

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	FILED Document CO Denver County District Court 2nd JD Filing Date: Sep 24 2012 03:14PM MDT Filing ID: 46612074 Review Clerk: Nicole Gawlikowski <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado, v. Defendant: DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for City and County of Denver, Intervenors-Defendants: COLORADO COMMON CAUSE and GILBERT ORTIZ in his official capacity as the Clerk and Recorder for the County of Pueblo.	Case Number: 2011CV6588 Div./Ctrm: 203
Attorney for Proposed Intervenor-Defendant, Colorado Common Cause Name: J. Lee Gray, #27306 Address: HOLLAND & HART LLP 6380 S. Fiddlers Green Cir., Suite 500 Greenwood Village, CO 80111 Telephone: (303) 290-1602 Facsimile: (303) 975-5303 E-mail: LGray@hollandhart.com Names: Myrna Perez (<i>pro hac vice</i>) Mimi Marziani (<i>pro hac vice</i>) Jonathan Brater (<i>pro hac vice</i>) Address: THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW 161 Avenue of the Americas, 12 th Floor New York, NY Telephone: (646) 292-8310 Facsimile: (212) 463-7308 E-Mails: Myrna.Perez@nyu.edu Mimi.Marziani@nyu.edu Jonathan.Brater@nyu.edu	<p style="text-align: center;">INTERVENOR-DEFENDANT COLORADO COMMON CAUSE'S MOTION FOR LEAVE TO FILE SECOND AMENDED COUNTERCLAIM</p>

Pursuant to C.R.C.P. 15(a), Intervenor-Defendant Colorado Common Cause (“CCC”), by and through its counsel, hereby moves this Court for an order granting leave to file a Second Amended Counterclaim, in the form attached as **Exhibit 1**, and, in support thereof, states as follows:

1. **C.R.C.P. 121 §1-15(8) Certification**: Counsel for CCC has conferred with Plaintiff’s counsel regarding the relief sought in this motion. Plaintiff objects to the amended counterclaim to the extent that it would lead to an extension of deadlines or further delay in this matter due to the potential addition of another level of discovery or review of this case.

2. On August 15, 2012, the Secretary adopted certain relevant amended and new rules related to mailing ballots to IFTV electors.

3. Specifically, Rule 12.4.1(d) prohibits election officials from mailing ballots to IFTV electors and Rule 13.19 prohibits an election official from providing ballots to an IFTV electors until the elector submits a timely application for mail-in ballot.

4. These rules formally set forth the Secretary’s interpretation of C.R.S. § 1-7.5-107(3)(a)(I), which has been the subject of CCC’s counterclaims throughout this case, and would alter the status quo, actively prohibiting county clerks from mailing ballots pending the outcome of this case.

5. To obtain adequate relief and assure full adjudication of the issues, CCC must amend its counterclaim to include these newly-promulgated rules in its counterclaims.

6. Because the same issues that have been the subject of this case with respect to the Secretary’s statutory interpretation and constitutionality of that interpretation will apply with respect to these rules, allowing the amendments will not affect the scope of the litigation, require any modification of existing deadlines or prejudice any party to the case.

WHEREFORE, Intervenor-Defendant Colorado Common Cause respectfully requests that the Court grant it leave to file its Second Amended Counterclaim and accept as filed the Second Amended Counterclaim in the form attached as **Exhibit 1**.

Dated: September 24, 2012.

Respectfully submitted,

s/ J. Lee Gray

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Myrna Pérez, *pro hac vice*
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THE BRENNAN CENTER FOR JUSTICE AT
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**ATTORNEYS FOR INTERVENOR-DEFENDANT,
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CERTIFICATE OF SERVICE

I certify that on September 24, 2012, I served a copy of the foregoing document to the following *via* Lexis-Nexis File and Serve:

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Exhibit 1

For its Second Amended Counterclaim against Plaintiff Scott Gessler (the “Secretary”), Intervenor-Defendant Colorado Common Cause (“CCC”), by and through its counsel, states as follows:

PARTIES, JURISDICTION, AND VENUE

1. CCC is a state chapter of Common Cause, a national non-profit citizens’ advocacy group that works to ensure open, honest and accountable government at the national, state and local levels. Common Cause has worked to protect the integrity of our voting system and to prevent voter disenfranchisement at the national, state and local levels, including in Denver, for decades. At the time this litigation was filed, CCC’s members include over 35 registered voters in Denver County who are designated as “Inactive — Failed to Vote.”

2. Plaintiff Scott Gessler, in his official capacity (“the Secretary” or “the Plaintiff”), is the duly elected Secretary of State of the State of Colorado. Secretary Gessler has the duty to supervise elections and enforce the Uniform Election Code in a lawful and constitutional manner.

3. This Court has jurisdiction of this matter under Article VI, §9(1) of the Colorado Constitution, C.R.S. §§ 13-51-105, 24-4-106, and C.R.C.P. 57(a).

4. Venue is proper in this Court under C.R.C.P. 98 (b)(2) and (c)(1).

FACTUAL ALLEGATIONS

5. Colorado electors are defined as “Inactive – Failed to Vote” (“IFTV”) if they miss a single general election. C.R.S. 1-7.5-108.5(1); *see also* C.R.S. § 1-2-605(2). IFTV electors remain fully eligible to vote in all elections. C.R.S. § 1-2-605(3).

6. Upon information and belief, Colorado is the only state to designate voters as “Inactive” for missing just one election.

7. Upon information and belief, after the general election in November 2010, tens of thousands of eligible voters were designated as IFTV.

8. Under the Mail Ballot Election Act, C.R.S. § 1-7.5-101, *et seq.* (1992), Colorado counties have had the option of conducting mail ballot elections in certain circumstances. In recent years, counties have increasingly chosen to conduct partisan primary elections and coordinated elections in odd-years by mail.

9. In a mail ballot election, there are no traditional polling places and voters most typically vote via a ballot they receive in the mail and they return by mail. Voters have the option of obtaining and dropping off the mail ballot to a designated location within the county, but there are typically very few such locations. Indeed, in many counties, there was only one such location in November 2011.

10. There is no dispute that in partisan primary elections, local election officials must mail ballots to active electors and to IFTV electors who are affiliated with a political party. *See* C.R.S. § 1-7.5-107(3)(a)(II)(A). But for non-primary mail ballot elections, the law states simply that “the designated election official shall mail to each active registered elector,” without mentioning IFTV electors. C.R.S. § 1-7.5-107(3)(a)(I).

11. In November 2011, of Colorado’s 64 counties, approximately 60 chose to hold nonpartisan, coordinated mail ballot elections. Several counties, including the County of Denver, decided to mail ballots to IFTV electors.

12. In September 2011, after learning of Denver’s intentions, the Secretary brought suit to permanently enjoin the Denver County Clerk from doing so. The Secretary claimed that C.R.S. § 1-7.5-107(3)(a)(I) prohibits election officials from mailing ballots to IFTV electors in non-primary contests. This litigation ensued.

13. Thereafter, on or about August 15, 2012, the Secretary, through his staff, temporarily adopted various amended rules concerning mail ballot elections. The Secretary published the adoption of the Temporary and Permanent Rules on September 10, 2012.

14. New Rule 12.4.1(d) expressly prohibits designated election officials from mailing ballots to IFTV electors:

Request for ballot by inactive — failed to vote elector. In a coordinated or nonpartisan election, ***the designated election official may not mail a ballot to an elector whose registration record is marked inactive - failed to vote*** until the elector submits a registration update or a request for a ballot under Section 1 -7.5-107(3), C.R.S., and Rule 12.11.

8 CCR 1505-1, Rule 12.4.1(d) (Aug. 15, 2012) (emphasis added).

15. In addition, new Rule 13.19 prohibits an election official from providing a ballot to an IVTF elector until that voter submits a timely application for a mail-in ballot:

For any election that is not a primary mail ballot election, ***the designated election official may not issue a mail-in ballot to an elector whose record is marked inactive — failed to vote*** until the elector submits a timely application for mail-in ballot.

8 CCR 1505-1, Rule 13.19 (Aug. 15, 2012) (emphasis added).

16. Thus, in non-primary elections, IFTV electors cannot access a ballot without first obtaining, filling out, and returning a specific form to their county clerk’s office, or to limited other designated locations in their county. IFTV voters who fail to complete this process more than seven days before an election have no option but to appear in person.

17. Upon information and belief, the new rules impose a substantial burden on the ability of IFTV electors to vote, and imposes particularly significant burdens upon the voting rights of racial and ethnic minorities.

18. When this lawsuit was first filed, over 35 of CCC's members were IFTV electors who resided in Denver and would not have received ballots in the November 1, 2011 mail-only statewide election under the Secretary's interpretation of C.R.S. § 1-7.5-107(3)(a)(I). Upon information and belief, dozens of CCC members will not receive ballots in future non-primary mail ballot elections under the new Rule 12.4.1(d), and will be forced to effectively re-register pursuant to new Rule 13.19.

19. The interests CCC seeks to protect in this suit are germane to its purpose of protecting the voting rights of its members, the integrity of our voting system, and preventing voter disenfranchisement in Denver and throughout Colorado.

20. A dispute exists between CCC and the Secretary as to whether election officials may mail ballots to IFTV Voters in coordinated mail ballot elections

**FIRST CLAIM FOR RELIEF
(Judgment That Clerks May Not Be Prohibited From
Mailing Ballots to Inactive Voters)**

21. CCC incorporates the allegations above as though fully set forth herein.

22. CCC is entitled to a judgment under C.R.S. §13-51-105, and C.R.C.P. 57(a), that under C.R.S. § 1-7.5-107(3)(a)(I), Secretary may not prohibit election officials from mailing ballots to all registered electors in mail ballot elections, including IFTV electors.

**SECOND CLAIM FOR RELIEF
(Rules 12.4.1(d) and 13.19 are Invalid)**

23. CCC incorporates the allegations above as though fully set forth herein.

24. The right to vote is a fundamental right of every citizen and there may be no discrimination between citizens with respect to that right, unless justified by a state interest sufficient to justify the burden on that right.

25. New Rules 12.4.1(d) and 13.19 violate the Equal Protection clause of the Fourteenth Amendment and Article 2, Section 25 of the Colorado Constitution by impermissibly burdening the right to vote, and imposing special burdens on members of racial and ethnic minorities.

26. Rules 12.4.1(d) and 13.19 also violate the First Amendment and Colorado Constitution by impermissibly burdening political expression—including the right to refrain

from voting—and by burdening IFTV electors’ right to vote, especially electors who are racial and ethnic minorities.

27. CCC is entitled to a judgment that Rules 12.4.1(d) and 13.19, or pertinent portions thereof, are invalid.

THIRD CLAIM FOR RELIEF
(Judgment That Secretary’s Interpretation of CRS § 1-7.5-107(3)(a)(I)
Would Render C.R.S. § 1-7.5-107(3)(a)(I) Unconstitutional)

28. CCC incorporates the allegations above as though fully set forth herein.

29. The right to vote is a fundamental right of every citizen and there may be no discrimination between citizens with respect to that right, unless justified by a state interest sufficient to justify the burden on that right.

30. The policy of not sending mail ballots to IFTV electors violates the Equal Protection clause of the Fourteenth Amendment and Article 2, Section 25 of the Colorado Constitution by impermissibly burdening the right to vote, and imposing special burdens on members of racial and ethnic minorities.

31. The Secretary’s interpretation of C.R.S. § 1-7.5-107(3)(a)(I) also violate the First Amendment and Colorado Constitution by impermissibly burdening political expression—including the right to refrain from voting—and by burdening IFTV electors’ right to vote, especially electors who are racial and ethnic minorities.

32. CCC is entitled to a judgment under C.R.S. §13-51-105, and C.R.C.P. 57(a), that the Secretary’s interpretation of C.R.S. § 1-7.5-107(3)(a)(I) is unconstitutional to the extent that it does not require mailing to IFTV electors.

PRAYER FOR RELIEF

Based on the foregoing, Intervenor-Defendant CCC respectfully requests the following relief:

A. A judgment that C.R.S. § 1-7.5-107(3)(a)(I) does not allow the Secretary to prohibit election officials from mailing ballots to IFTV electors.

B. A judgment that Rules 12.4.1(d) and 13.19 are invalid under C.R.S. § 24-4-106(7)

C. A judgment that Rules 12.4.1(d) and 13.19 would render C.R.S. § 1-7.5-107(3)(a)(I) unconstitutional.

D. A judgment that any interpretation of C.R.S. § 1-7.5-107(3)(a)(I) forbidding ballots to be mailed to IFTV electors in mail ballots elections would render C.R.S. § 1-7.5-107(3)(a)(I) unconstitutional.

E. Such other relief as the Court may deem appropriate.

Dated September 24, 2012.

Respectfully submitted,

s/ J. Lee Gray

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CERTIFICATE OF SERVICE

I certify that on September 24, 2012, I served a copy of the foregoing document to the following *via* Lexis-Nexis File and Serve and/or by e-mail to:

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