DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado, Plaintiff, v. DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for the City and County of Denver , Defendant, And COMMON CAUSE and GILBERT ORTIZ, in his official capacity as Clerk and Recorder for the County of Pueblo, Defendants-Intervenors	▲ **COURT USE ONLY** ▲
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SECRETARY'S RESPONSE TO DEFENDANT DEBRA JOHNSON'S MOTION FOR JUDGMENT ON THE PLEADINGS

Scott Gessler, in his official capacity as Secretary of State for the State of Colorado ("Secretary"), by and through undersigned counsel, hereby submits his Response to Defendant Debra Johnson's Motion for Judgment on the Pleadings. The Court should deny the motion because Clerk Johnson is not entitled to judgment as a matter of law.

I. STANDARD OF REVIEW

Judgment on the pleadings is appropriate when, based upon the pleadings, the moving part is entitled to judgment as a matter of law. *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001). The Court must construe the allegations in the pleadings strictly against the movant, must deem the allegations within the opposing party's pleadings to be true, and should not grant the motion unless the pleadings indicate that the matter can be determined on the pleadings. *Platt v. Aspenwood Condominium Ass'n,* 214 P.3d 1060, 1066 (Colo. App. 2009). A court should enter a judgment on the pleadings only if the material facts are undisputed, and movant is entitled to judgment as a matter of law. *Id.*

II. THE SECRETARY IS NOT LIMITED TO SEEKING INJUNCTIVE RELIEF.

Clerk Johnson contends that the Secretary may seek only injunctive relief. Her argument is founded on the assumption that the provisions of § 1-1-107, C.R.S. (2012), constitute a special statutory proceeding that preclude remedies other than those specified in that section.

Clerk Johnson correctly notes that special statutory proceedings may supersede more general rules of procedure. However, the existence of a special statutory proceeding that does not specifically provide for declaratory relief does not necessarily preempt a claim for declaratory relief. Instead, the court must decide whether the statutory procedure is intended to provide the *exclusive* means to assert a claim. *Clasby v. Klapper,* 636 P.2d 682, 685 (Colo. 1981).

The Court of Appeals has acknowledged that declaratory relief supplements a special statutory proceeding. *Citizens Progressive Alliance v. Southwestern Water Conservation District,* 97 P.3d 308 (Colo. App. 2004). In that case a citizens' group submitted an open records request under the Colorado Open Records Act ("CORA"). CORA contains a specific procedure for seeking court review. The statutory procedure does not contain a specific reference to declaratory relief. The citizens' group argued that CORA provided the exclusive remedy for resisting a CORA request. The court disagreed. Even though CORA does not expressly mention an action for declaratory relief, nothing in CORA precludes the filing of an action seeking declaratory relief. *Id.*, at 312.

The plain language of the § 1-1-107(2), C.R.S. (2012), on its face discloses that the Secretary may file actions other than ones seeking injunctive relief. It provides:

> *In addition to any other powers prescribed by law,* the secretary of state shall have the following powers:
>
> …

> (d) to enforce the provisions of this code by injunctive action…

(Emphasis added.) The introductory sentence unequivocally acknowledges that this section is not the exclusive means through which the Secretary may enforce election laws.

Statutes give the Secretary broad authority to institute lawsuits seeking a range of remedies. The Secretary may authorize the attorney general "to prosecute and defend all suits relating to matters connected with [his] department." Section 24-31-101(1)(b), C.R.S. (2012). In addition, the Secretary has inherent power to file a request for declaratory relief when another public official takes actions that are inconsistent with the Secretary's power to supervise elections. *See, Romer v. Colorado General Assembly,* 810 P.2d 215, 220 (Colo. 1991) (Public official such as the Governor may seek declaratory judgment against General Assembly when Governor asserts that General Assembly infringed upon his powers).

Clerk Johnson's argument also misperceives the reason for specifically including injunctive relief in the statute. The intent was not to limit the type of relief available to the Secretary; instead he General Assembly intended to supersede the provisions of Rules of Civil Procedure and to remove certain factors that a party must prove to obtain a permanent injunction.

In general, when a government agency is specifically authorized by statute to seek injunctive relief, it is unnecessary for that agency to show irreparable injury or

the other elements necessary for injunctive relief. *United States v. Marathon Investment Partners, LP,* 399 F.Supp.2d 1, 3, n.1 (D.Mass. 2005). All the agency must show is that the person against whom an injunction is sought has violated, or is about to violate, a statute or law. *Id.* The agency does not have to prove other elements, such as irreparable injury.

Colorado follows the general rule. *Lloyd A. Fry Roofing Co. v State Dep't of Health Air Pollution Variance Bd.*, 191 Colo. 463, 553 P.2d 800 (1976). In that case, a roofing company contested an injunction issued against it. The injunction was authorized by statute. The company argued that the injunction issued by the trial court was fatally defective because the court did not find that irreparable harm would result. The Colorado Supreme Court held that irreparable injury need not be shown when an injunction is sought pursuant to statute. *Id.* 191 Colo. at 473, 553 P.2d at 808. The Court also held that it is not necessary to prove irreparable injury when the suit is brought on behalf of the public or involves an issue of great public importance. *Id.* Thus, the statutory provisions regarding injunctive relief were intended to remove limitations on the ability to obtain injunctive relief imposed under C.R.C.P. 65. *Id. See also*, *State ex rel. Salazar v. The Cash Now Store, Inc.*, 31 P.3d 161, 167 (Colo. 2001) (state must prove only that company violated statute); *Kourlis v. District Court,* 930 P.2d 1329, 1336 (Colo. 1997) (same).

In this case, the reference to injunctive relief was not intended to prevent the Secretary from seeking other types of relief. Instead, it was intended to allow the Secretary to obtain injunctive relief by proving only a violation of the election laws.

CONCLUSION

For these reasons, the Court should deny Clerk Johnson's motion for judgment on the pleadings.

JOHN W. SUTHERS

Attorney General

s/ Maurice G. Knaizer
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Pursuant to C.R.C.P. 121, § 1-26(9), the original of this document with original signatures is maintained in the offices of the Colorado Attorney General, 1525 Sherman Street, Denver, CO 80203, and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2012, she served a true and correct copy of the foregoing **SECRETARY'S RESPONSE TO DEFENDANT DEBRA JOHNSON'S MOTION FOR JUDGMENT ON THE PLEADINGS** upon each of the following individuals via LexisNexis File & Serve or, where indicated, via United States First Class Mail, postage prepaid:

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/s/ Pam Ponder
Pam Ponder

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