District Court, City And County Of Denver, State Of Colorado City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	
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 THE 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	**▲COURT USE ONLY▲** Case Number: 2011CV6588 Division/Courtroom: 203
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DEFENDANT DEBRA JOHNSON'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO C.R.C.P. 56 (b)

Defendant Debra Johnson, in her official capacity as the Clerk and Recorder for the City and County of Denver ("Denver"), through her undersigned counsel, respectfully submits this Motion for Summary Judgment on Plaintiff Secretary of State Gessler's ("Secretary") claims for relief pursuant to C.R.C.P. 56(b). As shown below, there are no genuine issues of material fact and Denver is entitled to judgment as a matter of law on the Secretary's claims for declaratory and injunctive relief.

I. CERTIFICATE OF COMPLIANCE

Pursuant to C.R.C.P. 121, §1-15(8), counsel for movant certifies that she has conferred in good faith with counsel for Gessler, Ortiz and Common Cause prior to filing this motion, but the Secretary and Denver were unable to resolve their differences, thereby necessitating this motion.

II. NATURE OF PROCEEDING

In 2011, Denver conducted the November 1, 2011 Election (the "Election") as a mail ballot election. Denver, as it had for the previous five elections, intended to mail ballots to electors classified as inactive failed to vote (IFTV) electors. There were no restrictions in the Uniform Election Code, 1-1-101, et seq., ("Election Code") that prevented this activity. As part of its planning and preparations to conduct the Election, Denver consulted with the Secretary's Office months in advance, complied with the Secretary's requirements to set up and manage the Election in the Secretary's statewide voter registration system (the "SCORE" system), relied on the Secretary's written instructions (contained in checklist format), and submitted election plans and information in advance. The Secretary's procedures gave counties conducting a mail ballot election the option to include IFTV electors in the initial mailing of ballots. Denver, relying on its consultations with the Secretary's Office, chose that option. At the eleventh hour, the Secretary abruptly announced by a Friday night email a new interpretation that the Election Code prohibited sending ballots to IFTV electors. He ordered Denver to cease its mailing to IFTV electors. Prior to receiving this email, Denver had already issued ballots to active and IFTV uniform military and overseas voters to comply with a statutory deadline. The Secretary then filed this action claiming, inter alia, Denver could not disobey his order.

The Secretary alleges as his sole basis for this Court's jurisdiction the special statutory provision of Section 1-1-107(2)(d), C.R.S. Complaint, ¶2. This provision allows the Secretary to seek enforcement under the provisions of the Election Code by *injunctive action* in the district court for the judicial district in which any alleged violation occurs. By its nature, a Section 1-1-107(2)(d) injunctive relief proceeding is designed to resolve specific disputes, on a case by case basis, of alleged violations of the Election Code based on extrinsic facts pled in the Complaint and proved at trial. The statute does not provide a vehicle for *declaratory or other relief*. *See* Defendant Johnson's separately filed Motion for Judgment on the Pleadings (Rule 12(c) and 12(h)(2)).

When the Colo. General Assembly has conferred special statutory remedies, such remedies supersede and serve as the sole and exclusive means to seek and obtain judicial relief. See, *Oxley v. Colo. River Water Conservation Dist*., 513 P.2d 1062, 1064 (Colo. 1973). A party cannot circumvent special statutory remedies for judicial review by attempting to obtain declaratory relief, where the prescribed avenue of review is adequate. *Clasby v. Klapper*, 636 P.2d 682, 684 (Colo. 1981); See also, *Hays v. Denver*, 254 P.2d 860, 862 (Colo. 1953); *Greyhound Racing Assoc. v. Colo. Racing Comm'n*, 589 P.2d 70, 71 (Colo. App. 1978). The Plaintiff's exclusive remedy in this case is to seek injunctive relief; he is not entitled to declaratory or any other remedies that are not contained in Section 1-1-107(2)(d).

III. STANDARD OF REVIEW UNDER C.R.C.P. 56(b)

C.R.C.P 56(b) provides that a defending party against whom a claim is asserted or a declaratory judgment is sought may move for summary judgment, with or without supporting affidavits. The purpose of summary judgment is to expedite litigation by avoiding needless trials where no genuine issue exists as to any material fact and movant is entitled to judgment as a matter of law. *Dubois v. Myers*, 684 P.2d 940 (Colo.App. 1984). Summary judgment permits the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992); *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598 (Colo.App. 2004).

The Colorado Supreme Court has articulated the standards for adjudicating a motion as follows:

> Although the standard for analysis of summary judgment is well-established and almost axiomatic, we set it forth in order to frame the question we must address. Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law. [citations omitted]. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.

Martini v. Smith, 42 P.3d 629, 632 (Colo. 2002).

IV. STATEMENT OF UNDISPUTED FACTS

In his court filings to date, the Secretary has not alleged any disputed facts concerning a violation of the Election Code. Instead, the Secretary has stated the facts in this case are undisputed. (See, most recently, Secretary's Reply to Defendant Debra Johnson's Response Brief in Opposition to the Amended Secretary's Renewed Motion for Judgment on the Law pursuant to C.R.C.P. 56(H), p. 4) (hereinafter "Reply to Renewed Motion").

1. In 2010, Denver approved a budget to conduct Denver's 2011 scheduled elections as mail-ballot elections. *See* McReynolds Supp. Aff., ¶ 3. Exhibit 1.

2. The Denver Elections Division conducted Denver's regularly scheduled, home-rule municipal general and run-off elections on May 3, 2011, and June 7, 2011, respectively. *See* McReynolds Supp. Aff., ¶5.

3. County Clerks are required to use the SCORE software system to conduct a mail ballot election. In May 2011, Victor Richardson, an employee of the Denver Elections Division contacted the Secretary's SCORE customer support helpdesk and spoke to Vicky Stecklein concerning the SCORE system's option to include electors IFTV electors in the initial mailing of ballots for the Election. Ms. Stecklein informed him that there were no changes to the SCORE

system to prevent mailing ballots to IFTV electors. *See* McReynolds Supp. Aff., ¶29.

4. In July 2011, Victor Richardson again called the SCORE customer support team to inquire if there would be any changes to the SCORE system that would impact the November 1, 2011 Coordinated election. The SCORE help desk told him there would be no changes. *See* McReynolds Supp. Aff., ¶31, Richardson Supp. Aff., ¶ 4. Exhibit 3.

5. In preparing for the Election, the staff of the Elections Division consulted, from time to time, the Election Code, the Election Rules promulgated by the Secretary of State, the Secretary's Election Policy Manual, Newsletters, Quick Reference Guides, Training Materials, and the instructions contained in the Secretary's Mail Ballot Election Setup Checklist for guidance and policy changes from the Secretary. *See* McReynolds Supp. Aff., ¶30.

6. In making final plans and preparations for the Election, Denver relied upon the customer service it received from the Secretary's SCORE helpdesk in May and July 2011, stating the SCORE system had not been changed and it allowed mailing of ballots to IFTV electors. *See* McReynolds Supp. Aff., ¶ 39.

7. From August 22, 2011, until August 24, 2011, Victor Richardson set-up Denver's mail ballot election in the SCORE election management module. He provided the information requested by the SCORE system and checked the checkbox to include IFTV electors to participate in the Election. At the time Mr. Richardson performed these activities, he relied on the Mail Ballot Election Setup Checklist provided by the Secretary of State's Office which was dated June 10, 2010. Notably, the checklist highlighted the option of including inactive failed to vote electors by stating the following: "Be sure to select the "Inactive-Failed to Vote Eligible for Mail Ballot" checkbox." *See* McReynolds Supp. Aff., ¶41, Richardson Supp. Aff., ¶ 8.

8. The Secretary maintains he monitors, through his customer support team, election management activities conducted in the SCORE system, including but not limited to, data entry of details for election setup, identifying eligible electors for participation in the election, and issuance of ballots. *See*, SECRETARY'S ANSWERS TO FIRST SET OF INTERROGATORIES PROPOUNDED BY DEBRA JOHNSON, Answer to Interrogatory No. 4, p. 3. Exhibit 16. Consistent with established procedures, the Secretary reviewed and accepted Denver's data submissions and SCORE plans on or about August 26, 2011. *See* McReynolds Supp. Aff., ¶45, Richardson Supp. Aff., ¶ 12.

9. On Saturday, September 3, 2011, Denver completed the second step of the SCORE system requirements and started the process to pull voters from the SCORE system to print and mail ballots. *See* McReynolds Supp. Aff., ¶ 52, Richardson Supp. Aff., ¶ 17.

10. On September 7, 2011, Denver submitted its written mail ballot plan for the Election using the form on the Secretary of State's website - which was dated May 19, 2011. *See* McReynolds Supp. Aff., ¶62.

11. Denver's written mail ballot plan was completed using the most current form provided by the Secretary of State's Office. It asked for an estimate of the number of voters eligible to vote in Denver's 2011 Coordinated Election. Denver reported 288,204 estimated eligible electors. "Active" and "inactive failed to vote" electors both are eligible electors. *See* McReynolds Supp. Aff., ¶ 63; Transcript, Hearing October 7, 2011, p. 37, lines 1-3. Exhibit 15.

12. As part of the review of Denver's written mail ballot plan, Secretary of State staff assumed that the estimated number of eligible voters included both active and inactive electors. *See*, SECRETARY'S ANSWERS TO FIRST SET OF INTERROGATORIES PROPOUNDED BY DEBRA JOHNSON, Answer to Interrogatory No. 4, pp. 4-5. Exhibit 16.

13. The first indication to Denver that the Secretary of State's Office had reservations about Denver's plans to include IFTV electors for the Election was on September 12, 2011. *See* McReynolds Supp. Aff., ¶65; Transcript, Hearing October 7, 2011, p. 38, lines 1-13. Exhibit 15.

14. On September 12, 2011, Amanda Hill, a Denver Elections employee, contacted the SCORE help desk for assistance with balancing the counts of the total number of ballots to be issued with the total number of active and IFTVelectors. *See* McReynolds Supp. Aff., ¶ 65, Hill Supp. Aff., ¶ 6. Exhibit 2.

15. Paula Barrett from the SCORE helpdesk helped Ms. Hill with procedures to print mailing labels to send ballots to active and IFTV Uniform Military and Overseas Voters (UMOVA) prior to September 17, 2011 (which was the statutory deadline to complete this task). *See* McReynolds Supp. Aff., ¶ 65, Hill Supp. Aff., ¶ 6.

16. Ms. Barrett referred the call to Hilary Rudy for more specific information on an unrelated matter. *See* McReynolds Supp. Aff., ¶ 65, Hill Supp. Aff., ¶ 6.

17. By coincidence, Ms. Hill updated Ms. Rudy about her conversation with Ms. Barrett as background information. *See* McReynolds Supp. Aff., ¶65, Hill Supp. Aff., ¶ 6. Ms. Rudy provided her understanding to Ms. Hill that ballots could not be mailed to IFTV electors and asked to speak to the Denver Elections Director, Amber McReynolds. *See* McReynolds Supp. Aff., ¶65, Hill Supp. Aff., ¶ 6.

18. Ms. Rudy spoke to Amber McReynolds about the issue and stated that the Secretary of State's Office "would not care" about Denver's inclusion of IFTV electors if there "hadn't been a statewide ballot question on the ballot." *See* McReynolds Supp. Aff., ¶ 66.

19. On September 15, 2011, the Secretary notified the Denver Clerk by letter that Denver's November 1, 2011, Coordinated Mail Ballot Election Plan was in compliance with Article 7.5 of Title 1, C.R.S., and was therefore approved. *See* McReynolds Supp. Aff., ¶ 69. When the Secretary approves a mail ballot plan, it means each section has been reviewed and his staff has ensured that the information requested has been provided and the election will be

conducted in accordance with relevant statute and rules. *See* Transcript, Hearing October 7, 2011, p. 36, lines 4-7. Exhibit 15.

20. Saturday, September 17, 2011, was the deadline to send mail ballots to absent uniformed services members and overseas (UMOVA) electors of the City and County of Denver in accordance with Section 1-8.3-110, C.R.S. *See* McReynolds Supp. Aff., ¶ 82.

21. Because the UMOVA mailing deadline fell on a Saturday, Denver scheduled the mailing to occur on Friday, September 16, 2011. *See* McReynolds Supp. Aff., ¶ 82.

22. Denver's mailing of UMOVA ballots was commenced on the morning of Friday, September 16, 2011, as scheduled. *See* McReynolds Supp. Aff., ¶ 82. This mailing included sending ballots to IFTV UMOVA electors in accordance with the Secretary's SCORE set-up procedures. *See* McReynolds Supp. Aff., ¶ 82**.**

23. Also on September 16, 2011, Clerk Johnson and Judd Choate exchanged phone calls to inform the Clerk of the Secretary's concerns. *See* Johnson Supp. Aff., ¶ 14. Exhibit 4. During their conversations, Mr. Choate stated the Secretary of State's Office construed Section 1-7.5-107(3)(a)(II) to mean ballots could not be mailed to IFTV electors. He said this construction was "interpretive". *See* Johnson Supp. Aff., ¶ 15.

24. Clerk Johnson understood the word "interpretive" to mean "non-binding" and advisory. *See* Johnson Supp. Aff., ¶ 16. She asked Mr. Choate to provide the "interpretive" reading of Section 1-7.5-107(3)(a)(II) in writing in order to confirm what he had told her and for further deliberation. *See* Johnson Supp. Aff., ¶ 17.

25. By the time Clerk Johnson was contacted by Mr. Choate on September 16, 2011, ballots had already been issued to active and IFTV UMOVA electors of the City and County of Denver. *See* Johnson Supp. Aff., ¶ 18, McReynolds Supp. Aff., ¶ 82.

26. Mr. Choate failed to provide any procedures to Clerk Johnson or her staff by which to remove IFTV from the election which was already in progress. *See* Johnson Supp. Aff., ¶ 19, McReynolds Supp. Aff., ¶80.

27. At about 5:58 p.m., on Friday, September 16, 2011, Clerk Johnson received an email from Mr. Choate containing a cease and desist order not to mail ballots to IFTV electors. *See* Johnson Supp. Aff., ¶ 20, McReynolds Supp. Aff., ¶ 70.

28. The questions on the Denver ballot consisted of Proposition 103 (a statewide tax increase question); the Regular Biennial School Election (concerning three (3) nonpartisan School Board candidate races for School District No. 1 in the City and County of Denver and State of Colorado); and the citywide 2011 Special Municipal Election with Initiated Ordinance 300 (a citizen initiated ordinance) and Referred Question 3A (a municipal charter amendment question). *See* McReynolds Supp. Aff., ¶ 9.

29. Clerk Johnson is the elected Clerk and Recorder for the City and County of Denver. She is the chief election officials for the City and County of Denver (Sec. 8.1.2; Denver Charter; Sec. 1-1-110(3), C.R.S.). She has exclusive authority for all matters pertaining to municipal home-rule elections. (Sec. 8.1.2; Denver Charter).

V. PLAINTIFF'S CLAIMS FOR RELIEF

A. FIRST CLAIM FOR RELIEF

The Secretary's First Claim for Relief relies on the Uniform Election Code, Sec. 1-1-110(1), C.R.S. The Secretary alleges that:

> 28. The Clerk "shall…follow the rules and orders promulgated by the secretary of state." Section 1-1-110(1), C.R.S. (2011).
>
> 29. The Clerk cannot disobey an order of the Secretary, even if the Clerk believes the Secretary erred. For purposes of a statewide ballot issue election, the Clerk is a subordinate officer who has a ministerial duty to obey the order of the Secretary even when the Clerk disagrees with the interpretation
>
> 30. The Secretary is entitled to a declaration that the Clerk must follow the Secretary's order. Complaint ¶ 28-30.[1]

B. SECOND CLAIM FOR RELIEF

The Secretary's Second Claim for Relief relies on the Uniform Election Code, Sec. 1-1-107(1)(c), C.R.S. and the Help America Vote Act, C.R.S. Sec. 1-1.5-107(1)(c). The Secretary alleges that:

> 32. Under Colorado law, the Secretary must ensure that laws in statewide ballot issue elections are applied uniformly. Section 1-1-107(1)(c), C.R.S. (2011).
>
> 33. Under the legislative declaration in 1-1.5-101(g), the Secretary is required to "effectively and uniformly implement[]" election standards. Section 1-1.5-101(g), C.R.S. (2011).
>
> 34. The Secretary is entitled to a declaration that the election laws must be applied uniformly in each county in the State. Complaint ¶ 32-34.

[1] The issue of whether the Secretary is entitled to declaratory relief under this special proceeding for injunctive relief is the subject of Denver's separate Motion for Judgment on the Pleadings as to the First and Second Claims for Relief.

C. THIRD CLAIM FOR RELIEF

The Secretary's Third Claim for Relief cites the Uniform Election Code, Sec. 1-1-107(2)(d), C.R.S. (*see* caption preceding claim) and the Mail Ballot Election Act, C.R.S. Sec. 1-7.5-107(3)(a)(I). The Secretary alleges that:

> 36. As of July 1, 2011, clerks may mail ballots only to active registered voters. Section 1-7.5-107(3)(a)(I), C.R.S. (2011).
>
> 37. The Clerk has stated that she will not obey the order of the Secretary to mail ballots only to active registered electors.
>
> 38. The Secretary is entitled to an injunction requiring the Clerk to mail ballots only to active registered electors. Complaint ¶ 36-38.

VI. ARGUMENT

A. THE FIRST, SECOND AND THIRD CLAIMS FOR RELIEF ARE UNSUPPORTED BY THE ELECTION CODE

Plaintiff alleges that county election officials must comply with an order or rule from the Secretary regarding implementation of election law even if they disagree with the order or rule. The first claim argues for a broad declaration the Clerk must obey the Secretary. The second claim argues for an equally broad declaration that election laws must be applied uniformly in each county. These claims are not supported by the Election Code and they fail to comply with the specificity requirement of 1-1-107(2)(d) to prove a violation of the Election Code occurred in 2011. The Secretary's legal proposition is based on the premise that County Clerks are subordinate to the Secretary under the Election Code. Complaint, ¶ 29. As such, the Secretary contends the County Clerks must obey his interpretations and orders of the Election Code regardless of their content, the facts, or the circumstances. Complaint, ¶ 29-30. The Secretary's use of the indefinite article "an" to modify the word "order" (*see e.g.* ¶ 29 of the Complaint) means the County Clerks must obey "any" order and "all" orders. The distinction is critical because relief in Plaintiff's favor will not only establish a new legal standard that is not set forth in the Election Code concerning the roles of County Clerks and the Secretary in conducting elections, but will also increase the likelihood of unwarranted contempt proceedings for acts unrelated to those originally judged in violation of the Election Code specific to this dispute.

Assuming arguendo that this Court allows the first and second claims to survive, the claims act as the functional equivalent of an injunction to "obey the law". As contained in the complaint, they are too vague to enforce. They will not give Denver fair notice of what conduct will risk contempt in the future. Since contempt is a possible remedy, the relief requested will subject Denver to contempt proceedings if at any time in the future the Denver Clerk is accused of committing some new violation unrelated to this dispute. These claims seek to prevent all possible disobedience –as defined solely by the Secretary and must be rejected for exceeding the

scope of review under Section1-1-107(2)(d), C.R.S.. The Courts have denounced broad injunctions under Rule 65 that instruct the enjoined party to "obey the law" and fail to identify with specificity the conduct that will risk contempt. See, *Hughey v. JMS Dev. Corp.,* 78 F.3d 1523, 1531 (11th Cir. 1996)({A]ppellate courts will not countenance injunctions that merely requires someone to "obey the law."…Because of the possibility of contempt, an injunction must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law. An injunction must therefore contain an operative command capable of enforcement.)(citations omitted). The same rationale applies here. Plaintiffs' first and second claims must be denied as a matter of law because they do not meet the specificity requirement contained in Section 1-1-107(2)(d) to show a violation of law occurred.

1. County Clerks have historically had a unique role.

Prior to the adoption of the State Constitution, County Clerks were officers under Colorado's territorial laws, and canvassed Colorado's first election results. *See*, Colo. Const., Schedule, Sections 14 and 18. County officials had a major role in conducting elections under Colorado's territorial laws. (See, e.g., 1868, R.S. Chapter XXVIII, pp. 282-293, Exhibit 6).

The powers of local officials to conduct elections grew over time. For example, in 1921 County Clerks maintained registration books (C.L. 1921, § 7628, Exhibit 7). County commissioners provided ballot boxes and voting booths at polling places (C.L. 1921, §§ 7708 and 7709, respectively, Exhibit 7). County Clerks hired election judges and staff to conduct elections. *Id.* at § § 7700, 7701. The role of county officials in these earlier statutes was incorporated into later versions of law with County Clerks taking a greater role in coordinating day to day election activities. In 1963, the Colorado General Assembly overhauled Colorado's election laws. Relevant to this dispute, the General Assembly increased the powers and authority of the County Clerks with the express authorization to make decisions and interpretations under the election code in consultation, at that time, with the county attorney. Section 49-1-7, C.R.S. (1963) (Exhibit 8). In 1967, the Secretary was substituted for the county attorney to harmonize the roles of the parties in light of the addition of Section 49-1-11. Section 49-1-11, C.R.S. (1967) (Exhibit 9).[2] However, even with the 1967 amendments the County Clerks maintained their role as primary decision makers under the Election Code. In 2003, the General Assembly enacted H.B. 03-1356 to comply with the federal Help America Vote Act of 2002 (HAVA) (Exhibit 10). In particular, HAVA required a complaint procedure and a process to issue administrative orders to remedy HAVA related complaints. As indicated by the Bill's Title, Section 1-1-110(1) was changed to add the word "order" in response to the new HAVA complaint procedure.

Today, the power of the County Clerks to conduct elections is set forth in Section 1-1-110, C.R.S. (2012) which reads as follows:

> **1-1-110. Powers of the county clerk and recorder and deputy.**
> (1) The county clerk and recorder, in rendering decisions and interpretations

[2] After 1973, Section 49-1-7 was renumbered in the 1980 and 1992 versions of the Election Code.

under this code, shall consult with the secretary of state and follow the rules and orders promulgated by the secretary of state pursuant to this code.

(2) All powers and authority granted to the county clerk and recorder by this code may be exercised by a deputy clerk in the absence of the county clerk and recorder or if the county clerk and recorder for any reason is unable to perform the required duties.

(3) As the chief election official for the county, the county clerk and recorder shall be the chief designated election official for all coordinated elections.

(4) (a) Any communication by mail from the county clerk and recorder to any registered elector pursuant to this title, including a voter information card provided pursuant to section 1-5-206 or an elector confirmation card provided pursuant to section 1-2-605, shall be sent to the elector's address of record.

(b) Repealed.

Under Section 1-1-110, County Clerks have the power and duty to conduct elections relying on their own judgment, decisions, and interpretation. This requires and authorizes them to use their own discretion.[3]

2. Role of the Secretary of State.

In contrast, the Secretary has a much different role. The Secretary does not conduct elections. The Secretary's role in the day-to-day aspects of running elections is minimal. The Secretary is authorized to supervise some elections. Section 1-1-107(1)(a), C.R.S. (2012). The powers and duties in Section 1-1-107 characterize the scope and reach of the Secretary's role. To evaluate the scope and reach of the 1967 amendments, the Election Code must be read as a whole and in context of provisions that were not modified. The General Assembly left intact the critical components of the Election Code concerning the powers and duties of county officials including the designation that only local election officials are responsible for running elections. If an elector has been injured by the actions or inactions of a County Clerk, then relief entered against the Clerk not the Secretary will redress the injury.[4] Since County Clerks' bear the responsibility for implementing elections and are subject to legal actions as a party defendant, they have a sufficient independent role and identity under the Election Code. By operation of law, elections are implemented under a primarily decentralized system with complimentary powers given to the Secretary to ensure compliance.

In addition, the Secretary cannot invent procedures that are not authorized by law. *De Koevend v. Board of Ed.*, 688 P. 2d 219, 229 (Colo. 1984). He does not have the authority to take official acts under the guise of supervision when the action adds to, modifies, or conflicts with the authority granted to him by the Colorado Constitution or by the enabling statute. *See, e.g., Sanger v. Dennis*, 148 P.3d 404, 413 (Colo. Ct. App. 2006). His actions must rest on the powers granted to him in statute. He may not usurp the legislative functions of the General

[3] This is not to suggest, however, that the powers given to County Clerks are limitless – just as the Secretary's powers are not limitless. Yet, under the current state of the law County Clerks are the primary decisions makers in conducting elections.

[4] See, Section 1-1-113, C.R.S.

Assembly or a home rule political entity like Denver through orders or rules.

3. The County Clerks are not subordinate officials under the Election Code.

In construing the words in a statute, the courts will often read the statute as a whole. *Anderson v. Longmont Toyota*, 102 P.3d 323, 327 (Colo. 2004). The courts will seek to effectuate the intent of the General Assembly and, therefore, consider the plain meaning of the statutory language within the context of the statute as a whole. *South Fork Water & Sanitation Dist. v. Town of South Fork*, 252 P.3d 465, 468 (Colo. 2011). The Courts do not assume a State agency's legal interpretations of statute are correct. *Anderson*, 102 P.3d at 326. An agency's interpretation of law is not given deference where a result reached by the agency is inconsistent with legislative intent as manifested by statutory text. *Boulder County Bd. Of Equalization v. M.D.C. Const. Co*., 830 P.2d 975, 981 (Colo. 1992).

There are no provisions in the Election Code that declares County Clerks are "subordinate officials" or that he is a "superior" public official. In previous court filings, the Secretary has pointed to a dictionary term, Sections 1-1-107 and 110, C. R. S., and non-election case law to support his claims.

4. The Term "Supervise".

The term "supervise" is not defined in the Election Code. In an effort to bolster his authority, the Secretary has in other contexts in this case offered an all-purpose dictionary definition. (*See e.g.* Amended Secretary's Renewed Motion for Judgment on the Law Pursuant to C.R.C.P. 56 (h), p. 10) (hereinafter "Renewed Motion").[5] The dictionary meaning, however, fails to capture the Secretary's and the County Clerks' roles in elections under Colorado law. Instead, the Court should look to the Election Code itself to determine the balance of powers between the State and the local election officials. *See, South Fork Water & Sanitation Dist*, 252 P.3d at 468 (The Courts will … consider the plain meaning of the statutory language *within the context of the statute as a whole.*) [Emphasis added.]

5. Section 1-1-107, C.R.S.

The Secretary has previously argued that he has "broad" powers, citing the list of duties in Section 1-1-107(1)(a)-(c) and the powers listed in Section 1-1-107(1)(2)(b)-(c), C.R.S. Renewed Motion, p. 9. Yet, even with these powers and duties, the General Assembly has not expanded his role in the day-to-day operation of elections. Under the state of the law today, the Secretary cannot control, manage, or implement election activities within the counties. This responsibility rests with the County Clerks since they are designated under the Election Code as the "Chief Election Official" for their respective counties and for coordinated local elections. Section 1-1-110(3), C.R.S. When controversies arise, it is the County Clerks, rather than the Secretary, who are responsible to resolve them. When voters claim injury due to the County

[5] Denver must anticipate the Secretary's arguments as no reply is allowed on this motion.

Clerks' election practices, the relief entered against the Clerks will most likely directly redress their injury even if the complaint centers on an ad-hoc "order" or "interpretation" given by the Secretary. The rationale for placing responsibility with the counties is because voters vote in the county of their residence and have greater access to their county officials. If the voters experience any difficulties during an election, they can more easily obtain a direct response from local officials. Because every county is different (in geography, size, budget, etc.) and because County Clerks have obligations to the voters in their own jurisdictions who elected them to office, they have by necessity adopted policies and procedures for their own counties.

Because the Election Code allocates primary responsibility to County Clerks to implement the election laws, the Secretary cannot obtain compliance with unilateral orders or interpretations. At least one study has rejected the notion that the Colorado Secretary of State has superior powers over local officials and instead describes the role of the State Secretary as providing "some coordination". *See*, Election Reform Briefing, September 2002, "Working Together? State and Local Election Coordination, Exhibit 11, p.5.

Instead, the scope and reach of his role under 1-1-107(a)(1), C.R.S. allows the Secretary to oversee election practices from a statewide level. His interests as the State election official are served when he uses his powers given to him under Section 1-1-107(2), C.R.S. Under this section, the Secretary has several options available to promote uniformity in election practices. This list does not, however, include the authority to compel obedience through ad-hoc "orders", "interpretations", "directives", "instructions" or other commands (including verbal commands). Under the Election Code, the Secretary's role is not superior as the Secretary asserts it is. C.R.S. Section 1-1-107 does not operate to render County Clerks as ministerial subservient servants who must comply with an order (any order, all orders, every order) from the Secretary. To rule otherwise, would give the Secretary new powers to control the conduct of elections that are not contained or contemplated in the Election Code.

6. Section 1-1-110, C.R.S.

Section 1-1-110(1) fails to support the broad claims for obedience and uniformity and the Secretary's reliance on the phrase that the County Clerks must follow "orders promulgated by the Secretary" is misplaced. The meaning of the quoted language cannot be read in isolation. The quoted language, standing alone, does not extend the Secretary's powers to require obedience to every ad hoc "order", "instruction" or "directive" issued by the Secretary. The Secretary fails to acknowledge the additional language in Section 1-1-110 that "orders" are to be "promulgated by the secretary of state pursuant to this code." In context, Section 1-1-110(1) harmonizes the roles of the parties in the event the Election Code authorizes the Secretary to issue "orders" in specific circumstances. Although the list is small, there are a few instances where the Secretary is authorized to give an "order" pertaining to a particular topic. *See, e.g.,* C.R.S. Section 1-1.5-104(1)(d) (concerning the authority to issue appropriate orders in connection with HAVA complaints and C.R.S. Section 1-5-618 (concerning the written order of approval or disapproval of changes to electronic voting systems). However, the General Assembly simply has not given the Secretary broad powers to issue ad-hoc orders under the

Election Code. (In contrast, *see* Section 24-6-305(3), C. R. S. (2012) which provides a statutory framework for the Secretary to issue cease and desist orders under a different legislative scheme.)[6] If the General Assembly had intended to enlarge the Secretary's role with a general power to give orders, it would have spoken with exactitude and created a scheme in the Election Code for administrative orders. The Secretary's expansive construction of the word "order" in Section 1-1-110 must be rejected.[7]

7. *Lamm* and *Huddleston* are not dispositive or persuasive.

In previous arguments in this case, the Secretary also points to two non-binding, distinguishable cases to support his claim he is a superior public official. The conclusions reached by the Court in *Lamm v. Barber*, 565 P.2d 538 (1977) and *Huddleston v. Grand County Bd. of Equalization,* 913 P.2d 15 (Colo. 1986) are not controlling or persuasive as to the claims for relief. First, the cases are readily distinguishable because they were based on different facts, brought under different remedies, and concerned different legislative schemes. Neither case involved a determination by the Court of the allocation of powers under the Election Code.

In *Lamm,* a dispute arose between three county assessors and the State Board of Equalization (SBOE) over the implementation of adjustments to tax assessments made by the SBOE. The county assessors argued they had discretion whether or not to effectuate the tax increases. They also challenged the constitutionality of the statute and the actions taken by the SBOE. In that case, the Court reviewed two different statutory provisions each containing specific details about the procedures between the State and the counties to implement adjustments to tax assessments. *Id.,* at 543, notes 6 and 7. The dispute was resolved based on the detailed nature of the disputed tax statutes. However, the Court did not separately analyze whether the assessors in that case were "subordinate" or whether the SBOE was "superior". The Court's holdings in *Huddleston* are similarly distinguishable, however, the opinion shows the Court reviewed the legislative scheme as a whole to give meaning to certain words in dispute.

8. The 2012 Rules do not supersede the 2011 "order".

The Secretary has alleged the Clerk must follow the "rules and orders" promulgated by the Secretary of State. Complaint ¶28. He has argued previously that he is entitled to an order that the County Clerks must obey the orders, instructions, **and rules** issued or promulgated by the Secretary. (See, Renewed Motion, p. 12)(Emphasis added). More recently, the Secretary abandoned this argument and clarified he did not cite new Election Rules adopted in 2012 to

[6] Under C.R.S. 24-6-305(3), if the secretary of state has reasonable grounds to believe that any person is in violation of section 24-6-302 or 24-6-303, the secretary may, after notice has been given and a hearing held, issue a cease-and-desist order. Such order shall set forth the provisions of this part 3 found to be violated and the facts found to be the violation. Any person subject to a cease-and-desist order shall be entitled, upon request, to judicial review.

[7] Similarly, Section 1-7.5-106(2) does not give the Secretary superior powers for all purposes. The provision simply allows an expansion of local powers when necessary to perform particular activities. The authority to delegate power for particular purposes is not the equivalent of a superisor-subordinate relationship. The General Assembly has not given the Secretary the power he seeks from this court.

support his theory he is superior to County Clerks. (See, Reply to Renewed Motion, p. 10). In the event the Secretary maintains he is entitled to an order the County Clerks must obey "rules", the Court must reject such an argument. This case was filed against Denver based on events that occurred in 2011 which did not include the Rules adopted in 2012. Complaint, ¶ 6-26. *See also* the detailed recitation of facts in Section IV, ¶ 1-28 above. The time to amend the Complaint has passed. The Secretary has no factual basis to obtain relief based on rules that did not exist or "instructions" that were not given when this dispute arose. The Secretary's adoption of the 2012 IFTV Rules cannot now make the 2011 emailed orders effective after the fact.

9. The Election Code allows disagreements.

The Secretary is not entitled to a broad sweeping order that the County Clerks must obey the orders, instructions and rules issued or promulgated by the Secretary even if they believe the orders, instructions or rules are incorrect or illegal. If granted, such an order would trespass on powers given to yet another agency that has a role in elections - the Courts. The General Assembly did not give the Secretary limitless powers to interpret the Election Code which is why it provided the procedure in Section § 1-1-107(2)(d). Taken to its logical conclusion, the Secretary's proposition that the County Clerks are subservient broadens his powers under the Election Code and eliminates existing powers of the County Clerks and the courts. Section 1-1-107(2)(d) serves as a check and balance to both county and local election officials and it is the Court's role to make final interpretations of statute based on the facts and circumstances surrounding individual disputes. If this Court concludes County Clerks are subservient officials who must follow any order of the Secretary, then disputes will never even be brought to the Court's attention and the Court's role will effectively be written out of the statute. It would not matter what the underlying dispute was about; it would only matter that the Secretary issued an "order" and that the "order" must be "obeyed". If the Court accepts the Secretary's argument, there will be no way for the County Clerks or the public to know if his orders are based on legitimate policy or administrative reasons or are instead the result of whim, favoritism, bias, prejudice, partisanship, or the mere exercise of unbridled discretion. This result goes too far and gives the Secretary extraordinary powers outside of the Election Code.

If granted, Plaintiff's first and second claims (to "obey the Secretary" and to "apply the Election Code uniformly") will eliminate the Court's role to determine whether a violation of the Election Code occurred and instead future disputes will focus on whether or not to hold Denver in contempt for failure of some perceived act of disobedience.

B. THE SECOND AND THIRD CLAIMS FOR RELIEF MUST FAIL BECAUSE COUNTY OFFICIALS ARE NOT PROHIBITED FROM SENDING BALLOTS TO INACTIVE FAILED TO VOTE ELECTORS AND THE SECRETARY'S INTERPRETATION DEFEATS THE LEGISLATIVE PURPOSE OF INCREASING VOTER PARTICIATION OF ELIGIBLE ELECTORS.

1. Standards for de novo review.

Statutory interpretation is a question of law that the courts review de novo. *Robles v. People*, 811 P.2d 804, 806 (Colo. 1991); *Wycon Construction Co. v. Wheat Ridge Sanitation District*, 870 P.2d 496, 497 (Colo.App. 1993). When construing a statute, the goal is to give effect to the intent of the legislature and adopt the construction that best effectuates the purposes of the legislative scheme. *People v. Yascavage,* 101 P.3d 1090 (Colo. 2004). The courts first look to the plain and ordinary meaning of the statutory language to determine the legislative intent. *Holcomb v. Jan–Pro Cleaning Sys.*, 172 P.3d 888, 890 (Colo. 2007), citing *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006). If the statutory language is clear, we apply the plain and ordinary meaning of the provision. *Turbyne v. People,* 151 P.3d 563, 568 (Colo. 2007). We do not add words to the statute or subtract words from it. *Holcomb,* 172 P.3d at 894; *Turbyne*, 151 P.3d at 568. If the statute is susceptible of more than one reasonable interpretation, and is therefore ambiguous, a body of accepted intrinsic and extrinsic aids to construction may be applied to determine the particular reasonable interpretation embodying the legislative intent. *Holcomb,* 172 P.3d at 890.

In his Third Claim for Relief, and in his previous Renewed Motion, the Secretary maintained that election officials do not have discretion to send mail ballots to inactive failed to vote electors based on: language omitted from Section 1-7.5-107(3)(a)(I) (Renewed Motion, p. 13-15); a 2008 amendment to a different provision, Section 1-7.5-108.5 (Renewed Motion, p. 15); the failure of the General Assembly to enact new legislation in 2012 (Renewed Motion, p. 17-18); and the Secretary's new election rules adopted in 2012 (Renewed Motion, p. 18). All four arguments fail to show the Election Code prevents County Clerks from including IFTV electors in a mail ballot election. The Secretary's arguments contravene the primary purpose of the Mail Ballot Act: to increase voter participation of all eligible electors.

2. Section 1-7.5-107(3)(a)(I), C.R.S.

Section 1-7.5-107(3)(a)(I) states as follows:

> (3) (a) (I) Not sooner than twenty-two days before an election, and no later than eighteen days before an election, except as provided in subparagraph (II) of this paragraph (a), the designated election official ***shall mail to each active registered elector***, at the last mailing address appearing in the registration records and in accordance with United States postal service regulations, a mail ballot packet, which shall be marked "DO NOT FORWARD. ADDRESS CORRECTION REQUESTED.", or any other similar statement that is in accordance with United States postal service regulations. Nothing in this subsection (3) shall affect any provision of this code governing the delivery of mail ballots to an absent uniformed services elector, nonresident overseas elector, or resident overseas elector covered by the federal "Uniformed and Overseas Citizens Absentee Voting Act", 42 U.S.C. sec. 1973ff et seq." [Emphasis added].

Section 107(3)(a)(I) describes the general process for conducting mail ballot elections wherein several procedures are addressed. The emphasized language identifies one specific activity: mailing ballots to active registered electors. The Secretary's 2011 order to Denver did

not concern Denver's compliance with this language and Denver in fact mailed ballots to active voters. Instead, the Secretary announced, for the first time and by a Friday night email, his interpretation that Section 107(3)(a)(I) required ballots to be sent to "…*only* active registered voters." *See* McReynolds Supp. Aff., Exhibit 1-O. Taken to its logical conclusion, the Secretary's interpretation is that Section 107(3)(a)(I) was enacted "only" for "active" electors.

3. No statutory language of exclusion/preclusion.

The Honorable Brian R. Whitney, at preliminary injunction, rejected the Secretary's interpretation that County Clerks are precluded from including IFTV electors in the initial mailing. ("…there is nothing in statute that tells them they can't do this…") *See* Transcript, Hearing October 7, 2011, p. 88, Exhibit 13. One year later, the Secretary presented the same question of law to this Court arguing the General Assembly "intended to exclude 'inactive' electors" because they were omitted (Renewed Motion, p. 14).

The Courts have rejected this method of statutory interpretation. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *US Fax Law Center, Inc. v. Henry Schein, Inc.*, 205 P.3d. 512,516-517 (Colo. Ct. App. 2009). "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *US Fax*, at 516-517. Instead, this Court must look to other statutory context to discern legislative intent.

The Legislative declaration in Section 1-7.5-102 demonstrates that the General Assembly had "all eligible electors" in mind when it declared that elections are more legitimate and better accepted with increased voter participation.[8] Section 1-1-103(1) mandates a liberal construction of the election code 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. (Emphasis added).[9] The Secretary's interpretation is in direct conflict with the fundamental requirements to allow increased participation by *all eligible electors*.

IFTV electors are "eligible electors" and Section 1-7.5-107(3)(a)(I) itself does not contain the word "only. The lack of reference to IFTV electors in the emphasized portion of Section 1-7.5-107(3)(a)(I) is not the equivalent of a statement of intent to exclude. The Secretary's construction twists and strains the definition of "eligible elector" to the point that some eligible electors are to be excluded from participating in mail ballot elections in the same way as other eligible voters. This construction defeats the statutory purposes of promoting increased voter participation by all eligible electors and must be rejected by this Court.[10]

[8] Section 1-7.5-102. Legislative declaration. The general assembly hereby finds, determines, and declares that self-government by election is more legitimate and better accepted as voter participation increases. By enacting this article, the general assembly hereby concludes that it is appropriate to provide for mail ballot elections under specified circumstances.

[9] Other provisions also show the focus of the mail ballot act was to ensure all eligible electors have the opportunity to participate in mail ballot elections. See, e.g., Sections 1-7.5-103(4),(5),(7)(8).

The Secretary bemoans Denver's interpretation as "superfluous" in light of the election procedure described in Section 1-7.5-107(3)(c). Yet, he fails to inform the Court that 1-7.5-107(3)(c) applies in all elections – primary elections as well. By operation, County Clerks will have mail ballots on hand for electors in every mail ballot election – including primary elections where IFTV electors are included in the initial mailing. These provisions identify yet other procedural steps to be performed in mail ballot elections. They do not, however, and cannot justify an interpretation that excludes eligible electors.

Contrary to the Secretary's assertion, the inclusion of IFTV electors creates uniformity for mail ballot elections by distributing mail ballots to all eligible electors at the same time and in the same manner for each mail ballot election. *See* McReynolds Supp. Aff., ¶ 20. Consider, for example, the amount of confusion for voters where IFTV electors are included in municipal elections (scheduled for May in odd-numbered years), excluded a few months later for the November odd-year coordinated election, and then included again for a June primary election occurring in even numbered years. This result is not unique to Denver only, but can occur in any county. Because the legislature has spoken with exactitude that it desires increased voter participation by all eligible electors, the Court should not assume the General Assembly intended to exclude eligible electors without a clear expression of an intent to do so.

4. The 2008 amendment does not support the Secretary's interpretation.

The Secretary maintains the repeal provision in H.B. 08-1329 is evidence the General Assembly intended to exclude IFTV because it: "chose to include the repeal in the bill and subsequently did not take any action to reinstate the requirement that mail ballot packets be sent to inactive voters who failed to vote after July 1, 2011." (Renewed Motion, p. 15).

H.B. 08-1329, added Section 1-7.5-108.5 to the Mail Ballot Act to ensure mail ballots for the November 2009 election to be sent to both active **and** IFTV electors. Section 1-7.5-108.5(b)(II) repealed Section 1-7.5-108.5(b) ("This paragraph (b) is repealed, effective July 1, 2011). By its terms, Section 1-7.5-108.5(b)(II) repealed nothing more than the specific mandate to mail ballots **for the November 2009 Election**. It did not repeal or change the terms of Section 1-7.5-107(3)(a)(I).

The inclusion of the repeal provision merely reflects the preferred method of legislative drafting in Colorado. *See,* Colorado Legislative Drafting Manual, http://www.state.co.us/gov_dir/leg_dir/olls/legislative_drafting_manual.htm (Exhibit 12). According to the Manual, the future repeal provision is used for provisions of law that will become obsolete at a known point in the future. *See,* p. 2-19. The repeal section in Section 1-

[10] The Secretary's reliance on *Lunsford v. Western States Life Ins.,* 908 P.2d 79 (Colo. 1995) is misplaced. The statutory scheme in that case (the "slayer" statute) contained several specific provisions to prevent killers from reaping profits as a result of the perpetration of homicides. 908 P.2d at 83. Upon review of the statue in context, the Court determined that the statutory provisions were clear as written. *Lunsford,* 908 P.2d at 84. Notably, the Court refused to superimpose any exceptions to the literal language of the statute. It therefore provides guidance that prohibitive terms should not be added through statutory interpretation.

7.5-108.5(b)(I) indicates the General Assembly was trying to address a particular problem that occurred in 2006 by ensuring ballots be sent to all eligible electors in 2009. Moreover, an inference cannot be drawn from the lack of subsequent action by the General Assembly. *US Fax Law Center, Inc.*, 205 P.3d. at 516-517 ("Legislative silence is a poor beacon to follow in discerning the proper statutory route.").

The Secretary's suggestion that Denver's interpretation will somehow cause County Clerks to modify the provisions of the Election Code, including counting procedures, is remote and speculative and should not be addressed by the Court to determine the question of law presented. The primary purpose of the Election Code is to allow increased voter participation by all eligible electors. The Secretary's interpretation defeats that purpose.

5. 2012 Events.

Again, because no reply is allowed for this motion, Denver must anticipate the Secretary's arguments. In his prior filings in the case, the Secretary sought judgment against the County Clerks based on events that occurred in 2012 (after the election at issue in this case). The Secretary is not entitled to judgment against the County Clerks for a violation of the Election Code in 2011 based on events that occurred in 2012.[11]

a. Legislative inaction.

The failure to pass H.B. 12-1276 does not confirm the Secretary's interpretation and his reliance on *Schlagel v. Hoelsken,* 425 P.2d 39 (1967) is misplaced.[12] Generally, the Courts have declined to infer legislative intent based on the General Assembly's failure to enact proposed legislation. *Ritter v. Jones*, 207 P.3d 954, 972 (Colo. App.2009), citing, *Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 172 (Colo.1988) (failed attempts to amend a statute shed no light on the legislative intent underlying the original statute); *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo.1988) (same). This Court should not infer any legislative intent to affirm the Secretary's emailed interpretation because H.B. 12-1267 did not achieve final passage.

b. The 2012 IFTV Rules.

The Secretary has argued that this Court "must consider" recently adopted Rules (Rules 12.4.1(d), 13.19 and 12.11) (the "2012 IFTV Rules"). The new rules memorialize the Secretary's 2011 order prohibiting the mailing of ballots to IFTV electors. The Rules cannot have retroactive effect and the only question that can be decided is whether the Secretary made an erroneous interpretation of law in adopting the 2012 IFTV Rules. The Secretary's adoption of

[11] Further, under Rule 56(h) (the provision under which the Secretary filed his previous motion), the Court does not enter judgment. It can only enter an order deciding a question of law. In contrast, this motion is for summary judgment under Rule 56(b).

[12] In *Schlagel*, the Court's conclusion rested on regulations that had been in place for more than twenty years. *Id.*, 425 P.2d at 42.

the 2012 IFTV Rules merely memorializes his incorrect interpretation of Section 1-7.5-103(a)(I) set forth in an order in 2011.

Adopted Rules 12.4.1(d) and 12.11.4 provide:

Rule 12.4.1

(d) 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 1-7.5-23 107(3), C.R.S., AND RULE 12.11.

Rule 12.11.4

12.11.4 AN INACTIVE ELECTOR IN A NONPARTISAN MAIL BALLOT ELECTION WILL BE ISSUED A BALLOT IF THE ELECTOR SUBMITS A REGISTRATION UPDATE OR A BALLOT REQUEST.

(a) THE INACTIVE ELECTOR MUST SUBMIT A REGISTRATION UPDATE OR A WRITTEN REQUEST FOR A BALLOT BEFORE THE DESIGNATED ELECTION OFFICIAL MAY MARK THE ELECTOR'S RECORD ACTIVE AND ISSUE THE BALLOT.

(b) THE ELECTOR MAY SUBMIT A REGISTRATION UPDATE OR WRITTEN REQUEST FORM ONLINE, IN PERSON, BY MAIL, FAX, OR EMAIL.

(c) THE WRITTEN REQUEST FORM MUST INCLUDE THE ELECTOR' S NAME, DATE OF BIRTH, RESIDENCE ADDRESS, AND SIGNATURE.

A rule may not modify or contravene an existing statute, and any rule that is inconsistent with or contrary to a statute is void. *Colo. Consumer Health Initiative v. Colo. Bd. of Health*, 240 P.3d 525, 528 (Colo. App. 2010). *See also Sanger v. Dennis*, 148 P.3d 404, 413 (Colo. App. 2006) (recognizing the lack of authority to promulgate rules that modify or contravene constitutional provisions).

The 2012 Rules have the same impact and consequences as the 2011 "Order" – participation of IFTV electors is limited even though they are eligible electors. The only difference is the piece of paper on which the interpretation is memorialized – in 2011 it was a last minute, emailed "order" and in 2012 the interpretation is contained in rules. In both cases, the result is the same.

The Secretary does not have unbridled rule-making authority. Where, as here, the Secretary emails an order, after the Clerks consulted with him and followed his procedures and requirements for planning mail ballot elections, announcing a new interpretation of law and imposing new legal restrictions not contained in statute, the courts need not defer to his view. In fact, the traditional deference provided to an administrative official "is simply inapplicable" when his own actions in construing a statute have not been uniform. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988).

The Secretary's rules must stay within the confines of the grant of authority provided in Section 1-1-107(2)(a) which allows him to adopt rules that are "necessary for the proper administration and enforcement of election laws". Thus, the 2012 IFTV Rules must comply with legal standards already in law. The Court should not assume the General Assembly intended to exclude eligible electors without a clear expression of its intent to do so. Thus, the new 2012 IFTV Rules are unnecessary and should not be enforced.

The Secretary's interpretation should also be evaluated in light of its likely consequences. See *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000). Where the Secretary's construction would lead to unintended, unfair, or absurd results, he will be deemed to have exceeded his authority, and no deference need be accorded his proposed interpretation. *Catholic Media Groups v. Meyer*, 879 P.2d 480, 482 (Colo. App. 1994). The 2012 IFTV Rules contain an erroneous interpretation of law and cannot be upheld. Further, the 2012 Rules conflict with Denver's municipal home rule powers to distribute mail ballots in municipal elections. By operation, the 2012 Rules govern all non-partisan and all coordinated mail ballot elections. Moreover, the Secretary prohibits home rule municipalities from adopting procedures different from the procedures set forth in his rules under Election Rule 12.4.1(2)(a)(22) which states:

> "If the governing body is a home rule municipality, the written plan shall also include the following declaration:
> 'Nothing in this plan reflects locally adopted mail ballot election procedures different from those set forth in the Colorado Mail Ballot Election Act, section 1-7.5-101, C.R.S., et. seq., as from time to time amended, and any regulations adopted pursuant thereto.'
>
> The Secretary of State shall not review the mail ballot plan of any home rule municipality that fails to include the above declaration."

As a home rule city, Denver controls its own elections. The ballot for the November 1, 2011 Election contained important local questions. Denver was within the proper exercise of its home rule powers to increase voter participation on local questions. Yet, the Secretary's 2012 IFTV Rules impermissibly usurps those powers.

C. THE SECOND AND THIRD CLAIMS MUST ALSO FAIL BECAUSE THE SECRETARY INCORRECTLY INTERPRETED SECTION 1-8.3-101, TO PREVENT BALLOTS FROM BEING MAILED TO INACTIVE THE UNIFORM MILITARY AND OVERSEAS VOTERS.

The Secretary's interpretation also defeats the purposes of the Uniform Military and Overseas Voter Act, Section 1-8.3-101, et. seq., C.R.S., (UMOVA) which requires ballots to be mailed to "covered voters". A covered voter is defined at Section 1-8.3-102(2)(a)-(d) and includes both overseas voters and uniformed service members who are absent by reason of active duty. The General Assembly did not divide "covered voters" as either active or inactive electors. Section 1-8.3-110(1) requires County Clerks to transmit ballots to "covered voters". Thus, all uniformed and overseas voters who come within the definition of "covered voter" are entitled to receive a ballot regardless of active or IFTV status in SCORE. Under the Secretary's interpretation of Section 1-7.5-107(3)(a)(II), IFTV covered voters will be singled out and prevented from receiving a ballot. The consequence of this interpretation is even more severe for UMOVA electors who cannot simply walk into the office of the County Clerk and obtain a ballot in person. *See* McReynolds Supp. Aff., 103.

The Secretary's construction strains the definition of "covered voter" to and has the same consequences of defeating the statutory purposes of promoting increased voter participation by all eligible electors. By operation, the UMOVA scheme requires ballots to be sent to "covered voters". IFTV UMOVA electors are registered voters within the definition. Any limitations placed on IFTV UMOVA electors should not be adopted without a clear expression from the General Assembly of its intent to do so.

Moreover, the Secretary's claim that he seeks uniform enforcement of election laws throughout the state is doubtful. At the time the Secretary issued his order to Denver in September 2011, there was a noticeable change in the number of UMOVA voters whose status was changed from "inactive failed to vote" to "active" without proper documentation reflected in the Secretary's SCORE system for El Paso County. *See* Vargas Supp. Aff. Exhibit 5. Even a small sampling of data from the SCORE system indicates voters were unilaterally made active in order to issue the ballots but without supporting documentation from the inactive elector. Yet, the Secretary failed to enforce his interpretation uniformly, suing Denver but not El Paso County.

D. THE FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF MUST ALSO FAIL WITH RESPECT TO LOCAL, HOME RULE ELECTIONS.

The Secretary virtually concedes that, as a home rule city, Denver controls its own elections. (See, PI Motion, p. 11). By custom and practice, the Secretary does not intervene in home rule elections. *See* Transcript, Hearing October 7, 2011, p. 32, lines 14-25, and page 33, lines 1-8, respectively. Exhibit 15.

Article XX, Sec. 6, d. of the Colorado Constitution gives Denver all powers necessary to regulate, conduct, and control:

> All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character. (Emphasis added.) Art. XX, Sec. 6, d.

The enumerated powers in Section 6 are supplemented by the two additional broad powers:

"…all other powers necessary, requisite or proper for the government and administration of [Denver's] local and municipal matters including the power to legislate upon, provide, regulate, conduct and control" local affairs as enumerated[13] and "the full right of self-government in both local and municipal matters and the enumeration of certain powers shall not be construed to deny such cities and towns, and the people thereof any right or power essential or proper to the full exercise of such right."[14]

The grant of power under Art. XX, Sec. 6 is not restrictive. *Hoper v. City and County of Denver*, 479 P.2d 967, 970 (1971); *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a),* 3. P.3d 1219 (Colo. 2000). The language following the word 'including" operates as an illustration rather than a limitation of the powers that can be exercised by Denver. Section 6 confers all the powers of the General Assembly with regard to local and municipal electoral matters. *Bruce v. City of Colo. Springs*, 252 P.3d 30, 33 (Colo.App.2010).

Again, because no reply is allowed for this motion, Denver must anticipate the Secretary's arguments. Denver's constitutionally protected home rule interests under Article XX and the Denver charter provide the Court with authority to deny the Secretary's first, second and third claims for relief. See, *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1381 (Colo.1980) (Home rule municipalities are not inferior to the General Assembly and they have a constitutionally protected interest in its local concerns.); *City of Colorado Springs v. State*, 626 P.2d 1122, 1126-1127 (Colo.1981) (city had standing to challenge state statutes which had obvious implications for administrative budgeting activities); and *Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 437-38 (Colo. 2000) (constitutional home rule powers are legally protected interests upon which to challenge state agency actions.) A municipal election is a matter of local concern over which a home rule City has plenary power. *Englewood Police Benefit Assoc. v. City of Englewood*, 811 P.2d 464, 465 (Colo. 1990).

Similarly, the Court has recognized standing in cases where the state or state agencies have usurped separately established local powers and responsibilities. *See e.g. Bd of County Comm'rs of the County of Adams v. Colo. Dept. of Public Health and Environment*, 218 P.3d 336 (Colo.2009) (county regulation of radioactive and hazardous waste materials a legally protected

[13] See the fourth unnumbered paragraph in Section 6.
[14] See the fifth unnumbered paragraph immediately following the enumerated special powers in paragraph 4.

interest); *Douglas County Bd. of County Comm'rs v. Public Utils. Comm'n*, 829 P.2d 1303 (Colo.1992) (county land use plans and public utility improvements a legally protected interest).

By virtue of Art. XX, Section 6, the Clerk is not dependent upon legislative authority every time she wishes to implement an election procedure. Instead, the Clerk consults state and local laws to determine the requirements contained in law and the existence of any restrictions. Although the Clerk complies with legislative requirements as delineated, her authority to perform a particular election activity is not subject to prior approval of any branch of City government. By operation of her self-executing powers, the Clerk has full and exclusive authority to implement election activities without prior legislative consent as long as the activity isn't prohibited by existing statutes, charter provisions, or ordinances.

Since there are no limitations in existing statutes or ordinances, the Clerk's authority to decide the distribution of ballots for local and municipal elections controls. Section 6.d, of Article XX specifically grants authority to control "all matters" and activities concerning ballots and balloting. The broad authority to control "ballots" and "balloting" encompasses all procedures related to balloting, such as: printing, mailing, receiving, duplicating, replacing, and counting ballots. Even though the constitutional language does not expressly recognize the mailing of ballots to IFTV electors (nor could it since this classification did not exist in 1912), the phrase "all matters pertaining to" and "form of ballots and balloting" provides a basis for concluding that Denver has home rule powers to manage and control the distribution of ballots to IFTV electors in every municipal mail ballot election. *See, e.g., Berman v. City and County of Denver*, 120 Colo. 218, 209 P.2d 754, 751 (Colo. 1949) (An express grant of all power is an express grant of every power.).

Municipal home-rule elections, even when coordinated with other elections, are not subject to the supervision by the Secretary. To avoid confusion to voters, coordinated elections inherently contemplate one ballot will be sent to the voters. Since the Election Code does not prohibit the inclusion of IFTV electors, the Secretary cannot stretch his powers to usurp Denver's constitutional home rule interests to manage the distribution of ballots to Denver electors for home rule elections. The Secretary is not, as a matter of law, entitled to an injunction as a matter of law to enforce the "order" with respect to local, home rule elections.

E. THE SECRETARY IS NOT ENTITLED TO A PERMANENT INJUNCTION

This Court declined to grant the Secretary a preliminary injunction in this case. Neither is the Secretary entitled to a permanent injunction. In order to obtain a permanent injunction, the Secretary must demonstrate: (1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Langlois*, 78 P.3d at 1158; *K9Shrink, LLC v. Ridgewood Meadows Water and Homeowners Ass'n*, 278 P.3d 372 (Colo. App. 2011), *cert. denied*, 2012 WL 1190977 (Colo. 2012); *Joseph v. Equity Edge*, LLC, 192 P.3d 573 (Colo. App. 2008); *Saint John's Church in Wilderness v. Scott*, 194 P.3d 475 (Colo. App. 2008). An

appellate court will reverse a trial court's decision as to whether to grant injunctive relief only upon a showing of abuse of the trial court's discretion. *Saint John's Church in Wilderness v. Scott,* 194 P.3d 475 (Colo. App. 2008). The Secretary has not asserted any of the elements for a permanent injunction in his Complaint. *See* Complaint ¶ 1-38.

1. The Secretary must prove all Rule 65 criteria.

At the preliminary injunction stage, the Secretary asserted he was "entitled to an injunction if he can show that the Clerk refuses to obey an order." (PI Motion, p. 6). He cited *Kourlis v. District Court, 930 P.2d 1329, 1335 (Colo. 1997)* to suggest the standard *C.R.C.P. Rule 65* requirements may not apply when a statute establishes special statutory remedy for obtaining injunctions. (PI Motion, p. 5). The Secretary is not, however, exempt from proving the *Rule 65 prerequisites,* as already decided by the Honorable Brian R. Whitney. *See* attached Transcript pages 17-20 (argument), 20-21 (ruling), 78, 84-99 (ruling) (Exhibit 14).

In *Kourlis,* the Court reviewed the authority of the Colorado Commissioner of Agriculture to obtain a preliminary injunction under the Pet Animal Care and Facilities Act ("PACFA"). The Court determined PACFA was a comprehensive legislative scheme with specific procedures to obtain injunctions. This scheme included a restraining order proceeding, an administrative appeal proceeding, and a provision for court enforcement all as essential features of PACFA's enforcement design. *Id.* at 1334. Additionally, the General Assembly expressly dispensed with the evidentiary burdens of proving irreparable injury or inadequacy of a remedy at law when seeking to enforce properly issued agency enforcement orders. *Id.* As a result of this essential feature, the court concluded the statute's express language conflicted with the requirements of C.R.C.P. 65. *Id.* Upon review of PACFA's enforcement terms, the Court determined that the more specific enforcement provisions of PACFA prevailed over the six factor preliminary injunction standards of Rule 65.

Unlike the statute reviewed in *Kourlis,* Section 1-1-107, C.R.S., does not contain a comprehensive scheme for obtaining injunctions. It does not expressly dispense with the requirement to show irreparable injury or any other Rule 65 requirement. Thus, there is no conflict between the terms of Section 1-1-107 and the standard Rule 65 criteria. Moreover, Section 1-1-107 lacks specific procedures for obtaining an injunction. The only language in Section 1-1-107 that is similar to the statute reviewed in *Kourlis* is the general authority of Section 1-1-107(2)(d) that allows the Secretary to seek relief from the Court for alleged violations of the statute. This language fails to supply the essential elements necessary to properly invoke the *Kourlis* exception.

Any reliance on *Lamm v. Barber,* 565 P.2d 538 (1977) is misplaced. *Lamm* was decided before *Kourlis,* and did not present the issue of the requirements that must be met by a state official to obtain injunctive relief against a county official. Moreover, the legal claims and arguments advanced in *Lamm* to obtain mandamus rely on inapposite legal principles and procedural considerations. The Secretary must meet all Rule 65 criteria in this case.

a. The Secretary has not obtained success on the merits.

For the reasons set forth above, the Secretary has not succeeded on the merits of his claims and is therefore not entitled to the relief requested.

b. No Irreparable Harm for Lack of Uniformity

The Secretary cannot show that he will suffer any **real, immediate or irreparable harm** if he does not obtain an injunction. In 2011, Judge Whitney concluded all the uniformity issues raised by the Secretary were reparable. The same is true in 2012. *See* Transcript, Hearing October 7, 2011, p. 89, lines 18-19, Exhibit 15. Judge Whitney did not see an irreparable injury from the State and there is none today. *See* Transcript, Hearing October 7, 2011, p. 90, lines 11-12, Exhibit 15. In fact, he found that the Secretary's arguments for irreparable injury incredible and fairly specious. They remain so today. *See* Transcript, Hearing October 7, 2011, p. 92, line 25 and p. 93, line 1, Exhibit 15.

The Secretary has offered a conclusory allegation without supporting evidence or authority that there would be irreparable injury to the election process because mailing to IFTV electors undermines protocols for uniformity. This allegation is insufficient to prove irreparable harm and is legally incorrect. Under the Election Code, some counties may opt for mail ballot elections while others may choose traditional polling place elections. Thus, the Election Code itself does not require "uniformity" for the conduct of November odd-year elections.

According to the Secretary, each County Clerk must exclude IFTV electors to ensure uniform election practices. (See, PI Motion, p. 15; Reply to Renewed Motion, p. 13). The Secretary misses the point of why uniformity is desired to increase voter participation, lessen voter confusion, remove barriers to voting, etc. See, e.g., Section 1-1-103(1). The Secretary uses uniformity to obtain the opposite, and absurd, result - the exclusion of eligible electors.

By changing course at the last minute, the Secretary failed to maintain uniformity in the conduct of the Election. In the weeks and months leading up to the Secretary's Friday night email, all counties conducting a mail ballot election in November 2011 had the option and discretion to include IFTV electors **according to the Secretary's SCORE requirements.** See, McReynolds Supp. Aff., ¶ 39. The Secretary instructed counties, in a Mail Ballot Check-list, **last revised on June 10, 2010**, to: "Be sure to select the "Inactive-Failed to Vote Eligible for Mail Ballot" checkbox." *See* McReynolds Supp. Aff., ¶41; *See* Richardson Supp. Aff., ¶ 8. The Secretary's staff did not know the IFTV electors were to be excluded. *See*, SECRETARY'S ANSWERS TO FIRST SET OF INTERROGATORIES PROPOUNDED BY DEBRA JOHNSON, Answer to Interrogatory No. 10, p. 10-11. Exhibit 16.

Statutory deadlines to conduct the Election were fast approaching including the September 17, 2011, deadline to mail ballots to absent uniformed services members and overseas (UMOVA) electors. As Judge Whitney noted, Denver had to make plans and implement election plans. *See* Transcript, Hearing October 7, 2011, p. 92, lines 17-24, Exhibit 15. The ballots had

to be designed, laid-out, proofed, ordered, printed, sorted, stuffed, and mailed in a very short period of time. As a statewide election official, the Secretary should have been well aware County Clerks across the state were in implementing these activities. Uniformity had already been established months before the Election. The **only** action that was not uniform was the Secretary's 11th hour email/order.

Lastly, as indicated in the attached Vargas affidavit and chart, at the time the Secretary issued his "order" to Denver in September 2011, there was a noticeable change in the number of UMOVA voters whose status was changed from "inactive failed to vote" to "active" without proper documentation reflected in the Secretary's SCORE system for El Paso County. *See* Vargas Supp. Aff. Even the small sampling of data from the Secretary's SCORE system indicates voters were unilaterally made active in order to issue the ballots but without supporting documentation from the inactive elector. Yet, the Secretary failed to monitor the SCORE activity by El Paso County and failed enforce his interpretation uniformly, suing Denver but not El Paso County.

c. No Irreparable Harm to voter list

In his PI Motion, p. 14-15, the Secretary claimed injury to the integrity of the voter registration list. This argument is also without supporting evidence or authority and must be rejected The mailing itself does not impact or modify the voter registration list. To the contrary, the return of ballots from IFTV electors will, when processed and tabulated, protect the integrity of the voter registration list. If an elector votes, his or her registration status will be revised to active status. If the ballot is returned as "undeliverable", then the voter's registration status will be revised to "inactive-undeliverable". This allegation is insufficient to prove irreparable harm.

d. No Irreparable Harm due to Fraud by IFTV electors

To the extent the Secretary raises the specter of fraud due to unreturned ballots, he has failed at every step of this proceeding to provide any factual support for this claim. The Secretary ignores that the General Assembly has already concluded that mail ballot elections are an appropriate method of conducting elections and that self-government by election is more legitimate and better accepted as voter participation increases. Section 1-7.5-102, C.R.S. In addition, the Secretary cited no authority in his PI Motion for the statement that he must "account for all ballots." The statement is legally and procedurally incorrect. The Election Code does not require anyone to "account for all ballots". The Code requires ballots to be printed and mailed no sooner than twenty-two days before an election and no later than eighteen days before an election. Section 1-7.5-107(3)(a)(I). **Returned** ballots are processed for sorting, opening, signature verification, flattening, duplication, tabulation, and records retention. This argument assumes, without evidence, that IFTV voters are more prone to act illegally than active electors and are more likely to act illegally in an odd-year election with a statewide ballot question than in a primary election (where they will be mailed a ballot). Although no reported case in Colorado has addressed this issue, the same argument was recently rejected by the U.S. District Court of Puerto Rico *Colon-Marrero v. Conty-Perez*, 2012 WL 5185997, October 17, 2012,

(D.Puerto Rico). In that case, the Plaintiffs sought a preliminary injunction to allow voters who had been inactivated for failure to vote in the 2008 election to vote in the November 6, 2012 election. Although the process of reactivating inactive voters is procedurally different in Puerto Rico, the Court's analysis of the balance of harms and effects on the public interest requirements of injunctive relief is extremely persuasive in this case. The Court concluded that "the flaws and risks" charged to the inactive group of voters were equally present for active voters. "[T]he situation of identity fraud perpetrated by a third party can occur in either group…". The Secretary's argument is insufficient to prove irreparable harm.

In any event, Denver can track and report the status of mail ballots. As another example of performing an election activity that is not required by law, the Elections Division, with voluntary disclosure to the Secretary of State's Office, has since November 2009, used an award winning ballot tracking system known as Ballot TRACE. Under the Ballot TRACE system, Denver tracks mail ballots from the time they are printed, through the time they move through the U.S. Postal System to and from voters, and until the time they are returned or deposited with the Denver Elections Division to be processed for counting. Thus, the Secretary's concerns for tracking ballots and his concerns that inclusion of IFTV electors creates a greater potential for fraud are unwarranted.

e. Balance of harms/Disservice to the public interest

The balance of harms tips against granting an injunction. Denver will be harmed more by an injunction. Judge Whitney was concerned about the Secretary's actions of approving Denver's plans, stating Denver complied with all laws, and then changing his mind at the last minute. *See* Transcript, Hearing October 7, 2011, p. 92, lines 17-18. Exhibit 15. ("This is a decision that needed to be made … before their plan went into place."). The same concern remains today.

Denver consulted with the Secretary's Office months in advance, complied with the Secretary's SCORE requirements to set up the Election, and relied on the Secretary's written instructions and approvals to mail ballots to UMOVA electors. Injunctive relief cannot be awarded when performance has already occurred. *City of Colorado Springs v. Blanche*, 761 P.2d at 217. In contrast, the Secretary gave counties the option to include IFTV electors in the SCORE system, provided instructions (from 2010) to include IFTV electors, and approved Denver's plans and information to mail ballots to IFTV electors. The harm to Denver deserves greater weight and the junction must be denied.

For similar reasons, an injunction would disserve the public interest. The public has an interest in the integrity of election administration which was jeopardized by the Secretary's Friday night email. There were no procedures in place to remove IFTV electors. In addition, the SCORE system notified IFTV electors they were scheduled to receive a ballot. An injunction would disserve the public's confidence in the election process and place the burden all on Denver and its voters. Further, public interest in protecting the legislative purposes of increasing voter participation by eligible electors and maintaining consistency in election practices overrides all others. The Secretary cannot show the grant of an injunction under these

facts **favors the public interest** where, as here, the stated purpose of Election Code. is to assure that "all eligible electors may be permitted to vote."

VII. CONCLUSION

For the reasons stated above, Denver respectfully requests this Honorable Court enter summary judgment in its favor on all of Plaintiffs' claims.

Respectfully submitted this 16th day of November, 2012.

Attorneys for the Defendant Debra Johnson

By: */ s/ Victoria Ortega*
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In accordance with C.R.C.P. 121§1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I provided a true and correct copy of the foregoing was served via LexisNexis File and Serve on:

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