candidate on a primary ballot. While an argument can be made that even a 50% threshold is still too lenient the Court notes that such a standard (or more precisely just over this standard) often is used within the legal and political systems to mark whether a claim, proposition, candidate, etc., enjoys enough support to be considered proven, legitimate, electable, or successful. However, even under this much more forgiving standard, Dr. Bray falls short as she collected only 25.9% of the required total. The Court concludes this number does not suggest Dr. Bray has a "significant modicum" of support for her candidacy.

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 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 as Dr. Bray did not collect the minimum number of signatures in any congressional district. In the 1st Congressional District, Dr. Bray collected just under 1,000 valid signatures. In the 2nd Congressional District, she collected 637 valid signatures. In four of the five remaining districts she collected a comparable number of valid signatures – 267, 279, 285, and 285. However, in the 3rd Congressional District she collected only 62 total signatures and only 51 valid signatures. Given these numbers the Court cannot say that Dr. Bray obtained legitimate support for her candidacy in each district or when combined shows 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. Dr. Bray herself has experienced this phenomenon in the many campaigns she has worked on over the years. The "per-day average" analysis proposed by the Secretary is the converse of this experience and unfairly penalizes Dr. Bray for settling on a signature collection strategy that could not anticipate the havoc COVID-19 would wreak in our community. To the extent Dr. Bray should have anticipated and planned for a potential disruption to her collection efforts during the final two weeks of the collection window (e.g. inclement weather), 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 Secretary's mathematical formula is the proper method to judge whether a candidate 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 mostly convinced Dr. Bray made a good faith effort to comply with the signature requirements. The significant shortfall in the 3rd Congressional District is concerning to the Court and Dr. Bray did not explain during her testimony why the numbers in this district lagged so far behind the others. With that said, Dr. Bray and her campaign coordinator developed a sensible plan for collecting the required number of signatures. Dr. Bray hired two part-time staff members and one full-time field organizer and assembled a large group of volunteers to collect signatures. Dr. Bray also used two full-time interns to create "walk-lists" for circulators, maps of public places to engage electors, and schedules of events in ten cities across all seven congressional districts for additional engagement with electors. Dr. Bray and her team began collecting signatures on the first day of the collection window (i.e. on January 21, 2020). This shows Dr. Bray 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, Dr. Bray provided credible testimony she worked at least 15 hours per day and six days per week on her campaign, all with the obvious purpose of meeting the signature requirement and getting on the ballot. The Court, however, cannot find that these good faith efforts by Dr. Bray outweigh the shortfall in her numbers.

D. Remaining Claims

Concerning Dr. Bray's equal protection challenge to House Bill 20-1359, the Court does not have jurisdiction in a section 1-1-113 proceeding to consider this claim. *Kuhn v. Williams*, 418 P.3d 478, 489 (Colo. 2018). Similarly, Dr. Bray's requests that the Court order the parties to find an equitable resolution to the disparate and inequitable treatment of candidates and to consider an equitable resolution to this emergency fall under the same umbrella and cannot be considered in a section 1-1-113 proceeding.

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 two of the three factors weigh against granting the relief requested by Dr. Bray. Most importantly, the Court notes that Dr. Bray collected only 25.9% of the required total number of valid signatures. In doing so, the Court concludes Dr. Bray has not demonstrated a "significant modicum of support" from the statewide electorate to justify putting her name on the primary ballot. Accordingly, the Court does not find Dr. Bray has substantially complied with the Election Code's signature threshold, distribution, and validity requirements.

IT IS SO ORDERED on this Monday, April 27, 2020.

BY THE COURT:

Christopher J. Baumann,
District Court Judge