DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
MARIAN L. OLSEN AND JOSEPH HARRINGTON, Plaintiffs, v. TOM TANCREDO, PATRICIA MILLER, AMERICAN CONSTITUTION PARTY, AND BERNIE BUESCHER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO , Defendants.	▲ **COURT USE ONLY** ▲
	Case No. 2010CV7060 Ctrm.: 7
ORDER	

THIS MATTER concerns whether this Court should overturn the Colorado Secretary of State's decision to certify Thomas Tancredo and Patricia Miller as the candidates of the American Constitution Party for the offices of Governor and Lieutenant Governor, respectively. For the reasons set forth below, the Court affirms the Secretary's decision and orders that Mr. Tancredo and Ms. Miller may remain on the ballot for Colorado's 2010 general election.

I. Procedural History

On September 2, 2010, Marian Olson filed in Jefferson County her *pro se* Verified Petition Pursuant To C.R.S. § 1-1-113 naming Bernie Buescher as defendant, in his official capacity as the Secretary of State for the State of Colorado ("the Secretary"). On September 3, 2010, Ms. Olson filed her *pro se* Amended Verified Petition Pursuant To C.R.S. § 1-1-113 naming the Secretary, as well as Clyde Harkins, chairman of Colorado's American Constitution Party ("ACP") and Thomas "Tom" Tancredo, as defendants.

On September 3, the Jefferson County District Court transferred Ms. Olson's *pro se* case to Denver. This became Denver District Court case number 10CV7004.

On September 7, 2010, Ms. Olson and Mr. Harrington through counsel filed in Denver what the parties have generally referred to as the Second Amended Petition, naming the Secretary, ACP, Mr. Tancredo and Ms. Miller as defendants. The Second Amended Petition sets forth four statutory claims and a request that this Court order the Secretary and each County Clerk and Recorder to remove Mr. Tancredo and Ms. Miller from the 2010 general election ballot. This is Denver District Court case number 10CV7060.

On September 7, 2010, this Court held a status conference with the parties.

By September 11, 2010 all parties had filed briefs.

On September 13, 2010, the Court held a special statutory hearing under C.R.S. § 1-4-501(3) at which Mr. Tancredo, Ms. Miller, ACP Executive Committee member Amanda Campbell and the Secretary's Deputy Director of Elections, Gerald Wayne Munster, testified.

On September 14, 2010, Ms. Olson dismissed 10CV7004.

II. Findings of Fact

On May 15, 2010, the ACP held its party convention and nominated Mr. Ben Goss as its candidate for Governor and Mr. Douglas Campbell as its candidate for Lieutenant Governor.

On July 26, 2010, Mr. Tancredo changed his political party registration from Republican to ACP. On July 27, 2010, Mr. Goss filed a notice of withdrawal with the Secretary. Shortly thereafter, ACP's Candidate Search Committee and Executive Committee both unanimously voted to designate Mr. Tancredo to fill the vacancy created by Mr. Goss's withdrawal.[1]

The Court takes judicial notice of the fact that Colorado's statewide primary election occurred on August 10, 2010.

[1] The Court's notes reflect the following exchange on direct examination of ACP Executive Committee Member Amanda Campbell by counsel for ACP, Mr. Tancredo and Ms. Miller:

> Q: Let me make sure that we've got this clear. The Rule of the Article says the candidate search committee, the executive committee which you call the vacancy committee - is the vacancy committee the same as the candidate search committee and the executive committee?
>
> A: There is one extra person to the vacancy committee on the paperwork filed with the Secretary of State after our May 15 convention. The extra name is Jenna Goss.
>
> Q: And it says by a majority vote. Was a vote taken of Mr. Tancredo? A. Yes, there was.
>
> Q. Did it pass by a majority? A. It was passed unanimously.

The Court infers from this testimony and Ms. Campbell's demeanor while on the stand that she meant that both the Candidate Search Committee and the Executive Committee unanimously approved Mr. Tancredo's designation as ACP's candidate for Governor.

On August 23, 2010, Patricia Miller changed her political party registration from Republican to ACP. On August 24, 2010, Mr. Campbell filed a notice of withdrawal with the Secretary. Shortly thereafter, ACP's Candidate Search Committee and Executive Committee both unanimously voted to designate Ms. Miller to fill the vacancy created by Mr. Campbell's withdrawal.

ACP acted in accordance with its bylaws in designating Mr. Tancredo and Ms. Miller to fill the vacancies.

Article 11 of the ACP's bylaws states:

> Candidates for political office shall be eligible for nomination at the state nominating convention if they are: 1) registered as affiliated with the ACP for at least six months; 2) an up-to-date dues-paying member of the ACP for one year or more; prior to the nominating convention; and 3) are not and have not been a declared candidate for nomination by any other party to the same office in the current election cycle.
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> The above requirements may be waived on an individual, case-by-case basis by a 2/3 vote of the whole membership of the Executive Committee, unless required by state statute.
>
> Candidates who are seeking a position on the primary ballot by petition must have been registered as affiliated with the ACP for 12 months prior to the date of the state nominating convention in addition to meeting requirements 2 and 3 above.
>
> Candidates chosen to fill post-convention vacancies must be confirmed by a majority vote of the Candidate Search Committee and the Executive Committee.

In a letter dated July 27, 2010, officers of the ACP notified the Secretary that it had selected Mr. Tancredo to fill the vacancy created by Mr. Goss's withdrawal. They stated, "In the case of Thomas Tancredo, the executive committee agrees to waive the time period requirements for qualification numbers 1 and 2 as listed in Article 11 of the American Constitution Party bylaws." A similar statement was made in a letter from ACP notifying the Secretary that it had selected Ms. Miller to be its candidate for Lieutenant Governor.

On September 3, 2010, the Secretary certified Mr. Tancredo and Ms. Miller as the ACP's candidates for Governor and Lieutenant Governor of Colorado under C.R.S. § 1-5-203.

III. Conclusions of Law

The court has jurisdiction over this complaint pursuant to C.R.S. §§ 1-4-501(3) and 1-1-113. Both Ms. Olson and Ms. Harrington are eligible electors and have standing to bring this action. C.R.S. § 1-4-501(3).

Pursuant to C.R.S. § 1-4-501(3), a challenge "must be heard in not less than five days nor more than ten days after the date the election official's statement is issued," and within forty-eight hours after the close of the hearing, the court must "determine whether the candidate meets the qualifications for the office for which the candidate is declared." *Id.*

The ACP is a minor political party as defined in C.R.S. § 1-1-104(23).[2] ACP does not participate in Colorado's primary election. Instead, it holds a nominating assembly to select candidates. Therefore, by law, when Messrs. Goss and Campbell were nominated at the ACP assembly on May 15, 2010, they became the ACP's general election candidates for Governor and Lieutenant Governor. *See* C.R.S. § 1-4-1304(1.5)(d). Once they resigned their respective nominations, general election vacancies were created, and such vacancies could be filled pursuant to C.R.S. § 1-4-1002.

A. ACP's Designations Are Proper Under C.R.S. § 1-4-1002(4.5)

C.R.S. § 1-4-1002(4.5) specifically addresses how a minor political party, such as the ACP, fills a vacancy after the designated candidate withdraws. C.R.S. § 1-4-1002(4.5) states in relevant part:

> Any vacancy in a nomination for a minor political party candidate occurring after the filing of the certificate of designation pursuant to section 1-4-1304(3) and no later than seventy days before the general . . . election, which is caused by the . . . withdrawal of any person nominated by the minor political party, may be filled by the person or persons designated in the constitution or bylaws of the minor political party to fill vacancies.

Here, there were vacancies in nominations created by the withdrawal of Mr. Goss and Mr. Campbell. Those vacancies occurred after Mr. Goss and Mr. Campbell had been designated with the Secretary as ACP's candidates for Governor and Lt. Governor, but more than seventy days before the general election scheduled for November 2, 2010. Paragraph four of Article 11 of ACP's bylaws specifically addresses "post-convention vacancies" and authorizes ACP's Candidate Search Committee and Executive Committee to fill those vacancies. ACP's Candidate Search Committee and Executive Committee both unanimously voted to designate both Mr. Tancredo and Ms. Miller to fill the vacancies at issue. Therefore, ACP's actions complied with their bylaws and Colorado's statutory requirement for filling the vacancies.

B. C.R.S. § 1-4-1304 Does Not Apply

Plaintiffs assert, however, that C.R.S. § 1-4-1304 also dictates the eligibility of Mr. Tancredo and Ms. Miller to lawfully fill ACP's vacancies.

[2] A "minor political party" includes any political party whose candidate at the last preceding gubernatorial election received less than ten percent of the total gubernatorial votes cast and meets certain other conditions not at issue in this case. C.R.S. §§ 1-1-104(22) and (23).

C.R.S. § 1-4-1304(2) states:

> Nominations by a minor political party, to be valid, shall be made in accordance with the party's constitution or bylaws. No nomination under this section shall be valid for any general election held after January 1, 1999, unless the nominee:
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> (a) Is a registered elector;
>
> (b) Was registered as affiliated with the minor political party that is making the nomination, as shown in the registration books of the county clerk and recorder, no later than the first business day of the January immediately preceding the general election for which the person was nominated, unless otherwise provided in the constitution or bylaws of the minor political party; and
>
> (c) Has not been registered as a member of a major political party at any time after the first business day of the January immediately preceding the general election for which the person was nominated, unless otherwise provided in the constitution or bylaws of the minor political party.

There is no dispute that Mr. Tancredo and Ms. Miller are both registered electors. Plaintiffs contend, however, that Mr. Tancredo and Ms. Miller must meet both the affiliation requirement in subsection (2)(b) and the *dis*affiliation requirement in subsection (2)(c) and that any purported waiver is invalid. The Court agrees with Plaintiffs that ACP's efforts to waive these requirements were futile, because the waiver provision pertains only to a candidate's eligibility for nomination at the party's convention. The first two paragraphs in Article 11, including the waiver provision, are irrelevant here, because Mr. Tancredo and Ms. Miller were selected *after* ACP's May 15, 2010 convention.

Thus, if Plaintiffs are right and C.R.S. § 1-4-1304 applies, ACP's designation of Mr. Tancredo and Ms. Miller is, at the very least, in serious peril. If it does not, then their designations are valid.

A court's primary objective in construing statutes is to effectuate the intent of the General Assembly. *See Specialty Restaurant Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). If the statutory language is clear, the court must interpret the statute according to its plain and ordinary meaning. *Id.* If the statute is reasonably susceptible to multiple interpretations, a court may look to other aids in construction. *Id.* Courts will not construe a statute in a manner that assumes the General Assembly made an omission; rather, the General Assembly's failure to include particular language is a statement of legislative intent. *Id.*

Here, the relevant statutory language is clear. C.R.S. § 1-4-1304 governs the process by which minor political parties initially *nominate* candidates. C.R.S. § 1-4-1002(4.5) addresses how minor political parties may *replace* nominated candidates once a vacancy exists. Neither statute refers to the other. They are set forth in different parts of Title 1. The statutes do not

conflict. Even if they did, however, the more specific statute would control. *Moran v. Carlstrom*, 775 P.2d 1176, 1182 (Colo. 1989); *see also* C.R.S. § 2-4-205 (specific provision prevails over general provision, if conflict is irreconcilable). Here, the more specific statute is C.R.S. § 1-4-1002(4.5), which addresses the way in which minor political parties may fill vacancies.

In short, the fact that Mr. Tancredo and Ms. Miller were long-time registered Republicans until they switched parties, "at the 11th hour" as Plaintiffs put it, and were then designated by ACP to fill these vacancies is irrelevant, because the plain language of the controlling statute does not preclude that path to the ballot. Moreover, ACP's efforts to waive any affiliation and disaffiliation requirements are similarly irrelevant. Plaintiffs argue that those efforts implicitly constitute a concession by ACP that a waiver was necessary, in order for their designations to be valid. The Court instead infers that ACP acted as it did out of an abundance of caution, given the potential for this litigation. Regardless of ACP's motivation for invoking the waiver provision, the Court concludes that the provision simply does not apply.

C. Other Subsections Of C.R.S. § 1-4-1002 Do Not Foreclose ACP's Designations

Plaintiffs also assert that other subsections of C.R.S. § 1-4-1002 use the undefined term "party" in a way that encompasses both major and minor political parties and thus impose additional requirements for candidacy on Mr. Tancredo and Ms. Miller. This argument fails for several reasons.

First, courts must give considerable weight to the interpretation of a statute by the agency charged with its administration, even though it is not bound by that interpretation. *See Anderson v. Longmont Toyota*, 102 P.3d 323, 326 (Colo. 2004); *see also Colorado For Family Values v. Meyer*, 936 P.2d 631, 633 (Colo. App. 1996) (a court must accord the Secretary's construction of election statutes "great deference" because her office is charged with enforcement of those statutes). To the extent that these other subsections of C.R.S. § 1-4-1002 render the General Assembly's treatment of minor political parties in this context ambiguous, the Secretary's interpretation resolving that ambiguity is entitled to this Court's deference. Any resulting disparity in eligibility requirements for the candidates of minor political parties versus those for major political parties is not necessarily "absurd," as Plaintiffs maintain, because that disparity may be predicated on the General Assembly's desire to safeguard the associational and speech rights of less influential parties.

Second, even if C.R.S. §§ 1-4-1002(1), 1-4-1002(2.3)(a) and 1-4-1002(9)(b) do apply, they do not foreclose ACP's designations of Mr. Tancredo and Ms. Miller.

C.R.S. § 1-4-1002(1) states in relevant part:

> Any vacancy in a *party* designation occurring after the party assembly at which the designation was made and no later than sixty-eight days before the primary election may be filled by the party assembly vacancy committee of the district, county, or state, depending upon the office for which the vacancy in designation has occurred. A vacancy may be caused by the . . . withdrawal of

> any person designated by the assembly as a candidate for nomination, or by failure of the assembly to make designation of any candidate for nomination, or by death or resignation of any elective officer after an assembly at which a candidate could have been designated for nomination for the office at a primary election had the vacancy then existed. *No person is eligible for appointment to fill a vacancy in a party designation unless that person meets all requirements of candidacy* as of the date of the assembly that made the original designation.

C.R.S. § 1-4-1002(1) (emphasis added).

C.R.S. §§ 1-4-1002(9) states in relevant part:

> (a) No vacancy committee called to fill a vacancy *pursuant to the provisions of subsection (2.3)* of this section may select a person to fill a vacancy at a meeting held for that purpose unless a written notice announcing the time and location of the vacancy committee meeting was mailed to each of the committee members at least five days prior to such meeting by the chairperson of the central committee which selected the members. Mailing of the notice is effective when the notice is properly addressed and deposited in the United States mail, with first-class postage prepaid.
>
> (b) The vacancy committee, by a majority vote of its members present and voting at a meeting called for that purpose, shall select a person *who meets all of the requirements of candidacy as of the date of the primary election and who is affiliated with the same political party or minor political party, if any, shown on the registration books of the county clerk and recorder as the candidate whose . . . withdrawal caused the vacancy.* No meeting shall be held until a quorum is present consisting of not less than one-half of the voting membership of the vacancy committee. No member of the vacancy committee may vote by proxy. The committee shall certify the selection to the secretary of state within seven days from the date the vacancy occurs. If the vacancy committee fails to certify a selection within seven days, the state chair of the same political party or minor political party as the candidate whose declination, death, disqualification, resignation, or withdrawal caused the vacancy, within seven days, shall fill the vacancy by appointing a person having the qualifications set forth in this subsection (9). The name of the person selected or appointed by the state chair shall be certified to the secretary of state. The vacancy shall be filled until the next general election after the vacancy occurs, when the vacancy shall be filled by election.

C.R.S. § 1-4-1002(9) (emphasis added).

C.R.S. §§ 1-4-1002(2.3)(a) states in relevant part:

> A vacancy in a *party* nomination, *other than a vacancy for a party nomination for lieutenant governor for a general election occurring after January 1, 2001*, that occurs after the day of the primary election and more than eighteen days before the general election may be filled by the respective party assembly vacancy committee of the district, county, or state, as appropriate, depending upon the office for which the vacancy in nomination has occurred in accordance with the provisions of subsection (9) of this section. A vacancy in a party nomination for lieutenant governor for a general election occurring after January 1, 2001, shall be filled by a replacement candidate for lieutenant governor nominated by the party's candidate for governor. A vacancy may be caused by the . . . withdrawal of the person nominated at the primary election or by the . . . withdrawal of an elective officer after a primary election at which a nomination could have been made for the office had the vacancy then existed. *No person is eligible for appointment to fill a vacancy in the party nomination unless the person meets all of the requirements of candidacy as of the date of the primary election.* When a vacancy is filled pursuant to this paragraph (a), the designated election official shall provide notice by publication of the replacement nomination in the same manner as the notice required by section 1-5-205.

C.R.S. § 1-4-1002(2.3)(a) (emphasis added).

Because of the timing of their designations, C.R.S. § 1-4-1002(1), if it applies, is the subsection pertinent to Mr. Tancredo, and C.R.S. §§ 1-4-1002(2.3)(a) and 1-4-1002(9)(b), if they apply, are the subsections pertinent to Ms. Miller.

C.R.S. §§ 1-4-1002(1) and 1-4-1002(9)(b) include the provision italicized above: "No person is eligible for appointment to fill a vacancy in a party designation unless that person meets all requirements of candidacy." Plaintiffs assert that the "requirements for candidacy" include the affiliation and disaffiliation requirements of C.R.S. § 1-4-1304. For the reasons previously stated, the Court respectfully disagrees. The Court also observes that the omission of this language under C.R.S. § 1-4-1002(4.5) lends further support to the notion that the General Assembly deliberately chose to treat vacancies for minor political parties differently.

This leaves unanswered, however, the question of what requirements for candidacy otherwise exist. A person meets the requirements for candidacy if the person is an eligible elector

who is at least eighteen years of age. C.R.S. § 1-4-501(1). Mr. Tancredo and Ms. Miller are eligible electors and are over the age of eighteen. Therefore, Mr. Tancredo and Ms. Miller meet the requirements for candidacy.

Although section 1002(9) also contains an affiliation requirement that arguably applies to Ms. Miller, it does not set forth any requirement that she must have been affiliated for any appreciable period of time to qualify as the person selected to fill the vacancy for the Lt. Governor candidacy on ACP's ticket. In this case, Ms. Miller affiliated prior to filling the vacancy. Therefore, she met the requirements of section 1002(9).

D. Plaintiffs' First Amendment Argument Does Not Alter The Court's Conclusions

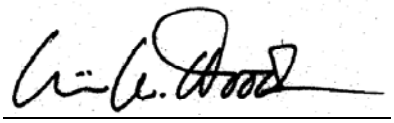
Plaintiffs seem to contend that the Court's construction of the statutory framework somehow implicates *Plaintiffs'* rights under the First Amendment to the United States Constitution. They point to *Storer v. Brown*, 415 U.S. 724 (1974), *Colo. Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998 (Colo. 1991), and *Riddle v. Daley*, 2010 WL 2593927 (D. Colo. June 23, 2010) and *Curry et al v. Buescher*, slip. op. 10-1265 (10th Cir. August 31, 2010). First, Plaintiffs do not explicitly assert a constitutional claim in their Second Amended Petition. Second, the law is clear that a court "should not decide a constitutional issue unless the necessity for such decision is clear and inescapable." *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). Third, the associational, speech and ballot access rights at issue, if any, belong to ACP, Mr. Tancredo and Ms. Miller. Fourth, the facts of the cases on which Plaintiffs rely are distinguishable. They involve independent candidates seeking direct access by petition to a general election ballot. Such candidates are not similarly situated to candidates selected through the processes available to major and minor political parties. Finally, Plaintiffs seem to invoke these cases to make a policy argument about what they perceive as the political instability that would result from allowing someone such as Mr. Tancredo late entry into a race. It is not appropriate, however, for this Court to decide public policy. For all these reasons, Plaintiffs' constitutional argument is not ripe for the Court's consideration.

IV. Conclusion

For the foregoing reasons, the Court affirms the Secretary's decision and orders that Mr. Tancredo and Ms. Miller may remain on the ballot for Colorado's 2010 general election. Mr. Tancredo and Ms. Miller meet the qualifications for the offices for which they have been declared. For the purpose of Supreme Court review under C.R.S. § 1-1-113(3), the district court proceedings related to this case are terminated.

Done this 14th day of September, 2010.

BY THE COURT:



William W. Hood, III

District Court Judge