

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock St. Denver, Colorado 80202</p> <hr/> <p>SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for the City and County of Denver</p> <p>Defendant,</p> <p>COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo</p> <p>Intervenors-Defendants.</p>	<p><b>FILED Document</b> <b>CO Denver County District Court 2nd JD</b> <b>Filing Date: Dec 07 2012 11:58PM MST</b> <b>Filing ID: 48261010</b> <b>Review Clerk: Nicole Gawlikowski</b></p> <p><b>▲ COURT USE ONLY ▲</b></p>
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<p align="center"><b>SECRETARY’S C.R.C.P. 56(b) MOTION FOR SUMMARY JUDGMENT AGAINST COLORADO COMMON CAUSE</b></p>	

Scott Gessler, in his official capacity as the Secretary of State for the State of Colorado  
(hereinafter “the Secretary”) hereby submits this C.R.C.P. 56(b) Motion for Summary Judgment  
Against Colorado Common Cause.

## STANDARD OF REVIEW

Summary judgment is warranted when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. App. 2001); *Salas v. Grancare, Inc.*, 22 P.3d 568, 571 (Colo. App. 2001); *Van Schacck v. Phipps*, 558 P.2d 581, 585 (Colo. App. 1976).

In determining whether summary judgment is appropriate, “the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party.” *St. Paul Fire Marine Ins. Co. v. Mid-Century Ins. Co.*, 18 P.3d 854, 855 (Colo. App. 2001); *see also*, *Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1011 (Colo. App. 1991).

For purposes of a motion for summary judgment, “a ‘material fact’ is one that affects the outcome of the case.” *Keybank, Nat. Ass’n v. Masacarenas*, 17 P.3d 209, 215 (Colo. App. 2000), *overruled on other grounds by West v. Roberts*, 143 P.3d 1037, 1045 (Colo. 2006). The appropriate construction of a statute is a question of law. *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990); *see also*, *Silverstein v. Sisters of Charity of Leavenworth Health Servs. Corp.*, 614 P.2d 891, 893 (Colo. App. 1979), *cert. denied* (1980).

## ISSUES PRESENTED FOR REVIEW

1. Whether Colorado Common Cause has associational standing to assert certain counterclaims against the Secretary on behalf of its members.

2. Whether the plain language of § 1-7.5-107(3)(a)(I), C.R.S. (2012)<sup>1</sup>, requires election officials to mail ballots only to active registered electors in a coordinated mail ballot election.

3. Whether the non-receipt of mail ballots by “inactive – failed to vote” electors – some of whom also may be racial or ethnic minorities – denies such electors the equal protection of the laws or rights under the First Amendment, even though such electors may cast ballots by other means.

### **STATEMENT OF UNDISPUTED FACTS**

1. Common Cause was founded in 1970 as a national organization. (*Exhibit A*, CCC Depo. 10:18-19).
2. Colorado Common Cause (“CCC”) was formed as the first state chapter of the national organization. (*Exhibit A*, CCC Depo. 10:19-20).
3. Common Cause and CCC are membership organizations. (*Exhibit A*, CCC Depo. 11:6-10, 85:23 – 86:6).
4. An individual becomes a member of Common Cause by submitting a membership form. (*Exhibit A*, CCC Depo. 85:23 – 86:6; *Exhibit B*, Common Cause membership form).
5. If an individual who resides in Colorado submits a membership form to Common Cause, then that individual is also added to CCC’s member list. (*Exhibit A*, CCC Depo. 85:23 – 86:6).

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<sup>1</sup> Although this action ensued in the fall of 2011, there has been no subsequent legislative change to the language of § 1-7.5-107(3)(a)(I), C.R.S. (2011), or to any of the other relevant provisions of the Election Code. Furthermore, CCC’s counterclaims seek only prospective equitable relief against the Secretary. Accordingly, unless otherwise specifically stated, all references to or quotes from any statutory provisions in this Motion are to the 2012 version of the Colorado Revised Statutes.

6. The Common Cause membership form does not request or require prospective members to provide information about their race or ethnicity. (*Exhibit B*, Common Cause membership form).
7. CCC does not request or obtain information from its members about their race and ethnicity as part of its normal course of business. (*Exhibit C*, CCC's Responses to the Secretary's First Set of Written Discovery Requests, p. 4-5; *Exhibit A*, CCC Depo. 94:10-15, 95:2-14).
8. Prior to seeking leave to intervene in this case and filing its original counterclaims, CCC did not make any effort to contact its IFTV members who reside in Denver County to determine their race or ethnicity. (*Exhibit A*, CCC Depo. 95:15-22).
9. Prior to seeking leave to intervene in this case and filing its original counterclaims, CCC did not make any effort to contact its IFTV members from across the state to determine their race or ethnicity. (*Exhibit A*, CCC Depo. 95:23 – 96:3).
10. Since becoming a defendant in this case, CCC has not made any effort to contact its IFTV members from across the state to determine their race or ethnicity. (*Exhibit A*, CCC Depo. 96:4-12, 99:25 – 100:7)
11. CCC has no information or knowledge about whether any member of the organization who is designated as "inactive – failed to vote" also identifies as a racial or ethnic minority. (*Exhibit C*, CCC's Responses to the Secretary's First Set of Written Discovery Requests, p. 4-5; *Exhibit A*, CCC Depo. 74:2-6, 77:8-12, 81:2-17, 94:11 – 96:12).

12. CCC does not claim that the Colorado General Assembly intended for a disparate impact on racial and ethnic minorities to result from its enactment of C.R.S. § 1-7.5-107(3)(a)(I). (*Exhibit A*, CCC Depo. 54:1 – 55:10).
13. CCC does not claim that the Colorado General Assembly intentionally or purposefully meant to discriminate against members of racial or ethnic minorities by enacting C.R.S. § 1-7.5-107(3)(a)(I). (*Exhibit A*, CCC Depo. 203:8-13).
14. In order to register to vote in Colorado, individuals are not required to provide information about their race or ethnicity. (*Exhibit A*, CCC Depo. 64:15-18).
15. The Secretary's office does not maintain data regarding registered voters' race and ethnicity in the Statewide Voter Registration Database ("SCORE") system. (*Exhibit A*, CCC Depo. 64:19-22).
16. CCC has no knowledge that either the Secretary or any member of his staff intended for a disparate impact on racial and ethnic minorities to result from his enforcement of C.R.S. § 1-7.5-107(3)(a)(I). (*Exhibit A*, CCC Depo. 56:2-11; 155:7-16; 178:20 – 180:16, 189:14 – 191:4).
17. In a verified response to CCC's Request for Admission No. 1, the Secretary denied that he was informed prior to September 2011 by the Denver Clerk that failing to mail ballots to "inactive – failed to vote" electors in Denver County would have a greater impact on minority voters in that county. (*Exhibit D*, Secretary's Responses to First Set of Requests for Admission Propounded by CCC, p. 2-5).
18. In a verified response to CCC's Request for Admission No. 2, the Secretary denied that he was informed prior to September 2011 by the Pueblo Clerk that failing to mail ballots

to “inactive – failed to vote” electors in Pueblo County would have a greater impact on minority voters in that county. (*Exhibit D*, Secretary’s Responses to First Set of Requests for Admission Propounded by CCC, p. 2-5).

19. In a verified response to CCC’s Request for Admission No. 6, the Secretary denied that he was aware prior to September 2011 that African Americans and Latinos participated in the 2010 general election at lower rates than in 2008 as compared to other voters.

(*Exhibit D*, Secretary’s Responses to First Set of Requests for Admission Propounded by CCC, p. 2-5).

20. An IFTV voter is still an eligible elector. (*Exhibit A*, CCC Depo. 46:16-18).

21. At the time CCC sought to intervene in this case and filed its original counterclaims against the Secretary, CCC had not contacted any of its members from across the State of Colorado who were “inactive – failed to vote” electors regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 99:13-24).

22. At the time CCC sought to intervene in this case and filed its original counterclaims against the Secretary, CCC had not contacted any “inactive – failed to vote” electors from across the State of Colorado regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 83:25 – 84:7).

23. Between intervening in this case on November 16, 2011, and filing its Second Amended Counterclaims on September 24, 2012, CCC did not contact any of its members from across the State of Colorado who were “inactive – failed to vote” electors regarding

whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 99:13-24).

24. Between intervening in this case on November 16, 2011, and filing its Second Amended Counterclaims on September 24, 2012, CCC did not survey any “inactive – failed to vote” electors from across the State of Colorado regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 46:19 – 47:12, 83:25 – 84:7).

25. On or around November 15, 2011, CCC began contacting its members from across the State of Colorado who are “inactive – failed to vote” electors regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 77:20 – 83:11, 99:13-24).

26. To date, CCC has not completed the task of contacting its members from across the State of Colorado who are “inactive – failed to vote” electors regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot. (*Exhibit A*, CCC Depo. 83:5-11).

27. CCC’s goal is to complete the task of contacting its members from across the State of Colorado who are “inactive – failed to vote” electors regarding whether and to what extent they have been burdened in the exercise of their right to vote by not receiving a mail ballot by the end of 2012. (*Exhibit A*, CCC Depo. 83:5-11).

28. Trial in this matter is set to begin on January 7, 2013. (*Exhibit I*, Notice of Trial).

29. CCC has no knowledge of any written or verbal statement made by either the Secretary or any member of his staff that the intent of enforcing C.R.S. § 1-7.5-107(3)(a)(I) was to

make it more difficult for “inactive – failed to vote” electors to vote. (*Exhibit A*, CCC Depo. 154:19 – 155:4; 178:20 – 179:6).

## **ARGUMENT**

### **I. COLORADO COMMON CAUSE LACKS ASSOCIATIONAL STANDING TO MAINTAIN THE PORTIONS OF ITS SECOND AND THIRD COUNTER-CLAIMS ALLEGING SPECIAL BURDENS ON ITS MEMBERS WHO ARE BOTH “INACTIVE – FAILED TO VOTE” ELECTORS AND RACIAL OR ETHNIC MINORTIES**

#### **A. Requirements for associational standing.**

Standing is a jurisdictional issue. *Anson v. Trujillo*, 56 P.3d 114, 117 (Colo. App. 2002). Under Colorado law, a plaintiff must allege that he or she suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions to have standing to sue. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). In this case, CCC is a membership organization and, as such, has associational standing to bring suit on behalf of its members as long as: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Com’n*, 432 U.S. 333, 342-43 (1977), expressly adopted by Colorado Courts in *Conestoga Pines Homeowners’ Ass’n v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984). The first prong requires a plaintiff-organization to make specific allegations establishing the standing of “at least one identified member” of the organization. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).



**B. Colorado Common Cause failed to identify any member who is *both* an “inactive – failed to vote” elector *and* a racial or ethnic minority.**

In this case, CCC claims that the Secretary’s interpretation and enforcement of § 1-7.5-107(3)(a)(I) in accordance with the statute’s plain language, violate the First and Fourteenth Amendment rights of its members who are “inactive – failed to vote” electors. (CCC’s Second Amended Counterclaim, ¶¶ 17, 25-26, 30-31). For these claims, CCC is only required to identify at least one member who is an “inactive – failed to vote” elector. *Earth Island*, 555 U.S. at 498. However, CCC also claims that the Secretary’s interpretation and enforcement of § 1-7.5-107(3)(a)(I) “especially” violates the First and Fourteenth Amendment rights of its members who are “inactive – failed to vote” electors and racial or ethnic minorities. (CCC’s Second Amended Counterclaim, ¶¶ 17, 25-26, 30-31). As such, CCC also must be able to identify at least one member who is *both* an “inactive – failed to vote” elector *and* a racial or ethnic minority. *Earth Island*, 555 U.S. at 498.

Even after amending its original counterclaims twice, CCC failed to make specific allegations about even one identified member who meets both standing criteria necessary to maintain claims of racial discrimination in their own right. (CCC’s Second Amended Counterclaim). Furthermore, the undisputed factual record in this case reveals that CCC made no effort – either before seeking leave to intervene and filing its counterclaims against the Secretary, or anytime during the course of the year-long discovery period in this case – to determine whether any of its members who are “inactive – failed to vote” electors are also racial or ethnic minorities. (Statement of Undisputed Facts, *supra*, ¶¶ 8-10). By its own admission,

CCC has no information or knowledge about whether any of its members who are “inactive – failed to vote” electors are also racial or ethnic minorities. (*Id.*, at ¶ 11).

Thus, to the extent that CCC’s counterclaims for violation of its IFTV members’ First and Fourteenth Amendment rights are based upon an alleged special burden on the rights of its “inactive – failed to vote” members who are also racial or ethnic minorities, CCC lacks associational standing because it failed to identify any member who would have standing to sue in his or her own right.

## **II. SECTION 1-7.5-107(3)(a)(I) DOES NOT PERMIT CLERKS TO MAIL BALLOTS TO “INACTIVE – FAILED TO VOTE” ELECTORS**

### **A. The statute’s plain language and other principles of statutory construction support the conclusion that Clerks may not send mail ballots to electors designated as “inactive – failed to vote.”**

CCC contends that under § 1-7.5-107(3)(a)(I), Clerks may, in their discretion, mail ballots to registered electors who are categorized as “inactive – failed to vote.” (CCC’s Response to Secretary’s Amended Renewed C.R.C.P. 56(h) Motion, p. 12). The Secretary contends that the plain, unambiguous language of the statutory provision authorizes Clerks to mail ballots only to active registered electors.

When construing a statute, courts “afford the words of the statute their ordinary and common meaning and construe the statutory provisions as a whole, giving effect to the entirety of the statute.” *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008). If the language is ambiguous or unclear, only then will courts “consider the statute’s legislative history, the state of the law prior to the enactment, the problem addressed and the statutory remedy.” *Id.* “When the legislature speaks with exactitude, [the court] must construe

the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others.” *Lunsford v. Western States Life Insurance*, 908 P. 2d 79, 84 (Colo. 1995); *see also Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 819 (Colo. App. 2007) (In rejecting plaintiffs argument that a statute was ambiguous due to silence as to the extent of its applicability, the court reasoned that the statute “states that damage immunity applies ‘in any civil action.’ If that phrase were missing from the statute, it might be possible to infer silence. Its presence, however, dictates a contrary conclusion.”); *In re Marriage of Chalat*, 112 P.3d 47, 57 (Colo. 2005) (courts “must presume that the General Assembly, having chosen to speak with exactitude, did not intend any implied exceptions.”).

Section 1-7.5-107(3)(a)(I), discusses the process by which mail ballots will be sent to registered electors. It provides:

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[.]

(emphasis added). An “active” voter is a person who voted in the last general election. § 1-2-605(2), C.R.S. (2012). Conversely, a voter is deemed “inactive – failed to vote” if he or she did not vote in the last general election. *Id.*

The use of the adjective “active” to describe which registered electors shall receive mail ballots is crucial. If the General Assembly intended to allow election officials to send mail ballots to all registered electors, including those marked as “inactive” for any reason, it would not have used the word “active.” Instead, it would have required election officials to mail ballots

to “each registered elector.” By using the word “active,” the General Assembly intended to exclude “inactive” voters. Adopting CCC’s interpretation, would “strain[] the statute to read otherwise [and] would ignore its plain language . . . [by] read[ing] in a judicially created exception that the General Assembly did not include.”<sup>2</sup> *In re Marriage of Chalat*, 112 P.3d 47, 57 (Colo. 2005) (internal citation omitted) (citation omitted).

Moreover, the General Assembly could have included an express reference to “inactive – failed to vote” electors in § 1-7.5-107(3)(a)(I), as it did for such electors in primary election mail ballot elections in § 1-7.5-107(3)(a)(II). In construing a statute, a court must consider the statute as a whole and interpret it so as to give consistent, harmonious, and sensible effect to all of its provisions. *Leaffer v. Zarlengo*, 44 P.3d 1072, 1078 (Colo. 2002), citing *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001). Indeed, statutes are construed so as to give effect to every word, and a construction that renders any term superfluous should not be adopted. *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 790 P.2d 827, 830 (Colo. 1990). If, as CCC contends, Section 1-7.5-107(3)(a)(I) gives County Clerks discretion to mail ballots to IFTV voters in coordinated elections, then the legislature’s inclusion of the phrase “in addition to active registered electors” and express authorization for County Clerks to mail primary ballots to IFTV

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<sup>2</sup> After deliberately straining the plain language of the statute, CCC then asks this Court to invoke the doctrine of constitutional avoidance to resolve the ambiguity of its own creation. (See, CCC’s Second Amended Counter Claim, p. 6, ¶ D. To the contrary, this Court’s application of that doctrine would be improper because Section 1-7.5-107(3)(a)(I) simply is not “capable of alternative constructions.” *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994); see also, *Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 816 (Colo. App. 2007) (If the statutory language is unclear or ambiguous, only then will courts “look to legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme.”).

voters in Section 1-7.5-107(3)(a)(II)(A) would be inconsistent and make no sense. This Court should avoid such a construction.

The interpretation proffered by Common Cause also renders superfluous other sections of the statute. Section 1-7.5-107(3)(c), states that designated election officials must make mail ballots available “at the designated election official’s office, or the office designated in the mail ballot plan filed with the secretary of state, for eligible electors who are not listed or who are listed as ‘Inactive’ on the county voter registration records.” No later than ninety-days before a mail ballot election, county clerks must mail a voter information card to a registered elector who is categorized as “inactive – failed to vote.” §§ 1-2-605(11) and 1-7.5-108.5(1), C.R.S. (2012). If Clerks retain the discretion to mail ballots to such electors, there is no need to make ballots available at designated locations twenty-two days before the election or to mail voter information cards ninety days before the election.

Consideration of a prior version of the law also confirms that the Secretary’s interpretation of § 1-7.5-107(3)(a)(I) is correct. In 2008, the General Assembly enacted H.B. 08-1329. (*Exhibit E*). This measure added § 1-7.5-108.5(2)(b), which provided:

(I) In connection with any mail ballot election to be conducted in November 2009, a mail ballot shall be mailed to all registered electors whose registration record has been marked as “inactive-failed to vote.” Such mail ballots shall not be sent to registered electors whose registration has been marked as “inactive – undeliverable.”

(II) This paragraph (b) is repealed, effective July 1, 2011.

(*Exhibit E*). Thus, in a prior version of the statutory scheme, the General Assembly expressly required clerks to mail ballots to registered electors who were “inactive – failed to vote,” as well

as to “active” registered electors. The intent of the since-repealed statutory provision was to reduce the number of persons who were designated as “inactive – failed to vote” due to unique election problems in Denver and Douglas Counties in 2006. Accordingly, the Clerks’ authority to mail ballots to registered electors who are “inactive – failed to vote” expired on July 1, 2011, when the prior legislation sunsetted. (*Exhibit E*).

If the General Assembly intended to permanently require Clerks to mail ballots to “inactive – failed to vote” electors, then it could have achieved that result merely by not including, or repealing, the sunset provision of H.B. 08-1329. Alternatively, it could have vested Clerks with the discretion to mail ballots “inactive – failed to vote” electors by amending § 1-7.5-108.5(2)(b) to state that “effective July 1, 2011, a mail ballot may be mailed to all registered electors whose registration record has been marked as ‘inactive-failed to vote.’” Instead, the General Assembly specifically chose to include the sunset provision in the bill and subsequently did not take any action to reinstate the requirement that Clerks mail ballots to “inactive – failed to vote” electors after July 1, 2011.

For this Court to accept CCC’s interpretation of § 1-7.5-107(3)(a)(I) also would have a serious impact on the interpretation of other provisions of the Election Code. CCC contends that the use of the term “active” in Section 1-7.5-107(3)(a)(I) to specify which “registered electors” the Clerks may mail ballots to in a coordinated election merely sets a floor, or a “minimum requirement,” that the Clerks have discretion to exceed. (CCC’s Response to Secretary’s Amended Renewed C.R.C.P. 56(h) Motion, p. 12). By logical extension, CCC interprets the language in § 1-7.5-107(3)(a)(I) to give discretion to the clerks because the General Assembly did not include any limiting words such as “only” or “solely.” If the Court adopts such an

interpretation, then any provision of the Election Code that imposes a specific requirement or obligation upon Clerks without using express limiting words could be modified at the discretion of any Clerk. For example, § 1-5-410 states that election judges receiving sealed ballot packages must provide receipts, and that such “receipts shall be filed with the designated election official.” The receiving election judges must deliver the packages “and, in the presence of all election judges, shall open the packages.” *Id.* Under CCC’s interpretation, Clerks would be permitted to specify that receipts may be filed with a person other than the designated election official, because the statute does not include the limiting word “only.” Clerks also would have the discretion to permit sealed ballot packages to be opened in the presence of persons other than election judges, because the statute does not include the limiting term “only.”

More significantly, CCC’s interpretation could result in different means by which ballots are counted. Under § 1-7-307(1), “election judges shall first count the number of ballots in the box” and reconcile the number of ballots with the number of names entered on each of the pollbooks. If the court adopts CCC’s construction, Clerks could instruct election judges to follow different procedures. It was precisely this type of arbitrary election process that led to the problems and issues recited by the U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). This Court should adopt the Secretary’s interpretation because it favors and promotes uniformity of elections in Colorado.

Finally, CCC’s interpretation runs counter to the history and purpose of the Election Code. The law is entitled the “Uniform Election Code of 1992” for a reason. As the recitation of the history of election laws plainly discloses, the legislature consolidated supervision and enforcement of election laws under the Secretary in order to achieve uniformity throughout the

Colorado. For this Court to accept CCC's interpretation of § 1-7.5-107(3)(a)(I) would undermine the purpose of the consolidation.

**B. The demise of proposed H.B. 12-1267 supports the Secretary's interpretation.**

Recent activity in the Colorado General Assembly also confirms the Secretary's interpretation. In interpreting a statute, the court may look to the legislature's failure to amend an act in light of its knowledge of the interpretation of the law and its implementation. *Schlagel v. Hoelsken*, 162 Colo. 142, 425 P.2d 39, 42 (1967); *see also*, 2B, Singer & Singer, *Sutherland Statutory Construction* (2008), § 49.10 ("Where contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness.").

In 2012, the Colorado General Assembly considered H.B. 12-1267 (*Exhibit F*). Section 1 of the proposed bill would have added § 1-2-229 to the Election Code:

- (1) Notwithstanding any other provision of law, any registered elector whose registration has been marked as "Inactive – failed to vote" as of the effective date of this section shall from that date forward be deemed to hold the status of an active elector.
- (2) By August 1, 2012, the Secretary of State shall update the statewide voter registration database to reflect the elimination of "Inactive – failed to vote" voter status pursuant to subsection (1) of this section and, as appropriate, restore permanent mail-in voter status to those electors who had previously selected such status but had subsequently been marked as "Inactive – failed to vote."

Section 2 of the proposed bill would have repealed § 1-2-605(11) of the Election Code, which governs actions involving "inactive" voters in mail ballot elections. (*Exhibit F*). Section 8 of the proposed bill specifically would have repealed § 1-7.5-108.5 of the Election Code, which



distinguishes between “active” and “inactive – failed to vote” registered electors for purposes of mail ballot elections. (*Exhibit F*).

Simply put, H.B. 12-1267 would have eliminated the status of “inactive – failed to vote” under Colorado law. The General Assembly killed the bill. By refusing to enact the bill, the General Assembly affirmed the Secretary’s interpretation of the statute.

**C. The Court must consider the Secretary’s recently promulgated election rules.**

Guidance can be obtained from the interpretation given to a statute by the implementing agency. *Colorado Mining Association v. Board of County Commissioners*, 199 P.3d 718, 731 (Colo. 2009). Courts will give significant weight to the agency’s guidance, rules and determinations if they are consistent with the governing constitutional and statutory provisions they implement. *Id.*

After the demise of H.B 12-1267, the Secretary adopted rules 12.4.1(d) and 13.19 and amended Rule 12.11. (*Exhibits G and H*). Rule 12.4.1(d) provides:

(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 1-7.5-107(3), C.R.S., and Rule 12.11.

(*Exhibit G*). Rule 12.11.4 states, in pertinent part:

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.

(*Exhibit G*). Rule 13.19 states, “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 a mail-in ballot.” (*Exhibit H*). The language of the rules is clear. The clerks may not mail a ballot to an “inactive” elector in a non-primary mail ballot election until the “inactive” elector submits a registration update or a written request for a ballot.

**D. Colorado Common Cause’s challenge to the constitutionality of the Secretary’s election rules is, in fact, a challenge to the constitutionality of a state statute.**

Finally, it is important to note that CCC attempts to couch what is truly an attack on the constitutionality of a *state statute* as merely an attack on the constitutionality of the Secretary’s *interpretation* of the statute as set forth in his September 16, 2011 Order to Clerk Johnson and Rules 12.4.1(d) and 13.19. (CCC’s Response to Secretary’s Amended Renewed C.R.C.P. 56(h) Motion, p. 15-18). Regardless of CCC’s efforts to convince this Court otherwise, the Secretary’s Order and Rules were based solely on the plain language of the § 1-7.5-107(3)(a)(I) and, as such, it is the plain language of the statute that must withstand constitutional scrutiny by this Court. It is well settled that “in cases involving neither a fundamental right nor a suspect classification that the party challenging the constitutionality of a statute or ordinance bear the heavy burden of proving its unconstitutionality beyond a reasonable doubt.” *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984) (citations omitted). Additionally, §1-7.5-107(3)(a)(I) is entitled to the presumption of constitutionality under Colorado law. § 2-4-201(1)(a). For the reasons discussed below, neither a fundamental right nor a suspect classification is at issue in this case. Therefore, CCC must overcome the presumption of

constitutionality afforded to § 1-7.5-107(3)(a)(I), and bears the heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt.

**III. THE STATUTE AND THE SECRETARY’S INTERPRETATION DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OR THE FIRST AMENDMENT.**

**A. The distinction between “active” and “inactive – failed to vote” electors does not violate the Equal Protection clause or impair the First Amendment rights of voters designated as “inactive – failed to vote.”**

In its Second and Third Claims for Relief, CCC asserts that the disparate treatment between eligible electors based upon whether they are designated “active” or “inactive – failed to vote” violates the Equal Protection Clause and the First Amendment right to political expression of those designated as “Inactive – failed to Vote.” In particular, CCC argues that the distinction interferes with the right to vote of persons designated as “inactive – failed to vote,” and violates their right to equal protection of the laws by not granting them the same right to a mail ballot as those who are designated as “active.”

The Supreme Court rejected highly similar claims in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). In *McDonald*, inmates in a county jail brought an action to enjoin enforcement of statutes excluding them from the class of persons entitled to receive absentee ballots. In particular, they argued that the absentee ballot provisions impermissibly distinguished between persons who were medically incapacitated and those who were judicially incapacitated. They also contended that the law unconstitutionally distinguished between those persons who were imprisoned in other states or in other counties within the State of Illinois, other than those of their own residence.

The Court applied a rational basis test. “The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.” *Id.*, at 809. “Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.” *Id.* As long as Illinois provided pretrial detainees with reasonable alternatives to vote and exercise political expression – such as special polling booths or voting facilities at jails, transportation to polling places, or temporary reductions in bail – its refusal to provide absentee ballots did not violate the detainees’ right to equal protection.

*McDonald* also rejected the argument that the state’s failure to provide absentee ballots violated detainees’ First Amendment right to vote. As long as detainees could cast ballots by means other than absentee ballots, the Supreme Court concluded that the right to vote was not implicated. “It is not the right to vote that is at stake here but a claimed right to receive absentee ballots.” *Id.* at 808. A statutory scheme that denies certain persons the ability to receive absentee ballots does not impact the right to vote as long as the individuals may cast a ballot in some other fashion. *Id.*

The legal precedent established by the Supreme Court in *McDonald* controls this case. Colorado has a strong basis for limiting mail ballots to those persons who are designated as “active” registered electors. Specifically, Colorado may limit the potential for fraud in the election process by limiting the dissemination of mail ballots to persons who have recently voted, thereby reducing the possibility that ballots will fall in the hands of those who are not

entitled to vote. In addition, both the State of Colorado and the counties expend funds to mail ballots. Therefore, state and local governments have an interest in limiting expenditures by not mailing ballots to persons who are less likely to vote.

The right to cast a ballot by mail is not a fundamental right. Under Colorado law, electors do not have a right to cast ballots by mail. Indeed, the Mail Ballot Election Act vests “the governing board of any political subdivision” with the discretion to determine whether “an election shall be by mail ballot.” § 1-7.5-104(1), C.R.S. (2012). It is axiomatic that the ability to vote by mail ballot cannot be a “fundamental right” if it is capable of being extended or withdrawn by the governing board of any political subdivision from one coordinated election to the next. Under Colorado law, eligible electors may cast ballots by mail only if government officials authorize mail ballot elections and only in certain types of elections.

Any burden imposed on “inactive-failed to vote electors” is minimal. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), voters who did not have proper photo identification were required to cast provisional ballots. To do so, they were required to travel to the circuit court clerk’s office to execute an affidavit. The Supreme Court concluded that this requirement did not pose a constitutional problem. *Id.* at 200. *See also, American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1324 (10<sup>th</sup> Cir. 2008) (a single additional trip to the city clerk’s office to present proper voter identification does not impose a constitutional burden on the right to vote).

In the case now before this Court, the requirements placed upon an “inactive – failed to vote” elector are not onerous. A voter can update his voter registration or request a ballot. At most, the voter must travel to a voter center or their County Clerk’s office to vote in-person, or to

pick up a mail ballot. If traveling to a city clerk's office to pick up a provisional ballot does not impose an unconstitutional burden, then traveling to a vote center or County Clerk's office to vote in-person or to pick up a mail ballot does not impose an unconstitutional burden. Indeed, the undisputed factual record in this case reveals that CCC cannot show that any of its members who are "inactive – failed to vote" electors have been substantially burdened in the exercise of their rights to vote or to engage in political expression by the non-receipt of a mail ballot. (Statement of Undisputed Facts, *supra*, ¶¶ 21-27).

**B. Evidence, standing alone, that election laws have a disparate impact on racial or ethnic minorities is insufficient as a matter of law to sustain an Equal Protection claim.**

CCC also claims that Rules 2.4.1(d) and 13.19, as well as the Secretary's "policy" of not mailing ballots to "inactive – failed to vote electors" under § 1-7.5-107(3)(a)(I), especially burdens the First and Fourteenth Amendment rights of "members of racial and ethnic minorities." (CCC's Second Amended Counterclaim, ¶¶ 17, 25-26, 30-31).

CCC's Second and Third Claims for Relief not distinguish between a law that on its face discriminates against a class of individuals on the basis of their race or ethnicity, and a facially neutral law that is applied or enforced by a government entity or official in an intentionally or purposefully discriminatory manner. CCC's claims must fail under either scenario.

A facially neutral law violates equal protection guarantees if it is adopted with the intent to discriminate against a racial or ethnic group. *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1222 (11th Cir. 2005). The party alleging racial or ethnic discrimination based upon the language of the law must show that the legislative body selected a course of action because of, and not in spite of, its adverse effect upon an identifiable group. *Hayden v. Paterson*, 594 F.

3d 150, 162 (2nd Cir. 2010). Persons challenging the law first must show that race or ethnicity was a substantial or motivating factor behind the law. *Johnson v. Governor of the State of Florida*, 405 F.3d at 1223. If there is evidence that racial or ethnic discrimination was a motivating factor, then the court must ask whether the provision would have been enacted in the absence of a discriminatory motive. *Id.* Proof of a disparate impact, by itself, is insufficient.

To the extent CCC claims that § 1-7.5-107(3)(a)(I) discriminates on the basis of race or ethnicity, the organization must allege and show that the General Assembly intended to discriminate against racial or ethnic minorities when it enacted the limitation on mailing ballots only to “active” registered electors. CCC’s claim that the statute governing mailings to “inactive – failed to vote” electors violates Equal Protection because it has an adverse impact on racial or ethnic minorities must fail without a showing that the General Assembly intended to discriminate, even if CCC is able to prove disparate impact. CCC’s counterclaims allege only a disparate impact and, therefore, fail as a matter of law. (CCC’s Second Amended Counterclaim, ¶¶ 17, 25-26, 30-31). Furthermore, as the undisputed factual record in this case reveals, CCC does not claim that the General Assembly intended for a disparate impact on racial and ethnic minorities to result from its enactment of § 1-7.5-107(3)(a)(I). Nor does CCC claim that the General Assembly intentionally or purposefully meant to discriminate against members of racial or ethnic minorities by enacting § 1-7.5-107(3)(a)(I). (Statement of Undisputed Facts, *supra*, ¶¶ 12-13).

CCC’s Second Amended Counterclaims also can be read as claiming that the Secretary’s enforcement of § 1-7.5-107(3)(a)(I) was meant to discriminate against racial or ethnic minorities. Again, CCC faces a high barrier to prevailing on such a claim. An official action that may

adversely affect racial or ethnic minorities does not deny equal protection unless plaintiffs can show intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, (1946). The mere showing that a statute more adversely affects persons within an identified racial or ethnic group is not enough. An equal protection claim must be based on *intentional* discrimination against a person because of his membership in a particular class. *Washington v. Davis*, 426 U.S. 229, 247-247 (1976). A voter complaining “about a law’s effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.” *Crawford v. Marion County Election Board*, 553 U.S. at 207 (Scalia, J., concurring). The obligation to allege and prove intentional discrimination applies to allegations that the actions of the public officials are directed to racial or ethnic minorities. *Id.*

As with allegations that the statute itself discriminates against racial or ethnic minorities, CCC must allege and prove more than just that the actions of a public official result in a disparate impact because “[d]isparate impact... is not necessarily the same thing as discriminatory intent.” *Secsys, LLC v. Vigil*, 666 F.3d 678, 686 (10th Cir. 2012). A showing of discriminatory impact, by itself, is insufficient. A complaint alleging racial or ethnic discrimination also must allege purposeful intent. Failure to do so must result in judgment for the defendant. *Perry-Bey v. City of Norfolk*, 678 F.Supp.2d 348, 367-368 (E.D. Va. 2009); *Coronado v. Napolitano*, 2008 WL 4838707 \*4 (D. Ariz, November 6, 2008) (Plaintiff must allege purposeful discrimination against racial minorities when enacting or implementing felon disenfranchisement law).



The allegations in CCC's Second Amended Counterclaim are wholly insufficient as a matter of law. It contends only that the law "burdens" racial and ethnic minorities. It does not identify the racial or ethnic minorities that are burdened, how they are burdened, or claim that the discrimination was intentional or purposeful.<sup>3</sup> Moreover, as the undisputed factual record in this case reveals, individuals are not required to provide information about their race or ethnicity when registering to vote in Colorado. (Statement of Undisputed Facts, *supra*, ¶ 14). CCC admitted that the Secretary's office does not maintain data regarding registered voters' race and ethnicity in the SCORE system. (*Id.*, at ¶ 15). CCC further admitted that it has no knowledge that either the Secretary or any member of his staff intended for a disparate impact on racial and ethnic minorities to result from his enforcement of C.R.S. § 1-7.5-107(3)(a)(I). (*Id.*, at ¶ 16). Additionally, the Secretary has repeatedly denied CCC's requests for admission regarding an intent to discriminate against racial and ethnic minorities by his enforcement of § 1-7.5-107(3)(a)(I). (*Id.*, at ¶¶ 17-19). CCC simply has no evidence to support its racial discrimination claims.

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<sup>3</sup> The same result must accrue under the Colorado Constitution. Colo. Const. art. II, section 25 does not grant greater protection to Colorado citizens in an election context than does the Fourteenth Amendment of the United States Constitution. *National Prohibition Party v. State*, 752 P.2d 80, 83, n. 4 (Colo. 1988) ("Article II, section 25 of the Colorado Constitution provides a guarantee similar to that under the Fourteenth Amendment of the United States Constitution.") The Colorado Supreme Court, in a factual circumstance similar to this case, held that a statute that authorized removing electors who had not voted at the previous general election from registration rolls did not violate the Equal Protection clauses of the United States or Colorado Constitutions. *Duprey v. Anderson*, 184 Colo. 70, 76, 518 P.2d 807, 810 (1974).

## CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court enter judgment in his favor and against CCC on all three of CCC's counterclaims.

DATED this 7th day of December, 2012.

JOHN W. SUTHERS  
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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **ASECRETARY'S C.R.C.P. 56(b) MOTION FOR SUMMARY JUDGMENT AGAINST COLORADO COMMON CAUSE** upon the following counsel of record via LexisNexis File and Serve or, where indicated via email, on December 7, 2012:

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1 testimony before any legislative body?

2 A. I don't know what "sworn testimony"  
3 means.

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4 Q. Sure. Sworn testimony is similar to your  
5 testimony here today, meaning that somebody  
6 administered an oath to you before you gave responses  
7 to questions or made statements, you know, that were  
8 not in response to questions.

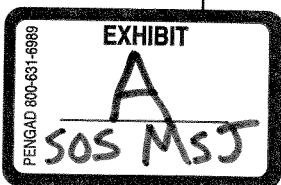
9 A. No.

10 Q. I want to talk to you a little bit about  
11 Colorado Common Cause generally. Could you just  
12 explain to me what Common Cause and the Colorado

13 chapter, what the purpose, the mission, the vision  
14 statement is.

15 A. Sure. So Common Cause works for open and  
16 accountable government and to increase political  
17 participation, or public participation in the political  
18 process, I should say. Common Cause was founded in  
19 1970 as a national organization. And then Colorado was  
20 formed as the first state chapter to do the same sets  
21 of organizing and advocacy and lobbying that was  
22 happening in DC at the state level.

23 So Colorado was the first chapter, and we  
24 worked to increase public participation in the  
25 political process. So that includes voting rights



1 work, reducing the influence of money in politics,  
2 working for transparency through open government and  
3 open meetings laws, as well as fiscal reform issues to  
4 increase confidence in government and government  
5 investments.

6 Q. Tell me a little bit in your own words  
7 about the process by which someone becomes a member in  
8 Common Cause.

9 A. So there are a couple of ways that people  
10 can join Common Cause. Traditionally, members would  
11 make a contribution and send in a member form. And  
12 they're what are still known as our dues-paying  
13 members. But in recent years, as we've started  
14 building our e-mail list, we also have an e-mail  
15 membership which we call our CauseNet supporters. And  
16 those are people who've opted in to receive updates and  
17 engage in our activities.

18 Q. What is CauseNet?

19 A. That's just -- since it's Common Cause,  
20 the term for our e-mail program. So someone who signs  
21 up for the CauseNet list receives e-mails from us.

22 Q. And what type of e-mails does Common  
23 Cause send to its members?

24 A. We send a combination of things. A lot  
25 of it is information, calls to action, we do

1                   And when they did so, they did not mail  
2                   ballots to IFTV electors. Is it your understanding  
3                   that the IFTV electors in El Paso County were unable to  
4                   cast a vote in the November 2011 coordinated election?

5                   A.       No. It was just more difficult for them.

6                   Q.       So Common Cause is not alleging or  
7                   claiming that the nonreceipt of a mail ballot by an  
8                   IFTV voter in a coordinated election disenfranchises  
9                   that voter completely?

10                  MR. GRAY: Object to form. You can  
11                  answer if you understand.

12                  A.       We don't -- our position is not that the  
13                  voter's unable to vote, but that it puts a significant  
14                  burden in their ability to vote, more so than their  
15                  neighbor who received the mail ballot.

16                  Q.       (By Ms. Morrill) So would you agree that  
17                  an IFTV voter is still an eligible elector?

18                  A.       Yes.

19                  Q.       So focusing on the burden that Common  
20                  Cause is alleging in paragraph 17, what information  
21                  formed the basis for the allegation that IFTV voters  
22                  are burdened in the exercise of their right to vote by  
23                  the nonreceipt of a mail ballot?

24                  A.       The voters are burdened by the  
25                  requirement they essentially reregister in order to be

1 activated and then request a ballot. That's the  
2 burden, that they have to go through those additional  
3 steps.

4 Q. And when you say that's the burden, in  
5 whose assessment is that a burden?

6 A. In Common Cause's assessment.

7 Q. So at the time that Common Cause made the  
8 allegation about the burden that IFTV electors  
9 experienced in paragraph 17, had Common Cause surveyed  
10 IFTV electors from the state of Colorado?

11 A. We did not conduct a statewide survey of  
12 inactive voters. We do run a nonpartisan election  
13 protection program where voters call with questions.  
14 And in our experience, when voters don't get ballots,  
15 they're confused and they are not happy they have to go  
16 through additional hurdles to be able to vote. That's  
17 anecdotal and it's based on our years of experience  
18 running the program, it wasn't a survey of voters that  
19 were deemed IFTV.

20 Q. And the -- can you say again what type of  
21 phone-in program it was? Just say the name of it  
22 again.

23 A. Sure. So Common Cause runs a nonpartisan  
24 election protection program. It's called Just Vote  
25 Colorado Election Protection. We run it primarily in

1 Q. (By Ms. Morrill) Are you familiar with  
2 Colorado Revised Statute Section 1-7.5-107(3) (a)  
3 Roman I?

4 A. Yes.

5 Q. And what's your understanding of that  
6 statutory provision?

7 A. That it's the provision around mail  
8 ballots in the off-year elections that says that they  
9 shall be mailed to active voters.

10 Q. And this is going to be -- you know, I  
11 have to do this in deposition. It's so basic, but you  
12 have to ask the very basic questions sometimes. How  
13 did that statute come in to being?

14 MR. GRAY: Object to form.

15 You can answer.

16 A. It was put into place by the legislature.

17 Q. (By Ms. Morrill) Is Common Cause  
18 alleging that the Colorado legislature purposefully or  
19 intentionally intended to discriminate against racial  
20 minorities by passing that statutory provision into  
21 law?

22 MR. GRAY: Object to form.

23 A. I'm sorry, you're asking if we -- if the  
24 legislature intended?

25 Q. (By Ms. Morrill) Yes. And before asking



1 you that, I can ask a preceding question that might  
2 help this make more sense. So do you agree that Common  
3 Cause is alleging that the result of the application of  
4 that statutory provision is a disparate impact on  
5 racial and ethnic minorities in the state of Colorado?

6 A. Yes.

7 Q. Is Common Cause also alleging that the  
8 general assembly intended that disparate impact to  
9 result bypassing the statutory provision?

10 A. No.

11 Q. Is Common Cause alleging that the  
12 Colorado Secretary of State Scott Gessler intended that  
13 disparate impact to occur by enforcing that statutory  
14 provision?

15 MR. GRAY: Object to form.

16 A. I don't know what the Secretary intended,  
17 but the rule does have a disparate impact on racial and  
18 ethnic minorities: It keeps them from being able to  
19 vote.

20 Q. (By Ms. Morrill) At the time that Common  
21 Cause sought to intervene in the case and in the two  
22 prior counterclaims before this Exhibit 1, the second  
23 amended counterclaim that we're looking at, the new  
24 rules were not in place, the Secretary had not  
25 promulgated them; do you understand that?

1 A. I do understand that.

2 Q. So at the time that CCC sought to  
3 intervene in this case and filed it's original  
4 counterclaim against the Secretary, was CCC alleging  
5 that Secretary Gessler intended to have a disparate  
6 impact on racial and ethnic minorities in the state of  
7 Colorado as a result of his enforcement of the  
8 statutory provision?

9 MR. GRAY: Object to form.

10 A. I don't know what was intended with the  
11 interpretation of the law.

12 Q. (By Ms. Morrill) Do you know when  
13 Colorado first began to distinguish between active  
14 voters and IFTV voters legally or statutorily?

15 A. I don't recall.

16 Q. But CCC's involvement in IFTV-related  
17 issues dates back at least as far as 2007; is that  
18 correct?

19 A. Yes.

20 Q. To your knowledge, was Secretary Gessler  
21 the secretary of state in 2007?

22 A. No.

23 Q. And between 2007 and the present, has  
24 Colorado had several secretaries of state?

25 A. Yes.

1 Q. Okay.

2 MS. MORRILL: That's all I have on that  
3 exhibit. If you want to take a break, this is a good  
4 stopping point for me.

5 (A short break was taken.)

6 Q. (By Ms. Morrill) Ms. Nunez, have you  
7 ever reviewed individual voter registration files as  
8 they exist with the secretary of state's statewide  
9 voter registration database, which is also referred to  
10 as SCORE?

11 A. I have not.

12 Q. Have you ever reviewed a voter  
13 registration form for the state of Colorado?

14 A. I have.

15 Q. In order to register to vote in Colorado,  
16 is an individual required to provide information  
17 regarding their race or ethnicity?

18 A. No.

19 Q. To your knowledge, does the secretary of  
20 state's office maintain race and ethnicity data  
21 regarding registered voters in the SCORE system?

22 A. Not to my knowledge.

23 (Exhibit 3 was marked.)

24 Q. (By Ms. Morrill) Ms. Nunez, the court  
25 reporter is handing you what has been marked as

1 A. Yes.

2 Q. Before we talk about the more recent  
3 round of calls, do you know whether in the original  
4 round of calls CCC asked its members to identify their  
5 race or ethnicity?

6 A. I don't know.

7 Q. All right. Let's focus now on the second  
8 or most recent round of calls. Am I correct that there  
9 were only two rounds of calls?

10 A. The most recent round of calls there --  
11 there's actually two rounds of calls. One we tried to  
12 run and identify as inactive - failed to vote. The  
13 list that we got actually was pulling in a lot of  
14 noninactive - failed to vote people. That was the bulk  
15 of the calls.

16 And then we have the third list, which, I  
17 guess, is the most accurate and most recent list, which  
18 is the list that we're now calling.

19 Q. All right. Let's see if we can break  
20 that down to make it a little more clear in the record,  
21 because there's a lot of lists, there's a lot of calls.

22 A. Right.

23 Q. So in the first part of the second round  
24 of calls, who was CCC calling?

25 A. We were calling our members statewide

1           Q.     And what's the name of the organization  
2     that provided the list?

3           A.     We got it through the Civic Engagement  
4     Roundtable.

5           Q.     And approximately when did CCC start  
6     making the calls in part one of round two?

7           A.     It was about a month ago.

8           Q.     During the calls made in part one of  
9     round two, do you know whether CCC asked its members  
10    about their race or ethnicity?

11          A.     I don't believe that was part of the  
12    script.

13          Q.     Does CCC still maintain a copy of the  
14    script?

15          A.     Yes.

16          Q.     To your knowledge, does Ms. Steele still  
17    have the notes or written documentation of the calls  
18    she made?

19          A.     I believe so, yes.

20          Q.     Let's talk now about the calls made by  
21    CCC during the second part of round two. First of all,  
22    when did CCC begin making -- I'm sorry, I'm getting  
23    over a head cold, so my voice is not really what it  
24    should be. When did CCC start making the calls in part  
25    two of round two?

1           A.     We got the list to make the calls around  
2     the time of our filing. It was the list that -- after  
3     we ran it against SCORE. Elizabeth had been on  
4     vacation. I don't know whether she started the calls  
5     this week. If she started the calls, that would be  
6     when she would have. She's been out.

7           Q.     Let me go back and ask you some questions  
8     about that answer. First of all, you referred to a  
9     list. What list did CCC get?

10          A.     It was a list of our members compared  
11     against the SCORE database.

12          MR. GRAY: For the record, this would be  
13     the Excel spreadsheet provided in response to discovery  
14     requests.

15          MS. MORRILL: Okay. There were several,  
16     do you know which one? We can look at them later.

17          MR. GRAY: Right.

18          A.     The plan was to call all three. I don't  
19     know how far we've gotten on that, so ... But  
20     eventually we'll get through all three.

21          Q.     (By Ms. Morrill) And who provided the  
22     list that compares CCC's statewide membership against  
23     the voter registration database to CCC?

24          A.     Holland & Hart did that analysis for us.

25          Q.     Do you know who at Holland & Hart?

1           A.     I don't.

2           Q.     Do you know how the analysis was done?

3           A.     I don't.

4           Q.     Do you know whether the IFTV data for the  
5 analysis came directly from the SCORE database?

6           A.     That is my understanding, but I don't  
7 know that.

8                   MR. GRAY: Without waiving any work  
9 product, I can tell you that the membership list was  
10 run against the voter database provided by the  
11 Secretary in this litigation, and the output was this  
12 Excel spreadsheet.

13                   MS. MORRILL: Okay. And the Secretary  
14 has produced several versions of the master voter  
15 registration list with status reasons in discovery. Do  
16 you happen to know which list was used?

17                   MR. GRAY: Yes. My understanding was it  
18 was run against the March 2012 list. I requested them  
19 to run it against the July list, as well. And I  
20 believe in the past couple of days I have gotten an  
21 e-mail from someone in our IT department who has  
22 finished that task and provided that list to me. I've  
23 not been in my office for the ability to look at it,  
24 but once I do, I will forward that on to you.

25                   MS. MORRILL: Why not?

1 MR. GRAY: As a supplemental.

2 MS. MORRILL: Joking. Let the record  
3 reflect that counsel is, in fact, smiling.

4 MR. GRAY: Yes, tiredly smiling.

5 MS. MORRILL: Okay. So thank you for  
6 providing those clarifications. And we may take a look  
7 at some of the Excel spreadsheets that Common Cause  
8 produced to the Secretary at a later point today, and  
9 we can maybe ask some more questions about those at  
10 that time.

11 Q. (By Ms. Morrill) So in your answer that  
12 I've been asking you questions about, you also stated  
13 that CCC received the list from Holland & Hart around  
14 the time of the filing. What filing are you referring  
15 to?

16 A. I'm sorry, the filing of our written  
17 discovery.

18 Q. Okay. That's what I thought, but I just  
19 wanted to make sure. And so the written discovery  
20 responses for CCC were filed on November 15th, 2012.  
21 So is it correct that the calls made in part two of  
22 round two began on or around that date or shortly  
23 thereafter that date?

24 A. That was the goal. I don't know how far  
25 we got, since, like I said, there were some vacation



1 issues and things, so ...

2 Q. Okay. Who at CCC is responsible for  
3 making the calls in part two of round two?

4 A. Elizabeth Steele.

5 Q. Anyone else?

6 A. Not as of now. The plan was to have her  
7 make the calls initially, see how the script was  
8 working, and then bring in other staff once that had  
9 been ironed out.

10 Q. And is -- so is there a script for part  
11 two of round two?

12 A. It's the same as the script for round one  
13 as of now. I mean, it could change, but ...

14 Q. I thought you said there wasn't a script  
15 for one.

16 A. I'm sorry. Round two, part one, it's the  
17 same script.

18 Q. Thank you. Do you know whether  
19 Ms. Steele has maintained notes or other written  
20 documentation about the calls she'd made during part  
21 two of round two?

22 A. I would assume that she's keeping the  
23 same notes as she did for the first part.

24 Q. Do you know approximately how many calls  
25 CCC will have to make in order to contact or at least

1 attempt to contact everyone -- every member across the  
2 state?

3 MR. GRAY: Object to form.

4 A. Our plan was to call the members who were  
5 flagged as inactive - failed to vote. I don't remember  
6 that number off the top of my head. I think it was --  
7 I don't remember off the top of my head. It was in the  
8 spreadsheets, but ...

9 Q. (By Ms. Morrill) Could you give me a  
10 ballpark? More than a hundred? Less than a hundred?

11 A. I mean, it's more than a hundred. But  
12 with the three spreadsheets, I don't have the number  
13 off the top of my head.

14 Q. I hate looking at spreadsheets, that's  
15 why I asked.

16 A. Sorry.

17 Q. I have bad flashbacks from Dr. Masket's  
18 deposition.

19 A. I can only imagine.

20 Q. People who go to law school are generally  
21 not very good at math. I'm not ashamed to admit that  
22 I'm one of those people.

23 Okay. So just so I'm clear, so far  
24 Ms. Steele has been the only individual for CCC making  
25 the calls in part two of round two?

1           A.     Yes.

2           Q.     But the plan is to maybe involve more CCC  
3 volunteers or staff?

4           A.     Yes.

5           Q.     Do you have any knowledge of the timeline  
6 or estimated time of completion of the calls in part  
7 two of round two?

8           A.     We haven't set a timeline. I mean, our  
9 goal was to get through them before the end of the  
10 year. But I don't know if that's realistic or how  
11 things are going.

12          Q.     So again, looking at the last sentence of  
13 CCC's response to interrogatory 2, other than the calls  
14 to the Denver members that occurred approximately a  
15 year ago and rounds one and two that occurred more  
16 recently that we've already discussed in detail, has  
17 CCC made any other attempts to contact IFTV members to  
18 ask them about whether they experienced any burden as a  
19 result of not receiving a mail ballot?

20          A.     No.

21          Q.     I would ask you the same question, but  
22 not limited to IFTV members. Instead, either prior to  
23 filing this litigation or after -- or, I'm sorry. Let  
24 me ask this question better.

25                 At the time that CCC sought to intervene

1 in the case and filed its counterclaim against the  
2 Secretary, had it made any efforts to contact IFTV  
3 electors in the state of Colorado about whether they  
4 have experienced burdens on their right to vote as a  
5 result of not receiving a mail ballot regardless of  
6 whether the individual was a member of CCC or not?

7 A. Not individual electors, no.

8 Q. Since CCC has intervened in this case as  
9 a defendant, has it done so?

10 A. Again, not individual electors.

11 Q. Earlier we talked about Dr. Masket and  
12 how he is providing expert testimony for CCC regarding

13 the disparate impact on racial and ethnic minorities;  
14 do you recall that?

15 A. I do.

16 Q. Prior to seeking leave to intervene in  
17 the case and filing the counterclaim against the  
18 secretary of state, did CCC make any efforts to consult  
19 with the expert in the field of survey taking or  
20 polling to obtain the same data for IFTV electors about  
21 their experiences through a survey or a polling  
22 process?

23 A. We did not.

24 Q. Okay. Since CCC has intervened as a  
25 defendant in this case, has it done so?

1 A. We have not.

2 Q. Let's look at CCC's response to  
3 interrogatory No. 3. Specifically, the second sentence  
4 of that response, it starts off, "As identified in the  
5 membership brochure produced here, there are suggested  
6 annual membership dues of \$40 for individual and \$15  
7 for student memberships." Do you see that?

8 A. I do.

9 Q. Let's take a look at another document.  
10 (Exhibit 4 was marked.)

11 Q. (By Ms. Morrill) The court reporter has  
12 handed you what's been marked as Exhibit 4. Please  
13 take a look and let me know when you're ready to  
14 discuss.

15 A. Yes.

16 Q. What is Exhibit 4?

17 A. It is part of a membership brochure that  
18 our national office has produced.

19 Q. Does the Colorado chapter of Common Cause  
20 have a separate membership form from that depicted in  
21 Exhibit 4?

22 A. We do not.

23 Q. Okay. So if an individual is interested  
24 in becoming a member of CCC, do they join the national  
25 organization and then select which state chapter they

1 might be interested in also being a member or how does  
2 it work? Tell me how it works.

3 A. Well, it depends. They can join as a  
4 member using this brochure. And if they do that, then  
5 they'll be on the national list, and if they're in  
6 Colorado, they'll also be on the Colorado list. If  
7 they make a contribution to Colorado even if they don't  
8 sign up as a member, they will be put on the member  
9 list.

10 Or if they were to sign up on-line for  
11 the CauseNet list, they would be an on-line supporter  
12 and be treated as a member that way.

13 Q. Does signing up for the CauseNet list  
14 require any type of monetary payment?

15 A. It does not.

16 Q. So looking at the right half of Exhibit 4  
17 where there's information that it asks the potential  
18 member to fill out, I want to draw your attention to  
19 the box at the very top. There's a box to check and it  
20 states, "Yes. I want to join Common Cause." Do you  
21 see that?

22 A. I do.

23 Q. Does CCC only count individuals as  
24 members if they have submitted a form on which they  
25 have checked that box?

1 Exhibit 5 were identified as racial or ethnic  
2 minorities, and if so, to state the race or ethnicity  
3 for each member. Do you agree with that assessment?

4 A. Yes.

5 Q. And in response, CCC states that it "does  
6 not obtain ethnic status from its members and is  
7 unaware of the ethnicity of these members." Is that  
8 correct?

9 A. It is.

10 Q. So I want to ask you some questions about  
11 that response. In the normal course of business for  
12 CCC, does the organization ever request members to

13 provide it with information about their race or  
14 ethnicity?

15 A. Not that I can recall. We've asked our  
16 advisory board for that information, but I don't  
17 remember ever asking the general membership for that  
18 type of information.

19 Q. Why would CCC ask the advisory board for  
20 information about the race and ethnicity of its  
21 members?

22 A. It was about the advisory board's race  
23 and ethnicity, not other people's race and ethnicity.  
24 I'm sorry.

25 Q. Oh, I see. Sorry, I was confused.

1           A.     Yeah.

2           Q.     And during the normal course of business  
3     for CCC, do individuals who become members, in one form  
4     or another as you've described the various ways to  
5     become a member of the organization, do they ever  
6     voluntarily offer information about their race or  
7     ethnicity to CCC?

8           A.     They may, but not as a normal course of  
9     business.

10          Q.     As you sit here today, are you aware of  
11     any business records for CCC or the national  
12     organization that would contain race or ethnicity  
13     information for Colorado members?

14          A.     I am not.

15          Q.     Okay. So putting aside the normal course  
16     of business and focusing on CCC's involvement in this  
17     litigation, prior to seeking leave to intervene in this  
18     case and filing the counterclaim against the Secretary,  
19     did CCC make any effort to contact its IFTV members in  
20     Denver County to ask them about their race or  
21     ethnicity?

22          A.     No.

23          Q.     Prior to the time that CCC sought to  
24     intervene in this case and filed a counterclaim against  
25     the Secretary, did CCC make any efforts to contact its



1 statewide members who were IFTV about their race or  
2 ethnicity?

3 A. No.

4 Q. Since CCC has become a defendant in this  
5 lawsuit, has it made any efforts to do so?

6 A. No.

7 Q. And that last question was not limited to  
8 only efforts to inquire of Denver County CCC members  
9 with IFTV status, but efforts to inquire about the race  
10 or ethnicity of CCC's statewide members with IFTV  
11 status. Is your answer still the same?

12 A. Yes.

13 Q. Let's talk about your response to  
14 interrogatory No. 7. And that interrogatory again  
15 refers to the same list in Exhibit 5, and asks CCC to  
16 state whether that individual received a mail ballot  
17 for the November 2011 coordinated election. Is that  
18 accurate?

19 A. Yes.

20 Q. And so in CCC's response, to paraphrase,  
21 that the understanding of the organization is that all  
22 of the individuals on -- listed on Exhibit 5 received  
23 mail ballots for the 2011 coordinated election because  
24 they were residents of the City and County of Denver.

25 A. Yes.

1           Q.     After the date of the November 2011  
2 coordinated election, did any of CCC's members who are  
3 listed on Deposition Exhibit 5 contact your  
4 organization and voluntarily disclose whether they cast  
5 the mail ballot received from the City and County of  
6 Denver?

7           A.     No.

8           Q.     Let's look at the response to  
9 interrogatory No. 9. Actually, we don't need to  
10 because I think I understand, based on your responses  
11 to interrogatory No. 4, what's going on with the  
12 spreadsheets and so forth, sort of, good enough.

13                   So let's skip ahead to interrogatory  
14 No. 13. So is it fair to summarize your testimony so  
15 far today as stating that CCC has only recently begun  
16 to contact its members on a statewide basis who have  
17 IFTV status?

18           A.     Yes.

19           Q.     So I won't ask you questions about  
20 whether CCC did any of this before it sought leave to  
21 intervene in this case and file the counterclaim  
22 against the Secretary because the answer to those  
23 questions is negative; is that right?

24           A.     Correct.

25           Q.     Okay. For the individuals on the

1 spreadsheet that CCC has disclosed that contains its  
2 membership on a statewide basis who are also IFTV  
3 voters, at least as of March 2012, has CCC made any  
4 attempt to contact those voters to specifically  
5 determine whether the IFTV members identify as members  
6 of racial or ethnic minorities?

7 A. We have not.

8 Q. Has CCC made any efforts to contact the  
9 same members as referred to in my last question for the  
10 purpose of asking them whether they received a mail  
11 ballot in the November 2011 coordinated election?

12 A. That is part of the script for those  
13 calls.

14 Q. For the same set of members statewide  
15 with IFTV status, has CCC made any efforts to contact  
16 the individual -- or to contact those members regarding  
17 whether they actually voted in the 2011 coordinated  
18 election regardless of how they may have done so?

19 A. That's also part of the script.

20 Q. Okay. And for the same group of  
21 statewide members, is CCC currently making efforts to  
22 determine whether -- which of its current members on a  
23 statewide basis also have IFTV status as of the  
24 July 2012 master voter registration list with status  
25 reason?

1       there was some proactive effort to get a ballot.

2                       I took from that that there was an  
3       admission that it was more difficult to get a mail  
4       ballot under the Secretary's proposed reading of the  
5       law. That wasn't a conversation, but the comments of  
6       the office suggested that.

7               Q.       (By Ms. Morrill) Suggested that to you.

8                       MR. GRAY: Object to form.

9               Q.       (By Ms. Morrill) Is that correct?

10              A.       That was my understanding from those  
11       comments.

12              Q.       Okay. Did Mr. Choate's answer to the  
13       question at the preliminary injunction hearing to which  
14       you're referring, did it use the word "burden"?

15              A.       I don't recall.

16              Q.       Did it use the words, "make it more  
17       difficult to vote"?

18              A.       I don't recall.

19              Q.       Do you have knowledge of any written or  
20       verbal statement made by Secretary Gessler or any  
21       member of his staff to the effect that the intent of  
22       enforcing section 1-7.5-107(3)(a) sub Roman I was to  
23       make it more difficult for IFTV electors to vote in  
24       elections?

25              A.       No.

1 Q. Let's move on to the next sentence.

2 MR. GRAY: I'll stipulate, if we did have  
3 such evidence, I would have presented it to you before  
4 now.

5 Q. (By Ms. Morrill) So in doing that, are  
6 you --

7 MS. MORRILL: I mean, we're going to go  
8 on through every sentence that says the word "aware."  
9 And if there is no basis other than belief and opinion  
10 for any of those awareness statements -- I mean, this  
11 is what we're going to do. Maybe we should do it just  
12 to make a record of it because we'll need it if there's  
13 a trial. But that's exactly what I'm looking for.

14 MR. GRAY: We will stipulate that the  
15 secretary of state has never said that he would like  
16 for brown people not to vote. Whether he was aware of  
17 these facts here, we believe that he was, and you can  
18 ask about them. And he or the secretary of state's  
19 staff.

20 MS. MORRILL: Right. As in Secretary  
21 Gessler.

22 MR. GRAY: And as in his office.

23 Q. (By Ms. Morrill) Looking at the next  
24 sentence it states, "The Secretary was aware of high  
25 turnout by minority voters in the 2008 general election

1           Q.     (By Ms. Morrill) Sure. Well, let me ask  
2     you a preliminary question. Still looking at the  
3     sentence in the second full paragraph on page 8, the  
4     first sentence, what impermissible motivation is being  
5     referred to and attributed to the Secretary in that  
6     sentence?

7           A.     An attempt to limit participation by IFTV  
8     electors in the 2011 election or future elections.

9           Q.     And is that motivation to limit IFTV  
10    voters' participation, is that -- are you asserting  
11    that that motivation is as to all IFTV voters? Because  
12    interrogatory 19 is seeking evidence of his

13   impermissible motivation, so to speak, as to IFTV  
14   voters who are members of racial and ethnic minorities.

15          A.     And the impact of limiting participation  
16    of IFTV electors would be disproportionately felt by  
17    minority voters.

18          Q.     Okay. So that's the connection.

19          A.     Yes.

20          Q.     Okay. I thought that earlier today in  
21    response to one of my questions you testified that  
22    you, as CCC's representative here in this deposition  
23    today, have no knowledge of what the Secretary  
24    intended or did not intend by his enforcement of  
25    Section 1-7.5-107(3)(a) Roman I against Denver in the

1 fall of 2011.

2 A. Yes.

3 MR. GRAY: Object to form.

4 Q. (By Ms. Morrill) So I've correctly  
5 restated your testimony?

6 A. Yes.

7 Q. So given that prior statement and your  
8 reconfirmation of it, why in this sentence are you  
9 asserting on behalf of Common Cause that the Secretary  
10 had an impermissible motivation?

11 A. I believe we're asserting that the  
12 inconsistent application of the Mail Ballot Act

13 allowing, in some instances, counties to do more, and  
14 in other instances, like with mailing to IFTV voters,  
15 to not allow them, that that provides circumstantial  
16 evidence of impermissible motivation.

17 Q. Right. And as part of that assertion,  
18 that assertion encompasses the allegation that the  
19 Secretary had an improper motivation in his  
20 enforcement.

21 A. Yes.

22 Q. Whereas, earlier today you said you had  
23 no knowledge of what the Secretary intended or did not  
24 intend in enforcing the statutory provision against  
25 Denver. So if that was the case earlier today, how do

1 we get from there to now the Secretary does have an  
2 impermissible motivation in enforcing the Mail Ballot  
3 Act?

4 MR. GRAY: Object to form.

5 A. I don't know the Secretary's motivation.  
6 In this answer, though, as we're talking about the  
7 pattern of enforcement or nonenforcement, it does  
8 provide, as the answer says, circumstantial evidence of  
9 impermissible motivation.

10 We don't know what his motivation was,  
11 but the impact, nonetheless, was to disproportionately  
12 impact minority voters.

13 MR. GRAY: And, Counsel, for the record,  
14 I will stipulate that Common Cause has no firsthand  
15 direct knowledge of any intent on the Secretary's  
16 behalf. But to the extent interrogatory 19 was what is  
17 sometimes called a contention interrogatory, we have  
18 endeavored to set forth all of the facts that may be  
19 presented at trial in order to fully inform you of the  
20 facts that may be presented at trial to demonstrate a  
21 purposeful and intentional discrimination whether or  
22 not those facts are within the personal knowledge of  
23 Colorado Common Cause.

24 MS. MORRILL: And I will note for the  
25 record in response to your counsel's comment that there



1           Q.     So 2011 is the most recent coordinated  
2 election, but to get the next most recent in time,  
3 you'd have to go back to 2005.

4           A.     Yes.

5           Q.     So as you sit here today, do you have any  
6 personal knowledge that the advice or instructions  
7 given by the 2005 secretary of state or his staff to  
8 counties regarding the mailing of ballots to inactive  
9 voters in coordinated elections conducted by mail was  
10 any different than the order, and before the order, the  
11 guidance given by the secretary of state to Denver in  
12 this case?

13          A.     I don't know about the 2005 guidance.

14          Q.     Let's go on and look at the first  
15 paragraph on page 9. By paragraph, I'm not referring  
16 to the bullet pointed paragraph. The first sentence of  
17 that paragraph states, "Moreover, for the reasons  
18 stated in the response to interrogatory 17 above, the  
19 fact that minority voters were much more likely to be  
20 IFTV was common knowledge, and it is implausible that  
21 the Secretary was not aware of the fact this his  
22 interpretation would disproportionately affect minority  
23 voters and pose special burdens on those voters in  
24 voting in mail ballot elections."

25                   I want to focus on what is asserted to be

1 common knowledge in that sentence. As CCC's designated  
2 representative, what personal knowledge do you have  
3 that at the time the Secretary took enforcement action  
4 against Denver related to the provisions of  
5 1-7.5-107(3)(a) Roman I, that it was common knowledge  
6 that minority voters in the state of Colorado were much  
7 more likely to be IFTV?

8 A. We believe that it would be common  
9 knowledge based on the voting trends in 2008 and 2010.

10 Q. And those are the trends that we  
11 discussed previously today?

12 A. Yes.

13 Q. Okay. Any other basis for why it was  
14 common knowledge that minority voters were much more  
15 likely to be inactive - failed to vote in the fall --  
16 as of the fall of 2011 when the Secretary sued Denver  
17 to enforce the statute?

18 A. Beyond the news coverage of voting  
19 patterns and things like that, no.

20 Q. Okay. As you sit here today as CCC's  
21 designated representative, do you have any personal  
22 knowledge about whether Secretary Gessler shared in the  
23 common knowledge?

24 A. I do not.

25 Q. As you sit here today, do you have any

1 personal knowledge that any of Secretary Gessler's  
2 staff shared in that common knowledge you're asserting  
3 to exist?

4 A. I do not.

5 Q. Look at the next paragraph on page 9, it  
6 states, "Following the election, the Secretary was  
7 given further information that mailing ballots to IFTV  
8 electors led to increased turnout from IFTV electors  
9 and minority voters."

10 My question is, first of all, how do you  
11 know that the Secretary was given further information  
12 after the 2011 coordinated election that mailing

13 ballots to IFTV electors led to increased turnout from  
14 IFTV electors and minority voters?

15 A. There were media accounts describing that  
16 increased turnout that referenced the counties where  
17 that existed in the counties that mailed to IFTV voters  
18 versus those who didn't.

19 Q. And what counties do you recall media  
20 coverage about for which there was increased turnout  
21 from not just IFTV electors, but also minority voters?

22 A. There were counties in, I believe -- I  
23 always get them confused, it was either Costilla or  
24 Conejos . There was one county that was referenced  
25 that was a county that -- also a Section 203 county

1 as a defendant and to bring a counterclaim against the  
2 secretary of state, did CCC review any of the  
3 legislative history for the house bill or senate bill  
4 that resulted in the enactment of  
5 Section 1-7.5-107(3)(a) Roman I as it currently exists  
6 in state law today?

7 A. Not that I'm aware of.

8 Q. In this case is CCC alleging or claiming  
9 that the general assembly intentionally or purposely  
10 meant to discriminate against members of racial or  
11 ethnic minority by enacting Section 1-7.5-107(3)(a)  
12 Roman I as it exists currently in Colorado law today?

13 A. No.

14 MS. MORRILL: I don't have anything  
15 further at this point. Thank you.

16 THE DEPONENT: Thank you.

17 MS. ORTEGA: No questions from Denver.

18 MS. MORRILL: Any redirect?

19 MR. GRAY: No redirect.

20 MS. MORRILL: Let's go off the record.

21 (Whereupon, the deposition was concluded  
22 at 4:08 p.m.)

23

24

25

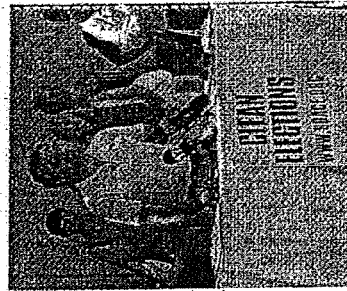
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**DISTRICT COURT, CITY AND COUNTY OF  
DENVER, COLORADO**

1437 Bannock St.  
Denver, CO 80203

**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.

Attorney for Intervenor-Defendant, Colorado Common  
Cause

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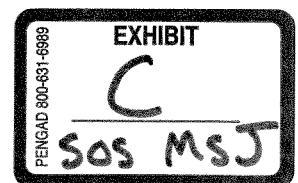
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Case Number: 2011CV6588

Div./Ctrm: 203

**COLORADO COMMON CAUSE'S RESPONSE TO SECRETARY'S FIRST SET OF  
WRITTEN DISCOVERY REQUESTS TO  
INTERVENOR-DEFENDANT COLORADO COMMON CAUSE**



Intervenor-Defendant Colorado Common Cause (“CCC”), by and through its attorneys, hereby responds to the Secretary’s First Set of Written Discovery Requests to Intervenor-Defendant Colorado Common pursuant to Rules 26, 33, and 34 of the Colorado Rules of Civil Procedure.

### **GENERAL AND CONTINUING OBJECTIONS**

1. CCC objects to Plaintiff’s instructions and definitions to the extent that they seek to impose obligations beyond or in addition to those imposed by the Colorado Rules of Civil Procedure and to the extent that they are unduly burdensome.
2. CCC expressly states that any inadvertent disclosure of any privileged communication is not in any way intended to constitute a waiver of the applicable privilege, and CCC reserves the right to seek return of all copies of the privileged communication.
3. CCC, in making these responses, does not in any way waive or intend to waive (a) objections relating to competency, relevancy, materiality, privilege, and admissibility; or (b) the right to revise, correct, supplement, or clarify any of its responses.
4. CCC has not completed its discovery, factual investigation, or trial preparation in this case. These responses are made in a good faith effort to timely comply with provisions of Colo. R. Civ. P. 33 and 34 to supply such responsive information and documents presently within CCC’s possession, custody or control. It is anticipated that further discovery, independent investigation, and analysis may lead to the discovery of additional information and documents, which may lead to changes to or variations from the information in these responses.

Subject to these General and Continuing Objections, CCC responds to Plaintiff’s combined discovery requests as follows:

### **INTERROGATORIES**

**INTERROGATORY 1:** For each of the following Interrogatories, identify any person who provided the information necessary to answer the Interrogatory and, if more than one person provided the information, state which person provided which information necessary to answer the Interrogatory.

**RESPONSE:** Elena Nunez, Executive Director, Colorado Common Cause; Jenny Rose Flanagan, Director of Voting and Elections, Common Cause; and Derek Cressman, Vice President of State Operations/Director of Campaign to Reverse Citizens United, Common Cause.

**INTERROGATORY 2:** Identify any person who has or claims to have any information about the facts related to this litigation, and for each person identified state in complete detail the substance and nature of their information.

**RESPONSE:** Objection. This interrogatory is overbroad as it seeks the identity of “any person” with knowledge of facts related to this case would likely include hundreds of thousands of people such as IFTV electors and others.

Without waiving this objection, CCC states as follows. The parties and individuals identified in the parties’ disclosures, depositions, discovery responses, pleadings, affidavits and expert witness reports, have information about the facts related to this litigation as identified in those documents. In addition, the election officials in various Colorado counties, including Denver, Pueblo and Eagle Counties, have information about the IFTV electors in their counties, the impact on those voters from not receiving mail ballots in mail ballot elections and their communications with the Secretary’s office. IFTV electors themselves, including those identified in the spreadsheets produced by CCC, also have information on the impact to them personally from not receiving mail ballots in mail ballot elections and the circumstances and difficulties they face in trying to cast a ballot in mail ballot elections.

**INTERROGATORY 3:** Describe in complete detail any requirements for membership in CCC as set forth in CCC’s governing documents (such as articles of incorporation and bylaws) or other corporate documents, including but not limited to any membership fee or dues, levels of membership, periods of membership, and renewal requirements for membership.

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**RESPONSE:** There are no requirements for membership set forth in CCC’s bylaws or in Common Cause’s articles of incorporation. As identified in the membership brochure produced here, there are suggested annual membership dues of \$40 for individual and \$15 for student memberships. In addition, CCC allows others to join CCC online and receive periodic updates and emails through CCC’s CauseNet (which are also sent to regular members). Those who sign up for these communications are considered members of CCC in addition to those who pay annual dues. CCC does not have any particular requirements for membership as it is open to participation by anyone in Colorado. Three excel spreadsheets of Dues-Paying Members, On-Line Member and lapsed members will be produced.

**INTERROGATORY 4:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, provide the date on which that individual first became a member of CCC.

**RESPONSE:** CCC is producing an excel spreadsheet identifying the previously-identified members deemed IFTV in 2011. The second tab of this spreadsheet identifies which of these members are understood to currently be IFTV based on the 2012 Voter database produced by the Secretary in this litigation. In addition, CCC is producing three excel spreadsheets containing full lists of current dues-paying members, lapsed members (those who have not paid dues in the past two years) and online members, which includes the dates on which the members and lapsed members became members of CCC. The second tab of these three spreadsheets identify which of those members are deemed IFTV CCC is working to generate and produce excel spreadsheets of



those members from these three lists who are understood to currently be IFTV based on the 2012 Voter database produced by the Secretary in this litigation.

**INTERROGATORY 5:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, state whether that individual’s membership with CCC currently is in good standing.

**RESPONSE:** Although some members have not remained current financially with membership dues, CCC treats lapsed members the same as current dues-paying members and does not designate members as in “good standing” or not “good standing.” Thus, all members listed as dues-paying, lapsed or online are considered members in good standing by CCC. *See also*, Response to Interrogatory No. 4.

**INTERROGATORY 6:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, state whether that individual identifies as a racial or ethnic minority and, if so, also state the racial or ethnic minority.

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**RESPONSE:** CCC does not obtain ethnic status from its members and is unaware of the ethnicity of these members.

**INTERROGATORY 7:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, state whether that individual received a mail ballot for the November 2011 coordinated election.

**RESPONSE:** As that list was made up of Denver residents, CCC understands that all of the individuals on the list received mail ballots for the 2011 coordinated election as did all IFTV electors in Denver.

**INTERROGATORY 8:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, state whether that individual voted in the November 2011 coordinated election.

**RESPONSE:** This information is available from the SCORE database that is maintained by the Secretary and is thus more accessible to the Secretary than it is to CCC, who does not maintain information regarding voting credits of its members. *See also*, Response to Interrogatory No. 4.

**INTERROGATORY 9:** For each individual included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, state whether that individual currently is deemed “inactive – failed to vote.”

**RESPONSE:** *See* Response to Interrogatory No. 4.

**INTERROGATORY 10:** Excluding those individuals included on the “List of CCC members who were deemed ‘inactive – failed to vote’ in September 2011” that was provided as part of Your C.R.C.P. 26(a)(1) Initial Disclosures, identify any other member of CCC who was deemed “inactive – failed to vote” at any time during the period of December 2010 through and including that date of the November 2011 coordinated election.

**RESPONSE:** *See* Response to Interrogatory No. 4.

**INTERROGATORY 11:** For each individual identified in Your response to Interrogatory 9, provide the date on which that individual first became a member of CCC.

**RESPONSE:** *See* Response to Interrogatory No. 4.

**INTERROGATORY 12:** For each individual identified in Your response to Interrogatory 9, state whether that individual’s membership with CCC currently is in good standing.

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**RESPONSE:** *See* Response to Interrogatory Nos. 4 and 5.

**INTERROGATORY 13:** For each individual identified in Your response to Interrogatory 9, state whether that individual identifies as a racial or ethnic minority and, if so, also state the racial or ethnic minority.

**RESPONSE:** CCC does not obtain ethnic status from its members and is unaware of the ethnicity of its members.

**INTERROGATORY 14:** For each individual identified in Your response to Interrogatory 9, state whether that individual received a mail ballot for the November 2011 coordinated election.

**RESPONSE:** This information is presumably available from the SCORE database maintained by the Secretary and thus more easily available to the Secretary than CCC. CCC has no information apart from that found in the SCORE database from which to respond to this Interrogatory.

**INTERROGATORY 15:** For each individual identified in Your response to Interrogatory 9, state whether that individual voted in the November 2011 coordinated election.

**RESPONSE:** *See* Response to Interrogatory No. 8.

**INTERROGATORY 16:** For each individual identified in Your response to Interrogatory 9, state whether that individual currently is deemed “inactive – failed to vote.”

**RESPONSE:** See Response to Interrogatory No. 4.

**INTERROGATORY 17:** Describe in detail any “information” or “belief” that formed the basis of the allegation in Paragraph 17 of CCC’s Second Amended Counterclaim that “the new rules impose a substantial burden on the ability of IFTV electors to vote, and imposes [sic] particularly significant burdens upon the voting rights of racial and ethnic minorities.”

**RESPONSE:** IFTV electors cannot access a ballot in non-primary mail ballot elections without first obtaining, filling out, and returning a specific form to county officials. IFTV electors are not adequately informed of the full consequence of their IFTV status, nor is the content and frequency of written notice provided to IFTV electors uniform across the counties.

IFTV voters who fail to complete the process of “reactivating” more than seven days before an election have no option but to vote in person. IFTV electors who do not reactivate in time and do not receive a ballot by mail have limited ability to vote because there are no traditional polling places, only voter-service centers and walk-in locations. IFTV electors must fill out a voter registration form in order to “update” their status and cast a ballot at these designated locations (or at any “drop-off location” that is located at the County Clerk’s office and is separate from a walk-in voting location). There are typically very few such locations. Based on the locations voter-service centers and walk-in locations as indicated in county mail ballot plans produced in this litigation, IFTV electors in some counties would need to travel more than 40 miles to vote. The State cannot guarantee county compliance with requirements of at least one walk-in location.

The Eagle County election official has also indicated that IFTV voters face additional hurdles to voting in mail ballot elections due to their not receiving a ballot by mail. She also knows of electors in her county who typically vote only in odd-year town elections and would thus be deemed IFTV for failure to vote in even year elections. These electors would not, under the Secretary’s new rules, receive the mail in ballot for odd-year mail ballot elections. Further, the voting public, including those in Eagle County, does not realize that they must vote in every election to remain “active.” She also indicates that the number of voters in the 2011 coordinated election would have been lower if ballots were not mailed to IFTV electors.

In addition, Dr. Masket’s report demonstrates that members of racial minorities are disproportionately affected by the refusal to mail ballots to them and are thus specially burdened by these restrictions on IFTV voting. Further, data from past elections and research based on that data shows that Latino voters are disproportionately much more likely to vote when mailed ballots.

The following documents were relied upon for this request:

- The Secretary’s 30(b)(6) deposition at 39:25-40:6; 42:16-19; 78:14-20; 121:2-128:15;
- Def. Johnson’s Resp. to Pl.’s Interrog. No. 6, May 14, 2012;
- Colorado Common Cause’s Rule 26(a)(2) Expert Witness Disclosures, Exhibit 1;

- Colorado Common Cause, Latino Voters Do Vote By Mail— But Only if We Let Them (October 2007), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/ETHNICMINORITIESDOVOTEYBYMAIL.PDF>;
- 2010 Census Data; and
- 2011 Coordinated Election Mail Ballot plans for Gunnison, Montrose, Weld, Conejos, Costilla, and Eagle Counties.

**INTERROGATORY 18:** Describe in detail any “information” or “belief” that formed the basis of the allegation in Paragraph 18 of CCC’s Second Amended Counterclaim that “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.”

**RESPONSE:** As demonstrated by the member spreadsheets produced with these responses, there are over 100 CCC members whose status remains IFTV in 2012 and 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. “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.” 8 CCR 1505-1, Rule 12.4.1(d) (Aug. 15, 2012) (hereinafter “Rule 12.4”).

**INTERROGATORY 19:** Describe in detail any facts that support CCC’s second claim that the new rules’ alleged imposition of “significant burdens upon the voting rights of racial and ethnic minorities” was the result of purposeful or intentional discrimination on the part of any Colorado government entity or official.

**RESPONSE:** The Secretary’s new Rules, 13.19 and 12.4, codify his interpretation of C.R.S. § 1-7.5-107(3)(a)(I).

The Secretary was aware based on conversations with Denver County and from the public record, prior to his attempt to prohibit Denver County from mailing ballots to IFTV voters, of the racial demographics of Denver County. The Secretary was also aware that voting by mail is the primary method of voting in mail ballot elections and that denying mail ballots to IFTV electors would make it more difficult for them to vote in those elections. The Secretary was aware of high turnout by minority voters in the 2008 general election and lower turnout by minority voters in 2010, indicating that a large number of minority voters were likely to be IFTV. Information publicly available as far back as 2007 showed the extreme disproportionate use of mail ballots among Latino voters. The Secretary was aware of the high number of language minorities in Denver and Pueblo Counties because of their inclusion in Section 203 of the Voting Rights Act and the Secretary’s participation in frequent conference calls and discussions with those counties (and others) related to compliance with the law and best practices for reaching out to these minorities. The Secretary was further aware of county officials’ positions that mailing ballots to IFTV electors would make it easier for voters to participate in the election. The Secretary was aware of the voting patterns of Denver County and indicated in

discussions with the Denver Clerk and Recorder's office that the Secretary was concerned that allowing Denver County to send mail ballots to IFTV electors where other counties were not mailing to IFTV electors could affect the outcome of a statewide ballot measure. The Secretary nevertheless proceeded to prohibit Denver County from mailing ballots to IFTV voters in the 2011 coordinated election.

Following the Secretary's attempt to prohibit Denver County from mailing ballots to IFTV electors, the Secretary was informed by Denver County of the importance of mail-in ballots for its demographics. The Secretary was aware no later than September 19, 2011 that preventing Denver County from mailing ballots would have a significantly disproportional negative impact on minority voters. The Secretary nevertheless persisted in attempting to prohibit Denver from mailing ballots to IFTV electors, and subsequently passed rules to prohibit counties from mailing ballots to IFTV electors.

The Secretary's irregular and inconsistent enforcement of the Mail Ballot Act also provides circumstantial evidence of impermissible motivation. Denver's mail ballot plan, submitted to the state, indicated that there 288,204 estimated eligible (but not active) electors in Denver County. The mail ballot plan template contained no prohibition on mailing ballots to IFTV electors, and Denver County planned to send mail ballots to active voters and IFTV electors, as the County had in past elections. Only weeks before the election, the Secretary's Director of the Division of Elections, Judd Choate, sent a letter to Denver announcing the Secretary's new interpretation of the IFTV Law to prohibit mailing ballots to IFTV electors (without explaining any basis for that interpretation) and ordering Denver not to send mail ballots to IFTV electors in accordance with that interpretation.

Not only was the timing of this announced interpretation unusual, the interpretation itself was also inconsistent with numerous other instances in which the Secretary permitted (and encouraged) counties to use their discretion and flexibility in order to encourage higher voter participation. *See* Secretary of State's Reply to Def's Br. in Opp'n to the Secretary's of State's Mot. for Prelim. Inj. at 5, *Buescher v. Doty*, Case No. 2010CV1945 (Dist. Arapahoe Oct. 7, 2010) ("Counties may exceed minimum standards for conducting elections"). For example:

- Notice must be mailed out to IFTV electors 90 days after a general election, but the Secretary allowed counties discretion to mail additional notices;
- Notice must contain certain information, but the Secretary allowed counties discretion to provide additional information;
- Counties must have one drop-off location for electors to drop off voted ballots, but the Secretary allowed counties discretion to provide more than one drop-off location;
- Counties must have one walk-in voting location for voters to cast ballots in person in mail ballot elections, but the Secretary allowed counties discretion to operate additional walk-in voting locations; and

- Counties must have voting locations open on the eight days prior to and including Election Day (Sunday excluded), but the Secretary allowed counties have the discretion to keep walk-in voting locations open additional days and longer hours to accommodate additional voters. Colo. Rev. Stat. § 1-7.5-107(4.5)(c) (2012).

Moreover, for the reasons stated in the response to Interrogatory 17 above, the fact that minority voters were much more likely to be IFTV was common knowledge, and it is implausible that the Secretary was not aware of the fact that his interpretation would disproportionately affect minority voters and pose special burdens on those voters in voting in mail ballot elections.

Following the election, the Secretary was given further information that mailing ballots to IFTV electors led to increased turnout from IFTV electors and minority voters. Media accounts indicated that thousands of IFTV electors voted when sent mail ballots, including in counties with large minority populations.

By the Secretary's own admission in this case, thousands of IFTV electors participated in the mail ballot elections when sent mail ballots. Nevertheless, following the election, the Secretary persisted in issuing rules codifying his interpretation of the mail ballot act to prohibit mailing ballots to IFTV electors. Therefore, the same impermissible motivations underlying the Secretary's interpretation of C.R.S. § 1-7.5-107(3)(a)(I) similarly underlie his issuance of the new rules.

The following documents were relied upon for this request:

- Denver County, Press Release (Sept. 19, 2011) located at <http://www.denvergov.org/clerkandrecorder/ClerkandRecorder/Newsroom/NewsReleases/tabid/437453/mid/491285/newsid491285/4983/Default.aspx>;
- Colorado Common Cause, Latino Voters Do Vote By Mail— But Only if We Let Them (October 2007), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/ETHNICMINORITIESDOVOTEBYMAIL.PDF>;
- Denver County 2011 Election Plan, SOS000295-305;
- Def. Johnson's Resp. to Pl.'s Interrog. No. 7, May 14, 2012;
- Ex. B to Compl.;
- Secretary's 30(b)(6) depo. Tr. at 29:1-11; 33:19-22; 33:23-34; 51:24-14-17; 127:16-128:15;
- Kurtis Lee, "Turnout by Colorado voters listed as 'inactive' rises after dispute," DENVER POST (Nov. 3, 2011), available at [http://www.denverpost.com/breakingnews/ci\\_19252177](http://www.denverpost.com/breakingnews/ci_19252177).

**INTERROGATORY 20:** Describe in detail any facts that support CCC's third claim that the Secretary's interpretation of C.R.S. § 1-7.5-107(3)(a)(I) allegedly imposes "special burdens on [the voting rights of] members of racial and ethnic minorities" was the result of purposeful or intentional discrimination on the part of any Colorado government entity or official.

**RESPONSE:** See response to Interrogatory No. 19.

**RESPONSE TO REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION 1:** Produce any document related to, referred to in, or that You reviewed in preparing Your answers and responses to Interrogatories 1 through 20 above.

**RESPONSE:** Where not publically available or otherwise previously produced, CCC is producing copies of documents or excel spreadsheets as indicated in the responses to interrogatories above.

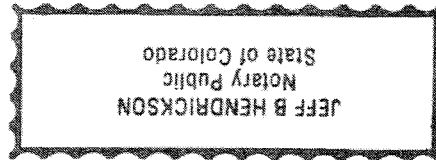
**Verification**

I, Elena Nunez, under the penalty of perjury hereby swear and affirm that the foregoing interrogatory responses are true and correct to the best of my knowledge, information and belief.



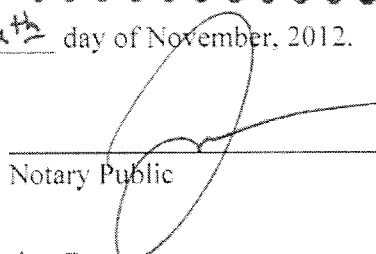
Elena Nunez, Executive Director  
Colorado Common Cause

STATE OF Colorado )  
COUNTY OF Denver ) ss



Subscribed and sworn to before me this 12th day of November, 2012.

Witness my hand and official seal.

  
Notary Public

My Commission Expires  
March 9, 2016

My Commission expires: \_\_\_\_\_

Dated November 15, 2012.

Respectfully submitted,

s/ J. Lee Gray

J. Lee Gray, #27306  
HOLLAND & HART LLP

Myrna Perez, *pro hac vice*  
Mimi Marziani, *pro hac vice*  
Jonathan Brater, *pro hac vice*  
THE BRENNAN CENTER FOR JUSTICE AT  
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**ATTORNEYS FOR INTERVENOR-DEFENDANT,  
COLORADO COMMON CAUSE**

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**CERTIFICATE OF SERVICE**

I certify that on November 15, 2012, I served a copy of the foregoing document to the following *via* Lexis-Nexis File and Serve:

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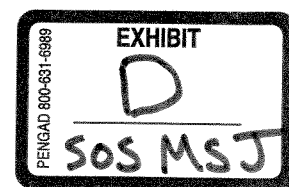
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*s/J. Lee Gray*

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<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock St. Denver, Colorado 80202</p> <hr/> <p>SCOTT GESSLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO,</p> <p>Plaintiff,</p> <p>v.</p> <p>DEBRA JOHNSON, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER FOR THE CITY AND COUNTY OF DENVER,</p> <p>Defendant,</p> <p>COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo,</p>	<p><b>FILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Dec 07 2012 11:58PM MST</b>  <b>Filing ID: 48261010</b>  <b>Review Clerk: Nicole Gawlikowski</b></p>
<p>Intervenors-Defendants.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General  MAURICE G. KNAIZER, Deputy Attorney General*  Reg. No. 05264  LEEANN MORRILL, Assistant Attorney General*  Reg. No. 38742  1525 Sherman Street, 7<sup>th</sup> Floor  Denver, CO 80203  Telephone: (303) 866-5380  FAX: (303) 866-5671  E-Mail: <a href="mailto:maurie.knaizer@state.co.us">maurie.knaizer@state.co.us</a>  <a href="mailto:leeann.morrill@state.co.us">leeann.morrill@state.co.us</a>  *Counsel of Record</p>	<p>Case No. 11CV6588  Courtroom: 203</p>
<p align="center"><b>SECRETARY'S RESPONSES TO FIRST SET OF REQUESTS FOR ADMISSION PROPOUNDED BY COLORADO COMMON CAUSE</b></p>	

Scott Gessler, in his official capacity as the Secretary of State for the State of Colorado ("the Secretary"), hereby submits his Responses to First Set of Requests for Admission Propounded by Colorado Common Cause.



## **OBJECTIONS AND RESPONSES TO REQUESTS FOR ADMISSION**

**REQUEST NO. 1:** Admit that the Secretary was informed prior to September, 2011 by the Denver Clerk that failing to mail ballots to IFTV Voters in Denver County would have a greater impact in minority voters in that county.

**Secretary's response:** Denied.

**REQUEST NO. 2:** Admit that the Secretary was informed prior to September, 2011 by the Pueblo Clerk that failing to mail ballots to IFTV Voters in Denver County would have a greater impact in minority voters in that county.

**Secretary's response:** Denied.

**REQUEST NO. 3:** Admit that the Secretary stated to the Greeley Tribune in March 2011 that he considers his official responsibilities to act to "further the conservative viewpoint."

**Secretary's response:** The Secretary admits that the Greeley Tribune reported that he made the following statement while delivering the keynote speech at the Weld County Lincoln Day Dinner in March 2011: "Obviously, you want to be thoughtful, you want to work at it, you want to take other views into consideration, but you're here to do something, to further the conservative viewpoint." The Secretary admits that the reported statement attributed to him by the Greeley Tribune is substantially accurate subject to the qualification that he may have used the term "values" instead of "viewpoint," or some other term similar to "viewpoint." The Secretary denies that he stated to the Greeley Tribune that he considers his official responsibilities to act to "further the conservative viewpoint."

**Request No. 4:** Admit that the Secretary was aware prior to September, 2011 that fifteen percent (10, 655) of IFTV voters in Denver County voted when mail ballots were sent to them in the 2011 municipal run-off election conducted in Denver County.

**Secretary's response:** Denied.

**REQUEST NO. 5:** Admit that the Secretary was aware prior to September, 2011 that the December 2010 listing of registered voters included 1,831,223 active registered voters, down 645, 979 from the month prior.

**Secretary's response:** Admitted.

**REQUEST NO. 6:** Admit that the Secretary was aware prior to September, 2011 that African Americans and Latinos participated in the 2010 general election at lower rates than in 2008 as compared to other voters.

**Secretary's response:** Denied.


**REQUEST NO. 7:** Admit that the Secretary does not pay for the costs of mailing ballots in mail ballot elections and that the process is handled by the counties.

**Secretary's response:** Denied.

**REQUEST NO. 8:** Admit that there have been no arrests or convictions for an individual taking a mail ballot sent to an IFTV voter and illegally voting with that ballot.

**Secretary's response:** Denied.

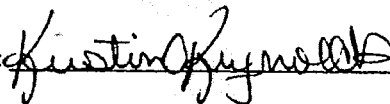
I, Scott E. Gessler, hereby certify that my foregoing responses to Intervenor-Defendant Colorado Common Cause's First Set of Requests for Admission to Plaintiff are true and complete to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Scott E. Gessler  
Secretary of State for the State of Colorado  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

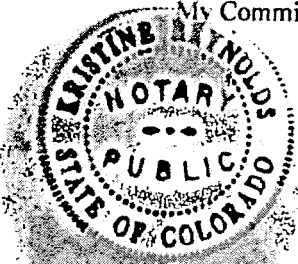
Subscribed and sworn before me by Scott E. Gessler on this 2nd day of March, 2012.

COUNTY OF DENVER                    )  
  )     [SEAL]  
STATE OF COLORADO                )

Notary Public:

  
\_\_\_\_\_

My Commission Expires: 1-2-2016



I, Judd Choate, hereby certify that my foregoing responses to Intervenor-Defendant Colorado Common Cause's First Set of Requests for Admission to Plaintiff are true and complete to the best of my knowledge, information, and belief.



Judd Choate  
Director, Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Judd Choate on this 15<sup>th</sup> day of March, 2012.

COUNTY OF DENVER )

STATE OF COLORADO )

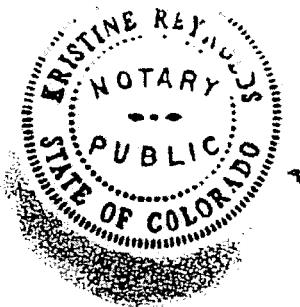
[SEAL]

Notary Public:

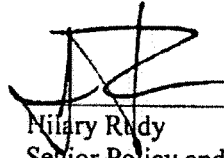


My Commission Expires:

1-2-2016



I, Hilary Rudy, hereby certify that my foregoing responses to Intervenor-Defendant Colorado Common Cause's First Set of Requests for Admission to Plaintiff are true and complete to the best of my knowledge, information, and belief.



Hilary Rudy  
Senior Policy and Legislative Analyst  
Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

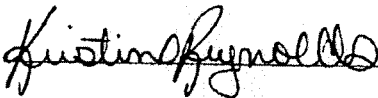
Subscribed and sworn before me by Hilary Rudy on this 15<sup>th</sup> day of March, 2012.

COUNTY OF DENVER )

STATE OF COLORADO )

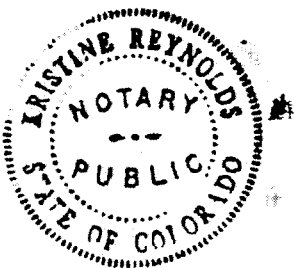
[SEAL]

Notary Public:



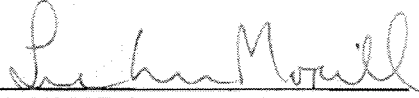
My Commission Expires:

1-2-2016



DATED this 2<sup>nd</sup> day of March, 2012.

JOHN W. SUTHERS  
Attorney General



MAURICE G. KNAIZER, 05264\*

Deputy Attorney General

LEEANN MORRILL, 38742\*

Assistant Attorney General

Public Officials Unit

State Services Section

Attorneys for Plaintiff

\*Counsel of Record

1525 Sherman Street, 7<sup>th</sup> Floor

Denver, Colorado 80203

Phone: (303)866-5380

FAX: (303)866-5671

Email: [maurie.knaizer@state.co.us](mailto:maurie.knaizer@state.co.us)

[leeann.morrill@state.co.us](mailto:leeann.morrill@state.co.us)

**CERTIFICATE OF SERVICE**


The undersigned attorney hereby certifies that on the 2<sup>nd</sup> day of March, 2012, she served a true and correct copy of the foregoing **SECRETARY'S RESPONSES TO FIRST SET OF REQUESTS FOR ADMISSION PROPOUNDED BY COLORADO COMMON CAUSE** upon each of the following individuals via LexisNexis File & Serve (service only):

Victoria J. Ortega  
David V. Cooke  
Assistant City Attorneys  
201 West Colfax Avenue, Dept. 1207  
Denver, CO 80202-5332

Daniel C. Kogovsek  
Pueblo County Attorney  
Peter S. Blood  
Assistant County Attorney  
215 West 10th Street  
Pueblo, CO 81003

---

J. Lee Gray  
Holland & Hart, LLP  
6380 S. Fiddlers Green Cir., Suite 500  
Greenwood Village, CO 80111

  
\_\_\_\_\_  
LEEANN MORRILL  
Assistant Attorney General



NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.



EFILED Document  
CO Denver County District Court 2nd JD  
Filing Date: Dec 07 2012 11:58PM MST  
Filing ID: 48261010  
Review Clerk: Nicole Gawlikowski

HOUSE BILL 08-1329

BY REPRESENTATIVE(S) Marshall, Carroll T., Curry, Kefalas, Kerr A.,  
Labuda, Madden, Middleton, Todd, Borodkin, and May M.;  
also SENATOR(S) Gordon, Groff, and Tupa.

CONCERNING PROCEDURES FOR UPDATING VOTER REGISTRATION LISTS AS  
APPLIED TO REGISTERED ELECTORS DEEMED INACTIVE IN  
CONNECTION WITH MAIL BALLOT ELECTIONS.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 1-2-605 (2), Colorado Revised Statutes, is amended  
to read:

**1-2-605. Canceling registration.** (2) A registered elector who is  
deemed "Active" but who fails to vote in a general election shall have the  
elector's registration record marked "Inactive (insert date)" by the county  
clerk and recorder following the general election. IN THE CASE OF A  
REGISTERED ELECTOR TO WHOM THE COUNTY CLERK AND RECORDER MAILED  
A CONFIRMATION CARD PURSUANT TO PARAGRAPH (a) OF SUBSECTION (6) OF  
THIS SECTION NO LATER THAN NINETY DAYS AFTER THE 2008 GENERAL  
ELECTION AND WAS RETURNED BY THE UNITED STATES POSTAL SERVICE AS  
UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE  
REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE -

*Capital letters indicate new material added to existing statutes; dashes through words indicate  
deletions from existing statutes and such material not part of act.*



UNDELIVERABLE".

**SECTION 2.** Article 7.5 of title 1, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

**1-7.5-108.5. Voter information card - verification of active status - designation of inactive status - mailing of mail ballots - repeal.**

(1) NOT LESS THAN NINETY DAYS BEFORE A MAIL BALLOT ELECTION CONDUCTED PURSUANT TO THIS ARTICLE, THE COUNTY CLERK AND RECORDER SHALL MAIL A VOTER INFORMATION CARD TO ANY REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED INACTIVE - FAILED TO VOTE." FOR PURPOSES OF THIS SECTION, "INACTIVE - FAILED TO VOTE" SHALL MEAN A REGISTERED ELECTOR WHO IS DEEMED "ACTIVE" BUT WHO FAILED TO VOTE IN A GENERAL ELECTION IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1-2-605 (2); EXCEPT THAT THE TERM "INACTIVE - FAILED TO VOTE" SHALL NOT INCLUDE AN ELECTOR WHOSE PREVIOUS COMMUNICATION FROM THE COUNTY CLERK AND RECORDER WAS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE AND IS, ACCORDINGLY, REFERRED TO IN THE REGISTRATION RECORDS OF THE COUNTY AS "INACTIVE - UNDELIVERABLE" PURSUANT TO SECTION 1-2-605 (2). THE VOTER INFORMATION CARD REQUIRED BY THIS SECTION MAY BE SENT AS PART OF THE VOTER INFORMATION CARD REQUIRED TO BE MAILED PURSUANT TO SECTION 1-5-206 (1). THE VOTER INFORMATION CARD SHALL BE SENT TO THE ELECTOR'S ADDRESS OF RECORD UNLESS THE ELECTOR HAS REQUESTED THAT SUCH COMMUNICATION BE SENT TO HIS OR HER DELIVERABLE MAILING ADDRESS PURSUANT TO SECTION 1-2-204 (2) (k) AND SHALL BE MARKED "DO NOT FORWARD".

(2) (a) IF THE VOTER INFORMATION CARD REQUIRED TO BE SENT TO A REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE" PURSUANT TO SUBSECTION (1) OF THIS SECTION IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

(b) (I) IN CONNECTION WITH ANY MAIL BALLOT ELECTION TO BE CONDUCTED IN NOVEMBER 2009, A MAIL BALLOT SHALL BE MAILED TO ALL REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE". SUCH MAIL BALLOT SHALL NOT BE SENT

TO REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - UNDELIVERABLE".

(II) THIS PARAGRAPH (b) IS REPEALED, EFFECTIVE JULY 1, 2011.

(c) IN ANY MAIL BALLOT ELECTION CONDUCTED ON OR AFTER JULY 1, 2008, IF A MAIL BALLOT SENT TO A REGISTERED ELECTOR IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

**SECTION 3.** 1-2-605, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**1-2-605. Canceling registration.** (11) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, REQUIREMENTS PERTAINING TO THE VERIFICATION BY A COUNTY CLERK AND RECORDER OF THE STATUS OF A REGISTERED ELECTOR WHO HAS BEEN DEEMED "INACTIVE" IN PREPARATION FOR A MAIL BALLOT ELECTION SHALL BE GOVERNED BY THE PROVISIONS OF SECTION 1-7.5-108.5.

---

**SECTION 4.** 1-5-101 (5), Colorado Revised Statutes, is amended to read:

**1-5-101. Establishing precincts and polling places for partisan elections.** (5) NOTWITHSTANDING SECTION 1-5-103, AND EXCEPT AS OTHERWISE REQUIRED BY FEDERAL LAW, in order to facilitate the preparation of a computerized database for use in the ~~reapportionment~~ REDISTRICTING process that will take place after the decennial census in ~~the year 2000~~ YEARS ENDING IN THE NUMBER ZERO, THE PRECINCT BOUNDARIES ESTABLISHED BY the county clerk and recorder of each county, subject to approval by the board of county commissioners, ~~shall establish precinct boundaries which~~ THAT ARE USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT shall remain in effect until after the general election in ~~2000~~ YEARS ENDING IN THE NUMBER ZERO; except that the precincts so established may be subdivided within the boundaries of the original precinct ~~Such precincts shall be established no later than twenty-nine days prior to the precinct caucus day in 1998; except that, in counties affected by the reapportionment plan required by Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996), such precincts shall be~~

~~established within two weeks after the federal district court approves of such reapportionment plan~~ AND ADJACENT PRECINCTS MAY BE AGGREGATED FOR PURPOSES OF DATA COLLECTION. In establishing precinct boundaries pursuant to the provisions of this subsection (5), county clerk and recorders and boards of county commissioners shall, to the extent reasonably possible, utilize natural and man-made boundaries that meet the requirements for visible features adopted by the United States bureau of the census. If THE PRECINCT BOUNDARIES USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT ARE CHANGED PRIOR TO THE NEXT GENERAL ELECTION IN YEARS ENDING IN THE NUMBER ZERO PURSUANT TO FEDERAL LAW, THE COUNTY CLERK AND RECORDERS SHALL TIMELY SUBMIT IN WRITING TO THE DIRECTOR OF RESEARCH OF THE LEGISLATIVE COUNCIL A LIST SHOWING THE PRECINCTS FOR WHICH THE BOUNDARIES HAVE CHANGED.

**SECTION 5. Effective date - applicability.** This act shall take effect July 1, 2008, and shall apply to mail ballot elections conducted on or after said date.

**SECTION 6. Safety clause.** The general assembly hereby finds,

---

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

---

Andrew Romanoff  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

---

Peter C. Groff  
PRESIDENT OF  
THE SENATE

---

Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

---

Karen Goldman  
SECRETARY OF  
THE SENATE

---

APPROVED \_\_\_\_\_

---

Bill Ritter, Jr.  
GOVERNOR OF THE STATE OF COLORADO

Second Regular Session  
Sixty-eighth General Assembly  
STATE OF COLORADO

**REREVISED**

*This Version Includes All Amendments*

*Adopted in the Second House*

**HOUSE BILL 12-1267**

**HOUSE BILL 12-1267**

**Review Clerk: Nicole Gawlikowski**

LLS NO. 12-0609.01 Kate Meyer x4348

**HOUSE SPONSORSHIP**

Coram,

**SENATE SPONSORSHIP**

Heath,

**House Committees**

State, Veterans, & Military Affairs

**Senate Committees**

State, Veterans & Military Affairs  
Appropriations

**A BILL FOR AN ACT**

101 **CONCERNING THE SIMPLIFICATION OF CERTAIN PREELECTION**  
102 **PROCEDURES IN ORDER TO REDUCE THE COST OF**  
103 **ADMINISTERING ELECTIONS, AND, IN CONNECTION THEREWITH,**  
104 **MAKING AN APPROPRIATION.**

**Bill Summary**

*(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)*

The bill:

! Allows the secretary of state to waive the requirement that

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate deletions from existing statute.

SENATE  
3rd Reading Unamended  
May 7, 2012

SENATE  
Amended 2nd Reading  
May 4, 2012

HOUSE  
3rd Reading Unamended  
March 22, 2012

HOUSE  
Amended 2nd Reading  
March 20, 2012



a political subdivision must use a vote center in an election other than a general election before establishing a vote center for a general election;

- ! Repeals the requirement that ballots sent by mail contain ballot stubs;
- ! Consolidates voter information card mailings, adds information that must be included on such mailings, and extends the deadline by which the mailings must be made for a primary election conducted as a mail ballot election; and
- ! Reduces, to 7 days prior to any election, the time allotted for early voting and specifies that, while a board of county commissioners has the discretion to extend early voting hours, it may not increase the period of time for early voting.

---

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** In Colorado Revised Statutes, **add 1-2-229 as follows:**

**1-2-229. Change in status of electors deemed "Inactive - failed to vote" - transfer to active status - repeal. (1) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, ANY REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE" AS OF THE EFFECTIVE DATE OF THIS SECTION SHALL FROM THAT DATE FORWARD BE DEEMED TO HOLD THE STATUS OF AN ACTIVE ELECTOR.**

**(2) (a) BY AUGUST 1, 2012, THE SECRETARY OF STATE SHALL UPDATE THE STATEWIDE VOTER REGISTRATION DATABASE TO REFLECT THE ELIMINATION OF "INACTIVE - FAILED TO VOTE" VOTER STATUS PURSUANT TO SUBSECTION (1) OF THIS SECTION AND, AS APPROPRIATE, RESTORE PERMANENT MAIL-IN VOTER STATUS TO THOSE ELECTORS WHO HAD PREVIOUSLY SELECTED SUCH STATUS BUT HAD SUBSEQUENTLY BEEN MARKED AS "INACTIVE - FAILED TO VOTE".**

**(b) THIS SUBSECTION (2) IS REPEALED, EFFECTIVE JULY 1, 2013.**

1           **SECTION 2. In Colorado Revised Statutes, 1-2-605, amend (1)**  
2           **(a) (I), (1) (b), (3), (4) introductory portion, (6) (a), and (7); and repeal**  
3           **(2), (5), and (11) as follows:**

4           **1-2-605. Canceling registration - voter confirmation card.**

5           (1) (a) (I) Communication by mail from the county clerk and recorder to  
6           the registered eligible electors of a county shall be in the form of a voter  
7           information card, including but not limited to the elector's name and  
8           address, precinct number, and polling place, which shall be mailed to the  
9           elector's address of record unless the elector has requested that the card  
10           be sent to his or her deliverable mailing address pursuant to section  
11           1-2-204 (2) (k). The county clerk and recorder shall send a voter  
12           information card by forwardable mail to each active registered eligible  
13           elector of the county, as defined in section 1-1-104 (16). and by  
14           nonforwardable mail to each inactive registered eligible elector, except  
15           an elector whose previous communication from the county clerk and  
16           recorder was returned by the United States postal service as undeliverable  
17           or an elector whose registration record was marked "Inactive" by the  
18           county clerk and recorder pursuant to subsection (2) of this section before  
19           the general election of 2006.

20           (b) For all electors whose communication pursuant to paragraph  
21           (a) of this subsection (1) is returned by the United States postal service as  
22           undeliverable at the elector's voting address, the county clerk and recorder  
23           may SHALL mark the registration record of that elector with the word  
24           "Inactive" PHRASE "INACTIVE - RETURNED MAIL".

25           (2) A registered elector who is deemed "Active" but who fails to  
26           vote in a general election shall have the elector's registration record  
27           marked "Inactive (insert date)" by the county clerk and recorder following



1 the general election. In the case of a registered elector to whom the  
2 county clerk and recorder mailed a confirmation card pursuant to  
3 paragraph (a) of subsection (6) of this section no later than ninety days  
4 after the 2008 general election and was returned by the United States  
5 postal service as undeliverable, the county clerk and recorder shall mark  
6 the registration record of that elector with the words "Inactive -  
7 undeliverable".

8 (3) Any registered elector whose registration record has been  
9 marked "Inactive" "INACTIVE - RETURNED MAIL" shall be eligible to vote  
10 in any election where registration is required and the elector meets all  
11 other requirements.

12 (4) Any "Inactive" "INACTIVE - RETURNED MAIL" elector shall be  
13 deemed "Active" if:

14 (5) If a mail or mail-in ballot that was mailed pursuant to the  
15 requirements of this article to an elector who has been deemed "Active"  
16 is returned to the county clerk and recorder by the United States postal  
17 service as undeliverable, the county clerk and recorder shall send to the  
18 elector's address of record, unless the elector has requested that such  
19 communication be sent to his or her deliverable mailing address pursuant  
20 to section 1-2-204 (2) (k), a notice pursuant to section 1-2-509 by  
21 forwardable mail and a postage prepaid, preaddressed form by which the  
22 elector may verify or correct the address information. If the elector  
23 verifies that he or she resides in a county other than the county mailing  
24 the mail or mail-in ballot, the county clerk and recorder shall forward the  
25 address information to the county clerk and recorder of the county in  
26 which the voter resides. If the elector fails to respond, the county clerk  
27 and recorder shall mark the registration record of that elector with the

1 word "Inactive".

2 (6) (a) No later than ninety days after any general election, any  
3 registered elector whose registration record is marked "Inactive"  
4 "INACTIVE - RETURNED MAIL" and who has not previously been mailed a  
5 confirmation card shall be mailed a confirmation card by the county clerk  
6 and recorder.

7 (7) If the county clerk and recorder receives no response to the  
8 confirmation card and the elector has been designated "Inactive"  
9 "INACTIVE - RETURNED MAIL" for two general elections since the  
10 confirmation card was mailed pursuant to the requirements of this article,  
11 the county clerk and recorder shall cancel the registration record of the  
12 elector; except that, notwithstanding any other provision of law, no  
13 elector's registration record shall be canceled solely for failure to vote.

14 (11) Notwithstanding any other provision of this section,  
15 requirements pertaining to the verification by a county clerk and recorder  
16 of the status of a registered elector who has been deemed "Inactive" in  
17 preparation for a mail ballot election shall be governed by the provisions  
18 of section 1-7.5-108.5.

19 **SECTION 3.** In Colorado Revised Statutes, 1-5-206, **amend** (1)  
20 (a) as follows:

21 **1-5-206. Postcard notice - reimbursement of mailing cost.**

22 (1) (a) ~~No later than twenty-five~~ NOT LESS THAN SIXTY days before the  
23 general election or a special legislative election, the county clerk and  
24 recorder shall mail a voter information card concerning the general  
25 election or special legislative election by forwardable mail \_\_\_ to each  
26 active registered eligible elector of the county, as defined in section  
27 1-1-104 (16). ~~and by nonforwardable mail to each inactive registered~~

1 eligible elector, except an elector whose previous communication from  
2 the county clerk and recorder was returned by the United States postal  
3 service as undeliverable or an elector whose registration record was  
4 marked "Inactive" by the county clerk and recorder pursuant to section  
5 1-2-605 (2) before the general election of 2006.

6 **SECTION 4.** In Colorado Revised Statutes, 1-5-102.7, **amend** (7)  
7 as follows:

8 **1-5-102.7. Combining precincts and polling places - vote**  
9 **centers.** (7) The designated election official of a political subdivision  
10 shall not establish vote centers for a general election unless vote centers  
11 were used in a previous election held by the political subdivision in an  
12 odd-numbered year or in a primary election held on or after January 1,  
13 2006; EXCEPT THAT THE SECRETARY OF STATE MAY WAIVE THIS  
14 REQUIREMENT IF THE DESIGNATED ELECTION OFFICIAL TIMELY SUBMITS A  
15 PLAN FOR IMPLEMENTATION THAT SATISFACTORILY DEMONSTRATES TO  
16 THE SECRETARY OF STATE THAT THE POLITICAL SUBDIVISION IS CAPABLE  
17 OF CONDUCTING A GENERAL ELECTION AT A VOTE CENTER.

18 **SECTION 5.** In Colorado Revised Statutes, 1-5-407, **amend** (1.5)  
19 as follows:

20 **1-5-407. Form of ballots.** (1.5) A ~~duplicate~~ BALLOT stub is not  
21 required for a ballot that is prepared for A MAIL-IN BALLOT OR a mail  
22 ballot election pursuant to article 7.5 of this title.

23 **SECTION 6.** In Colorado Revised Statutes, 1-5-505.5, **amend** (3)  
24 (a) and (3) (b) as follows:

25 **1-5-505.5. State reimbursement to counties for ballot measure**  
26 **elections.** (3) For any other odd- or even-numbered year election in  
27 which a state ballot issue or state ballot question is on the ballot of a

1 particular county, the state shall reimburse such county for the cost of the  
2 duties performed by the county clerk and recorder that relate to  
3 conducting the election on the ballot issue or ballot question; except that  
4 the reimbursement shall be set at the following rates:

5 (a) For counties with ten thousand or fewer active registered  
6 electors, ~~eighty cents~~ NINETY CENTS for each active registered elector as  
7 of the time of the election;

8 (b) For counties with more than ten thousand active registered  
9 electors, ~~seventy cents~~ EIGHTY CENTS for each active registered elector as  
10 of the time of the election.

11 **SECTION 7.** In Colorado Revised Statutes, 1-7.5-107, **amend**  
12 (2.3) (a) and (3) (a) (II) (A) as follows:

13 **1-7.5-107. Procedures for conducting mail ballot election -**  
14 **primary elections - first-time voters casting a mail ballot after having**  
15 **registered by mail to vote.** (2.3) (a) Not less than ~~thirty days nor more~~  
16 ~~than forty-five~~ SIXTY days before a primary election that is conducted as  
17 a mail ballot election pursuant to this article, the county clerk and  
18 recorder shall mail a notice by forwardable mail to each unaffiliated  
19 active registered eligible elector. and to each unaffiliated registered  
20 eligible elector whose registration record has been marked as "Inactive -  
21 failed to vote".

22 (3) (a) (II) (A) If a primary election is conducted as a mail ballot  
23 election pursuant to this article, in addition A MAIL BALLOT PACKET SHALL  
24 BE MAILED to active registered electors who are affiliated with a political  
25 party. the mail ballot packet shall be mailed to each registered elector who  
26 is affiliated with a political party and whose registration record has been  
27 marked as "Inactive - failed to vote".

1           **SECTION 8.** In Colorado Revised Statutes, 1-7.5-108.5, amend  
2 (2) (c); and repeal (1) and (2) (a); and add (3) as follows:

3           **1-7.5-108.5. Voter information card - verification of active**  
4 **status - designation of inactive status - mailing of mail ballots.** (1) Not  
5 less than ninety days before a mail ballot election conducted pursuant to  
6 this article, the county clerk and recorder shall mail a voter information  
7 card to any registered elector whose registration record has been marked  
8 "Inactive - failed to vote". For purposes of this section, "Inactive - failed  
9 to vote" shall mean a registered elector who is deemed "Active" but who  
10 failed to vote in a general election in accordance with the provisions of  
11 section 1-2-605 (2); except that the term "Inactive - failed to vote" shall  
12 not include an elector whose previous communication from the county  
13 clerk and recorder was returned by the United States postal service as  
14 undeliverable and is, accordingly, referred to in the registration records  
15 of the county as "Inactive - undeliverable" pursuant to section 1-2-605  
16 (2). The voter information card required by this section may be sent as  
17 part of the voter information card required to be mailed pursuant to  
18 section 1-5-206 (1). The voter information card shall be sent to the  
19 elector's address of record unless the elector has requested that such  
20 communication be sent to his or her deliverable mailing address pursuant  
21 to section 1-2-204 (2) (k) and shall be marked "DO NOT FORWARD".

22           (2) (a) If the voter information card required to be sent to a  
23 registered elector whose registration record has been marked as "Inactive  
24 = failed to vote" pursuant to subsection (1) of this section is returned by  
25 the United States postal service as undeliverable, the county clerk and  
26 recorder shall mark the registration record of that elector with the words  
27 "Inactive - undeliverable".

1           (c) In any mail ballot election conducted on or after July 1, 2008,  
2           if a mail ballot sent to a registered elector is returned by the United States  
3           postal service as undeliverable, the county clerk and recorder shall mark  
4           the registration record of that elector with the words "~~Inactive~~ =  
5           undeliverable" "INACTIVE - RETURNED MAIL". THE CLERK AND RECORDER  
6           SHALL MAIL A VOTER CONFIRMATION CARD PURSUANT TO SECTION 1-2-605  
7           (6) (b) TO ANY ELECTOR WHOSE BALLOT WAS RETURNED BY THE UNITED  
8           STATES POSTAL SERVICE AS UNDELIVERABLE.


9           (3) A VOTER INFORMATION CARD ISSUED UNDER THIS SECTION  
10          SHALL ADVISE THE ELECTOR OF HIS OR HER STATUS AS ACTIVE OR  
11          INACTIVE, PARTY AFFILIATION, WHETHER HE OR SHE WILL RECEIVE A  
12          BALLOT BY MAIL, AND, IF NOT, WHAT HE OR SHE MUST DO IN ORDER TO  
13          RECEIVE A BALLOT. THE VOTER INFORMATION CARD SHALL ALSO INCLUDE  
14          A RETURNABLE PORTION THAT THE ELECTOR MAY USE TO UPDATE HIS OR  
15          HER REGISTRATION RECORD, AFFILIATE WITH A POLITICAL PARTY, AND  
16          REQUEST A MAIL BALLOT.

17          **SECTION 9.** In Colorado Revised Statutes, 1-8-104.5, add (3)  
18          and (4) as follows:

19          **1-8-104.5. Application for permanent mail-in voter status -**  
20          **legislative declaration.** (3) (a) NOTWITHSTANDING ANY OTHER  
21          PROVISION OF LAW, ANY ELIGIBLE ELECTOR WHOSE REGISTRATION RECORD  
22          HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE", WHOSE STATUS HAS  
23          BEEN CHANGED TO ACTIVE IN ACCORDANCE WITH SECTION 1-2-229, AND  
24          WHO HAD PREVIOUSLY SELECTED PERMANENT MAIL-IN VOTER STATUS  
25          PURSUANT TO THE REQUIREMENTS OF THIS SECTION SHALL HAVE THE  
26          STATUS OF PERMANENT MAIL-IN VOTER RESTORED AS OF THE EFFECTIVE  
27          DATE OF THIS SUBSECTION (3).

1           (b) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND  
2           DECLARES THAT THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION  
3           (3) ARE NECESSARY TO CLARIFY EXISTING LAW AND TO ENSURE A UNIFORM  
4           APPLICATION OF THE RECENT JUDICIAL DETERMINATION THAT AN  
5           ELECTOR'S STATUS OF "INACTIVE - FAILED TO VOTE" DOES NOT OPERATE  
6           TO INVALIDATE, TERMINATE, OR SUSPEND THAT ELECTOR'S REGISTRATION.

7           (4) IN CONNECTION WITH ANY ELECTION CONDUCTED ON OR AFTER  
8           THE EFFECTIVE DATE OF THIS SUBSECTION (4), IF A MAIL-IN BALLOT SENT  
9           TO A REGISTERED ELECTOR IS RETURNED BY THE UNITED STATES POSTAL  
10           SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL  
11           MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS  
12           "INACTIVE - RETURNED MAIL". THE CLERK AND RECORDER SHALL MAIL A  
13           VOTER CONFIRMATION CARD PURSUANT TO SECTION 1-2-605 (6) (b) TO  
14           ANY ELECTOR WHOSE BALLOT WAS RETURNED BY THE UNITED STATES  
15           POSTAL SERVICE AS UNDELIVERABLE.

16             
17           **SECTION 10. Appropriation.** (1) In addition to any other  
18           appropriation, there is hereby appropriated, out of any moneys in the  
19           department of state cash fund created in section 24-21-104 (3) (b),  
20           Colorado Revised Statutes, not otherwise appropriated, to the department  
21           of state, for the fiscal year beginning July 1, 2012, the sum of \$642,286,  
22           or so much thereof as may be necessary, to be allocated for the  
23           implementation of this act as follows:

24           (a) \$615,646 for local election reimbursement; and  
25           (b) \$26,640 for the information technology services division, for  
26           reprogramming of the statewide Colorado voter registration and elections  
27           system.

1           **SECTION 11. Applicability.** The provisions of this act apply to  
2 elections conducted on or after the effective date of this act.

3           **SECTION 12. Safety clause.** The general assembly hereby finds,  
4 determines, and declares that this act is necessary for the immediate  
5 preservation of the public peace, health, and safety.

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**Rule 12. Rules Concerning Mail Ballot Elections****12.1 Definitions.**

12.1.1 A secrecy sleeve or secrecy envelope shall be sealed, or closed on at least two sides, one of which shall be the bottom of the sleeve.

(a) In accordance with Rule 51, the designated election official shall use a current approved version of the Secrecy Sleeve with Voter Instructions or Voter Instructions form.

(b) The approved form will at a minimum include:

- (i) Instructions to return a copy of identification with the ballot for first time electors who are required to provide identification in accordance with section 1-2-501, C.R.S.;
- (ii) Information regarding the availability of accessible voting systems in elections coordinated by the county clerk and recorder;
- (iii) Information regarding how to vote and return the ballot or obtain a replacement; and
- (iv) Instructions to include adequate postage.

12.1.2 A separate mail ballot plan is not required from a political subdivision if a county clerk and recorder submits a mail ballot plan for a coordinated election which includes the political subdivision.

**12.2 Election Judges.**

12.2.1 The designated election official for the election may appoint an appropriate number of judges to receive the ballots after they are mailed, to handle "walk-in" balloting and mail-in ballots at the sites designated for "walk-in" balloting, to check registrations, to inspect, verify, and duplicate ballots when necessary, and to count the ballots and certify results.

**12.3 Notice of elections.****12.3.1 Call and notice.**

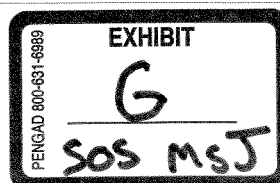
(a) Notice of the election is to be sent to the clerk and recorder of the county in which the election is to be held. The notice is to include the date by which the list of registered electors is to be submitted to the political subdivision.

(b) For multi-county political subdivisions, the notice sent to each clerk and recorder shall also include the names of all other counties in which the election will be held.

**12.3.2 Repealed.**

12.3.3 For elections coordinated by the county clerk and recorder, a security plan shall be submitted in accordance with Rule 43 in addition to the mail ballot plan submitted in accordance with this Rule.

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12.3.4 Prior to making a determination to conduct a Primary Election as a mail ballot election, a county clerk and recorder shall give public notice and seek public comment on such determination for a period of not less than ten business days in accordance with section 1-7.5-105(1.5)(b), C.R.S. Such public comment shall be in the form of accepting written comment or conducting a public hearing or both. All written comments received and audio recordings, where applicable, shall be retained as election records.

12.3.5 Repealed.

## 12.4 Mail Ballot Plans

12.4.1 Coordinated and non-partisan elections.

(a) Written plan. The designated election official must submit a mail ballot plan to the Secretary of State no later than 55 days before any nonpartisan election, and 90 days before any election that is coordinated with or conducted by the county clerk and recorder. The designated election official must use the approved mail ballot plan template that includes the following:

- (1) Date of the election;
- (2) Type and name of jurisdiction involved in the election;
- (3) Description of the type of election to be conducted;
- (4) Citation of the statute(s) or home rule charter provisions authorizing the election;
- (5) Estimated number of eligible electors;
- (6) Name of the designated election official who will be responsible for all aspects of the election;
- (7) Indication of whether the county clerk and recorder will assist in the election for the entity other than by providing a list of registered electors and other information required by statute;
- (8) The address and hours of operation for all drop-off locations;
- (9) For elections coordinated by the county clerk and recorder, the total number of walk-in voting locations;
- (10) Number of accessible voting machines anticipated being used for walk-in voting locations in elections coordinated by the county clerk and recorder;
- (11) Length of time accessible voting machines will be available for walk-in voting in elections coordinated by the county clerk and recorder;
- (12) Written timetable for the conduct of the election in accordance with the statute;
- (13) Indication of how postage will be handled for ballot packets returned as undeliverable (e.g. "return postage guaranteed");

- (14) Indication of procedures to be followed to ensure compliance with statutes and rules, including persons responsible for each stage;
- (15) Description of procedures to be used to ensure ballot security at all stages of the process;
- (16) Description of procedures for maintaining privacy and security of accessible voting machines to be used in an election coordinated by the county clerk and recorder;
- (17) Description of procedures to be used for signature verification;
- (18) Description of procedures to be used for ballots returned by electors who have not previously voted in Colorado and have failed to include proper proof of identification;
- (19) Description of procedures to ensure privacy by use of a secrecy sleeve or secrecy envelope so receiving judges cannot tell how the elector voted;
- (20) Description of procedures to be used to reconcile ballots issued, ballots received, defective ballots and substitute ballots; and
- (21) An actual sample of the secrecy sleeve or secrecy envelope to be used in the mail ballot election.
- (22) 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.

(b) Deadlines and exceptions.

- (1) Repealed.
- (2) Recall election. If a non-partisan recall election will be held as a mail ballot election, the designated election official must submit a written plan to the Secretary of State within five calendar days after calling the election. The Secretary of State will approve or disapprove the plan within five calendar days of receipt in accordance with section 1-12-111.5, C.R.S.

(c) Timetable. The designated election official shall prepare a written timetable for conducting the mail ballot election for a coordinated or non-partisan election with the following specific dates or range of dates regarding each event listed below:

- (1) Date that a copy of the written plan was presented to the governing body;
- (2) Anticipated date of approval of election by the governing body;
- (3) Date of notice of election to the county clerk;

- (4) Date of notice of election to the county assessor, if property owners are eligible to vote in the election;
  - (5) Date by which the county clerk and recorder must submit the list of eligible electors to the political subdivision and, if property owners are eligible to vote in the election, the date by which the county assessor must submit the list of property owners;
  - (6) Date of close of registration;
  - (7) Date ballots will be mailed;
  - (8) Date of publication of notice of election, including information regarding walk-in voting and accessible voting options for elections conducted by the county clerk and recorder;
  - (9) Date that ballots will be made available at the designated election official's office;
  - (10) Date verification and counting of ballots will begin; and
  - (11) Date of the election.
- (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 1-7.5-107(3), C.R.S., and Rule 12.11.

12.4.2 Primary Elections conducted as a mail ballot election.

- (a) Written plan. The county clerk and recorder must submit a mail ballot plan to the Secretary of State no later than 90 days before the election. The county clerk must use the approved mail ballot plan template that includes the following:
- (1) Date of the election;
  - (2) Type and name of the jurisdiction involved in the election;
  - (3) Citation of the statute(s) or home rule charter provisions authorizing the election;
  - (4) Estimated number of eligible electors;
  - (5) The address and hours of operation for all drop-off locations;
  - (6) The address and hours of operation for all service centers;
  - (7) Description of the procedures that will be taken to ensure that each service center complies with the requirements set forth in section 1-7.5-107, C.R.S., including the number of accessible voting machines anticipated being used at each service center;
  - (8) Written timetable for the conduct of the election in accordance with statute;

- (9) Indication of how postage will be handled for ballot packets returned as undeliverable (e.g. "return postage guaranteed");
  - (10) Indication of procedures to be followed to ensure compliance with statutes and rules, including persons responsible for each stage;
  - (11) Description of procedures to be used to ensure ballot security at all stages of the process;
  - (12) Description of procedures for maintaining privacy and security of accessible voting machines to be used;
  - (13) Description of procedures to be used for signature verification;
  - (14) Description of procedures to be used for ballots returned by electors who have not previously voted in Colorado and have failed to include proper proof of identification;
  - (15) Description of procedures to ensure privacy by use of a secrecy sleeve or secrecy envelope so receiving judges cannot tell how the elector voted;
  - (16) Description of procedures to be used to reconcile ballots issued, ballots received, defective ballots and substitute ballots; and
  - (17) An actual sample of the secrecy sleeve or secrecy envelope to be used in the mail ballot election.
- 

(b) Timetable. The timetable for a Primary Election held as a mail ballot election shall include the following dates:

- (1) Date that the county gave public notice and began receiving public comments;
- (2) Anticipated date of approval of election by the governing body;
- (3) Date that the county clerk and recorder will mail a voter information card to all registered electors whose registration records have been marked "Inactive – failed to vote" in accordance with section 1-7.5-108.5(1), C.R.S.;
- (4) Date by which a county clerk and recorder must provide notice to the secretary of state in order to cancel the election;
- (5) Date that the county clerk and recorder will mail a notice by forwardable mail to each unaffiliated active registered eligible elector and to each unaffiliated registered eligible elector whose registration record has been marked as "Inactive – failed to vote;" in accordance with section 1-7.5-107(2.3)(a), C.R.S.;
- (6) Date that the ballots will be in the possession of the county clerk and recorder;
- (7) Date of the close of voter registration;
- (8) Date ballots will be mailed;

- (9) Date that ballots will be made available at the county clerk and recorder's office;
  - (10) Date of publication of notice of election, including information regarding accessible voting options for elections conducted by the county clerk and recorder;
  - (11) Dates the drop-off locations will accept mail ballots delivered by electors;
  - (12) Dates service centers will be open;
  - (13) Date verification and counting of ballots will begin;
  - (14) Date of the Primary Election.
- (c) Cancellation of the election. If, pursuant to section 1-4-104.5, C.R.S., the county clerk and recorder cancels a Primary Election prior to the close of business on the 60th day before the Primary Election, the county clerk and recorder shall complete the cancellation of Primary Election form on the Secretary of State's website and return such form to the Secretary of State within two business days.

#### 12.4.3 Approval of mail ballot plans and submission of amendments

- (a) If the Secretary of State requests modifications to a plan prior to approval, the designated election official shall submit the modified plan within ten days from the request. The secretary of state will approve or disapprove the modified plan within 15 days from the date it is received.
- (b) A designated election official may amend a timely submitted mail ballot plan by submitting a written statement outlining the amendment(s) to the plan. The amendment must state the specific section of the plan amended and the reason(s) for the amendment. The secretary of state will approve or disapprove the amendment within 15 days from the date it is received. If the amendment is received within 30 days before the election, the Secretary of State will approve or disapprove the amendment within two business days.

### 12.5 Ballots

- 12.5.1 In any election where a multiple page printed ballot is used, a voter must vote and return all pages of the ballot at the same time. Any voter who has returned at least one page of a multiple page printed ballot will be considered to have voted.
- 12.5.2 For non-partisan elections where multiple ballots will be included in the same packet or will be sent in separate packets, the ballots and return envelopes shall include distinctive markings or colors to identify political subdivisions when the colors or distinctive markings will aid in the distribution and tabulation of the ballots.
- 12.5.3 The designated election official for each political subdivision for whom one or more county clerk and recorders are conducting the election shall assure that a complete list of eligible electors in their political subdivision is sent to each appropriate county clerk and recorder, unless otherwise provided in the intergovernmental agreement. The political subdivision shall list each elector only once to assure that each elector receives one and only one ballot unless otherwise authorized.
- 12.5.4 For coordinated mail ballot elections, each county clerk and recorder may compare the

lists submitted by the various political subdivisions to assure that each elector receives the appropriate ballot or ballots for the election.

12.5.5 In accordance with section 1-7-116(1), C.R.S., for all Coordinated elections, the outgoing envelope as well as the instructions or other notice shall include a notice advising electors that they may receive a ballot from another political subdivision conducting a mail ballot election.

12.5.6 If the ballot is returned to the election official as undeliverable, the official shall not be required to re-mail the ballot packet.

12.5.7 The designated election official shall require that the eligible elector submit a copy of his or her identification as defined in Section 1-1-104(19.5), C.R.S., with the elector's ballot in the return envelope if the eligible elector registered to vote by mail pursuant to Part 5, Article 2, Title 1, C.R.S. and did not provide the required ID upon registration.

12.5.8 The county clerk and recorder shall indicate on the list of registered voters requested by the designated election official those registered voters required to provide ID pursuant to section 1-7.5-107(3.5)(b), C.R.S., unless such registered voter either:

(a) Submitted as part of the registration by mail a copy of the elector's identification as defined in Section 1-1-104(19.5), C.R.S.; or

(b) Votes pursuant to Section 1-7-111(2), C.R.S.; or

(c) Is otherwise entitled to vote under any federal law.

12.5.9 If the elector is required to provide his or her identification, the outside of the return envelope shall be marked to identify such envelope.

12.5.10 All return envelopes used in a mail ballot election coordinated by the county clerk and recorder may be formatted in such a manner that the voter's signature on the back of the envelope is concealed. [Sections 1-7.5-106 and 1-7.5-107, C.R.S.]

## 12.6 Mail-in and Early Voting

12.6.1 In a mail ballot election, any elector with a mail-in ballot request shall be sent a mail ballot to the requested address in accordance with section 1-8-111(1), C.R.S. Mail-in ballots shall be treated as mail ballots for all other purposes.

12.6.2 Establishment of a polling place for early voting shall not be required for a mail ballot election, however the location for walk-in balloting shall be maintained.

## 12.7 Receipt of Ballots

12.7.1 One or more judges shall be appointed for the site to which ballots are to be mailed to receive the ballots as mailed.

12.7.2 Each day when ballots come in, a judge shall count the ballots, batch them and record the number of ballots received.

12.7.3 The ballots shall be date-stamped when received. If any ballot is received after the time set for the closing of the elections, the ballot shall be date-stamped but the ballot shall not be counted.

- 12.7.4 Records shall also be kept of the number of ballot packets returned as undeliverable.
- 12.7.5 Ballot packets shall then be placed in a safe, secure place until the counting of the ballots.
- 12.8 If a voter has been directed to return a document with his/her voted ballot, the election judge shall open the returned envelope to retrieve the required form. If the required form cannot be found in the return envelope, the election judge shall open the secrecy envelope/sleeve to find the required form or document in an effort not to disenfranchise the voter.
- 12.8.1 If the marked return envelope does not contain proper identification, the ballot shall be treated as a "provisional" ballot. The outside of the return envelope shall be marked "provisional". The ballot shall be verified and counted as follows:
- (a) In accordance with section 1-7.5-107(3.5)(d), C.R.S., the voter shall be sent a letter explaining that he/she has not provided identification. Nothing in this rule shall be construed to prohibit the designated election official from calling the elector; however, a phone call shall not substitute for notification to the elector in writing.
  - (b) If the elector provides a copy of his/her identification within eight days after election day, then the ballot shall be verified and counted in the same manner as other mail ballots in accordance with sections 1-7.5-107 and 1-7.5-107.3, C.R.S.
- 12.9 Signature verification.
- (a) For any missing signatures, Rule 29.1 shall be followed.
  - (b) In accordance with section 1-7.5-107.3, C.R.S., the procedures in Rule 29 shall be followed for any non-matching signature on a mail ballot return envelope that is received in an election coordinated with or conducted by the county clerk and recorder. An elector may use a signature stamp because of age, disability, or other need, which shall be treated as a signature and does not require a witness.
- 12.10 Ballots Delivered in Person
- 12.10.1 All "drop-off locations" shall be accessible to electors with disabilities.
- 12.10.2 All "drop-off locations" and any walk-in voting locations shall be located within the political subdivision where feasible. If a political subdivision desires to establish a drop-off location or a site for walk-in voting outside of the county, municipality or district, permission must be obtained from the Secretary of State.
- (a) The designated election official shall state the reasons for requesting such exception in the mail ballot plan submitted to the Secretary of State for approval.
  - (b) The alternate location proposed by the designated election official shall be within reasonable proximity to the political subdivision or the majority of the electors of the political subdivision.
- 12.10.3 Any eligible elector may deliver in person to the designated or coordinated election official's office no more than ten (10) voted mail ballots.
- 12.10.4 Monitoring drop-off locations. All drop-off locations must be monitored by an election judge or video security surveillance recording system, as defined in Rule 43.



- (a) Freestanding drop-off locations must be monitored at all times.
  - (b) If the drop-off location utilizes a drop-slot into a building, the ballots must be collected in a locked container, and both the drop-slot and container must be monitored at all times.
- 12.11 Request for a replacement ballot by an active elector and request for a ballot by an inactive elector
  - 12.11.1 An elector may request a replacement ballot in-person beginning on the twenty-second day before the election and ending at 7:00 p.m., MT on election day. If the elector requests to receive the ballot by mail, he or she must make the request no later than the close of business on the seventh day before the election.
  - 12.11.2 If an elector moved at least 30 days before the election, he or she may include the address change with the ballot request.
  - 12.11.3 Request for a replacement ballot by an active elector. An active elector may request a replacement ballot in person, by mail, fax, email, or telephone.
    - (a) The elector must complete the self-affidavit on the approved form.
    - (b) If the elector requests to receive the replacement ballot by mail, the designated election official may include the self-affidavit in the mail ballot packet. The elector must complete and return the self-affidavit no later than 7:00 p.m. MT on election day.
- (c) The designated election official must indicate on the outside of the return envelope that the elector must complete and return the self-affidavit.
  - (d) The designated election official may not count a replacement ballot unless the elector completed and returned the self-affidavit by the deadline.
- 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.
- 12.11.5 A military or overseas elector whose registration record is inactive or whose ballot request has lapsed may download an application and ballot using the electronic ballot delivery system.
  - (a) The elector must submit the ballot and application in accordance with the deadlines in section 1-8.3-111 and 1-8.3.113, C.R.S., for the ballot to be counted.
  - (b) Every county must use the approved electronic delivery system to implement this rule, except that a county may obtain a waiver. The Secretary will consider the

following factors in approving or denying a request for waiver:

- i. Number of military or overseas electors registered to vote in the county;
- ii. Historical data regarding the number of military and overseas electors who have registered and voted in the county; and
- iii. Staff or other resource limitations.

12.11.6 If a county clerk and recorder conducts a primary election by mail ballot, he or she must mail a ballot to an elector whose record is marked inactive – failed to vote in accordance with section 1-7.5-107(3)(a)(II)(A), C.R.S.

#### 12.12 Surrender of Mail Ballot

12.12.1 In an election coordinated by the county clerk and recorder, beginning on the twenty-second day before the election and until 7:00 p.m. MT on election night, any voter may surrender a mail ballot to the designated election official and vote in-person on the accessible device provided for the election as required by section 1-5-705, C.R.S.

12.12.2 The mail ballot must be voided prior to issuing an in-person ballot, and the voter's record will be updated to give the voter credit for voting.

12.12.3 Any accessible device used in accordance with this rule shall be subject to the privacy, security and accuracy standards set forth in the Election Rules and Title 1, C.R.S.

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#### 12.13 Judges Duties.

12.13.1 The judges shall record the results of the election on the judges' certificate and statement.

12.13.2 The judges shall deliver the results of the election to the designated election official along with all election materials.

12.13.3 The judges shall deliver all election materials bound separately as follows:

- (a) Ballots which were counted;
- (b) Ballots which were defective, as defined in 1-7-309(4), C.R.S.;
- (c) Additional ballot pages returned after the voter cast his/her ballot that were appropriately marked and not counted in accordance with Rule 12.5.1;
- (d) Ballots/ return envelopes which may be challenged;
- (e) Return envelopes with ballots removed;
- (f) Defective return envelopes with ballots inside;
- (g) Ballot packets which were returned as undeliverable.

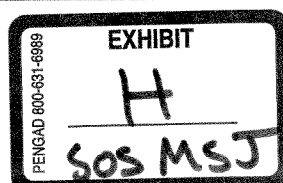
#### 12.14 Canvass of votes/certificates of election.

12.14.1 Elections can be challenged as provided in the enabling statute of the entity calling the election.

- 12.14.2 The failure of an elector to receive a ballot will not by itself be sufficient grounds for the challenge of an election, so long as the designated election official acted in substantial compliance with Title 1, Article 7.5, C.R.S. or the rules promulgated thereunder by the Secretary of State.

**Rule 13. Rules Concerning Mail-in Voting**

- FILED Document**  
**CO Denver County District Court 2nd JD**  
**Filing Date: Dec 07 2012 11:58PM MST**  
**Filing ID: 48261010**  
**Review Clerk: Nicole Gawlikowski**
- 13.1 All election materials prepared by the designated election official, including the Article X, Section 20 notice, may be included in the mail-in ballot packet.
- 13.2 The county clerk and recorder shall keep a list, to the extent possible, of the names and mailing addresses of all individuals who deliver more than ten (10) voted mail-in ballots to the designated or coordinated election official's office or the designated drop site for mail-in ballots.
- 13.3 The county clerk and recorder shall notify each individual on the list required by 13.2 by letter that they have violated section 1-8-113, C.R.S., by delivering more than ten (10) mail-in ballots to the designated election official.
- 13.4 The designated election official shall require that the eligible elector submit a copy of his or her identification as defined in section 1-1-104(19.5), C.R.S., with the elector's ballot in the return envelope if the eligible elector registered to vote by mail pursuant to Part 5, Article 2, Title 1, C.R.S., and failed to include the copy with the original registration or failed to supply a driver's license number, Colorado Department of Revenue ID number or at least the last four digits of a social security number that was subsequently verified per Rule 30.3.
- 13.5 The county clerk and recorder shall indicate on the list of registered voters requested by the designated election official those registered voters required to be identified in Rule 13.4.
- 13.6 In any election where a multiple page printed ballot is used, a voter must vote and return all pages of the ballot at the same time. Any voter who has returned at least one page of a multiple page printed ballot will be considered to have voted. Any additional page returned at a later time shall not be counted but shall be appropriately marked, set aside, and preserved as other election materials in accordance with section 1-7-802, C.R.S.
- 13.7 If the elector is required to provide his or her identification, the outside of the return envelope shall be marked to identify such envelope. A county may use additional methods to communicate the requirement to provide identification. The elector shall also be provided with specific instructions on the requirement to provide such identification.
- 13.8 If the marked return envelope does not contain proper identification, the ballot shall be verified and counted as follows:
- 13.8.1 In accordance with section 1-8-113(3)(d), C.R.S., the elector shall be sent a letter explaining that he/she has not provided identification. Nothing in this rule shall be construed to prohibit the designated election official from calling the elector; however, a phone call shall not substitute for notification to the elector in writing.
- 13.8.2 If the elector provides a copy of his/her identification within eight days after election day, then the ballot shall be verified and counted in the same manner as other mail-in ballots in accordance with section 1-8-113, C.R.S.
- 13.9 If a voter has been directed to return a document with his or her voted ballot, the election judge shall open the returned envelope to retrieve the required form. If the required form cannot be found in the return envelope, the election judge shall open the secrecy envelope/sleeve to find the required form or document in an effort to not disenfranchise the voter.
- 13.10 For any non-matching or missing signatures on a mail-in ballot return envelope, Rule 29 concerning procedures for the verification of signatures shall be followed. An elector may use a signature stamp because of age, disability, or other need, which shall be treated as a signature



and does not require a witness.

13.11 The designated election official's duties under section 1-8-112, C.R.S., are triggered if the U.S. mail is delivered collectively to the residential facility. If the U.S. mail is delivered to individuals or individual mailboxes, the requirements of section 1-8-112, C.R.S., shall not be applicable.

13.12 Mail-in voters who appear in person at the polling place shall be permitted to cast a ballot in accordance with the following provisions:

13.12.1 Mail-in voters who have requested and have been issued a mail-in ballot, who appear at the polling place on election day shall be permitted to cast a provisional ballot in accordance with section 1-8.5-101(3), C.R.S.

13.12.2 Mail-in voters who have requested and have been issued a mail-in ballot who appear at an early voting location may vote a regular ballot in accordance with section 1-8-113(1)(e), C.R.S. The mail-in ballot must be voided prior to issuing the early voting ballot.

13.12.3 Unaffiliated mail-in voters who have not been issued a mail-in ballot, who appear at their correct polling place in a primary election may affiliate and be issued a regular ballot in accordance with sections 1-7-201 and 1-8.5-101(5), C.R.S.

13.13 Permanent Mail-in Voting.

13.13.1 An application for a mail-in ballot received by the county clerk and recorder shall be treated as an application for permanent mail-in ballot only if the applicant makes such designation. If the applicant does not specify the length of the request for a mail-in ballot, the application shall be treated as an application for the current calendar year. If the applicant marks both the permanent and calendar year boxes, the application shall be treated as an application for permanent mail-in ballot.

a. If a registered elector submits a mail-in ballot application that does not contain all of the information required by section 1-8-104.5, C.R.S., the county clerk and recorder may not process the application, unless the county clerk and recorder can confidently identify the elector, except that in no event shall an application be processed if such application does not contain the elector's signature.

b. If the county clerk and recorder is unable to confidently identify the elector, the county clerk shall promptly notify the elector what additional information is required.

13.13.2 If an elector who is eligible and wishes to vote in a municipal or special district election wishes to have a mail-in ballot sent to an address other than his or her address of record, the elector shall file a separate mail-in ballot request with the designated election official of that jurisdiction.

13.14 A county clerk and recorder using the "Ballot Now" system to print mail-in ballots shall print and make ballots available no later than thirty-two (32) days preceding the election in accordance with section 1-5-403, C.R.S. Ballot issuance shall begin no later than seventy-two (72) hours after printing is complete in accordance with 1-8-111, C.R.S.

13.15 A county clerk and recorder who utilizes a third party vendor to mail ballots shall be considered to be in possession of the ballots for the purposes of sections 1-5-403 and 1-8-111, C.R.S., when the vendor has prepared the ballots for mailing, but no later than thirty-two (32) days preceding the election in accordance with section 1-5-403, C.R.S.

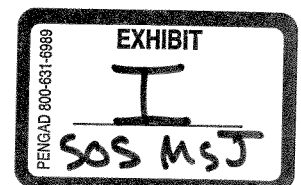
- 13.16 In addition to the language required by section 1-8-101(4)(a), C.R.S., the secrecy sleeve and instructions shall contain a statement that "All valid mail-in ballots are counted in every election in Colorado, regardless of the outcome or closeness of any race."
- 13.17 All return mail-in ballot envelopes used in an election coordinated by the county clerk and recorder may be formatted in such a manner that the voter's signature on the back of the envelope is concealed.
- 13.18 A properly executed mail-in ballot application may be submitted to the county clerk and recorder in person, by mail, by fax, by online voter registration, or as a scanned attachment to an email. For the purpose of submitting mail-in ballot applications by fax, email, or online voter registration, close of business shall be 11:59pm MT.
- 13.19 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 a mail-in ballot.
- 13.20 A military or overseas elector whose registration record is inactive or whose ballot request has lapsed may download an application and ballot using the electronic ballot delivery system.
- 13.20.1 The elector must submit the ballot and application in accordance with the deadlines in section 1-8.3-111 and 1-8.3.113, C.R.S., for the ballot to be counted.
- 13.20.2 Every county must use the approved electronic delivery system to implement this rule, except that a county may obtain a waiver. The Secretary will consider the following factors in approving or denying a request for waiver:
- 
- (a) Number of military or overseas electors registered to vote in the county;
  - (b) Historical data regarding the number of military and overseas electors who have registered and voted in the county; and
  - (c) Staff or other resource limitations.



DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO  1437 Bannock St Denver, Colorado 80203	<div style="text-align: right;"> <b>FILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Dec 07 2012 11:58PM MST</b>  <b>Filing ID: 48261010</b>  <b>Review Clerk: Nicole Gaylikowski</b>  Review Clerk: Charmaine Bright </div>
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,  COLORADO COMMON CAUSE, and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo,	
Intervenors-Defendants	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<b>NOTICE OF TRIAL</b>	

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PLEASE TAKE NOTICE that this matter has been set for a trial on the merits before the Honorable Edward Bronfin in Courtroom 203 of the Denver District Court on January 7-11 and 14-15, 2013 commencing each day at 8:30 a.m.

JOHN W. SUTHERS  
Attorney General

/s/Maurice G. Knaizer

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Public Officials

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