DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	
Plaintiff: SCOTT GESSLER v. **Defendant:** DEBRA JOHNSON, *et al.*	
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COLORADO COMMON CAUSE'S RESPONSE TO THE SECRETARY'S AMENDED RENEWED MOTION FOR JUDGMENT ON THE LAW PURSUANT TO C.R.C.P. 56(h)	

INTRODUCTION

The Secretary of State's office, just two years ago, argued before a Colorado state court that mail ballot elections "are fundamental to a democracy," that voting by mail has become "a fundamental component of the right to vote," and that the State has an obligation to

"accommodate the practical needs of voters." Secretary of State's Reply to Def's Br. in Opp'n to the Secretary's of State's Mot. for Prelim. Inj. at 3-4, *Buescher v. Doty*, Case No. 2010CV1945 (Dist. Arapahoe Oct. 7, 2010), attached as Ex. 1 (hereinafter, "Sec. Reply in *Buescher v. Doty*"). Today, the Secretary seeks this Court's assistance to make voting in mail ballot elections nearly impossible for a certain class of eligible voters, who are disproportionately members of poor and minority communities. Specifically, the Secretary seeks to prohibit duly-elected county election officers from sending ballots, in mail ballot elections, to eligible voters who did not vote in 2010. The Secretary's Amended Renewed Motion for Judgment on the Law Pursuant to C.R.C.P. 56(h) ("Pl.'s Mot.") should be denied.[1]

This litigation centers on whether the Secretary's decision to forbid the mailing of ballots to eligible electors deemed "inactive—failed to vote" ("IFTV") can be reconciled with mandates of Colorado law, the Colorado Constitution and the U.S. Constitution. Despite the Secretary's characterizations, this case is not about whether counties can choose to ignore orders from the Secretary because they "disagree" with his policy.

As explained below, the Secretary cannot proffer an interpretation of Section 1-7.5-107(3) (the "IFTV Law") of the Mail Ballot Election Act (the "MBE Act") that prohibits the mailing of ballots to IFTV voters in mail ballot elections—either through executive order or administrative rulemaking. While discovery is ongoing, the (still-developing) record clearly

[1] Colorado Common Cause ("CCC") does not respond to the issues the Secretary has raised regarding the Uniform Military and Overseas Voters Act ("UMOVA"). *See* Pl.'s Mot. at 3 (Question # 3), 19-21. CCC understands that Pueblo County will respond to the Secretary's arguments related to UMOVA, and defers to that response. Moreover, CCC responds to the first question presented for review, *see* Pl.'s Mot. at 2, 6-12, insofar as the Secretary cannot set forth an unlawful and unconstitutional interpretation of the Mail Ballot Election Act.

shows that withholding ballots in this manner erects substantial barriers for IFTV voters, impinging their ability to vote. Accordingly, the Secretary's interpretation runs contrary to the legislature's clear intent to further voter participation by enacting the MBE Act. Moreover, the Secretary's interpretation cannot be reconciled with the U.S. and Colorado Constitutions, which protect the right to vote from being unduly burdened. It is settled law that statutes must be construed in a manner which avoids constitutional infirmities, providing an independent reason to reject the interpretation of the IFTV Law offered by the Secretary.

Moreover, the Secretary brings this sweeping summary judgment motion at an inappropriate time—before the discovery period has concluded. At this juncture discovery requests are pending, expert analysis is ongoing, and additional depositions are forthcoming. The record does not contain enough information to properly evaluate CCC's constitutional claims. Unambiguous caselaw requires a court evaluating a constitutional challenge to an election regulation to weigh the injury to the right to vote against the interests offered as justifications. This "balancing approach" is intrinsically and unavoidably fact-intensive. The Court does not yet have the fully developed factual record needed to undertake this evaluation.

BACKGROUND INFORMATION

I. Procedural History

Colorado law permits counties to conduct odd-year elections by mail ballots. COL. REV. STAT. § 1-7.5-102 (2012). As required by law, Denver County submitted a mail ballot election plan to the Colorado Department of State prior to the November 1, 2011 coordinated election, indicating that the county intended to hold the election by mail ballot and that there were 288,204 estimated *eligible* electors in Denver County. (Denver County 2011 Election Plan,

SOS000295-305, Ex. 2). Notably, the mail ballot plan template contained no prohibition on mailing ballots to IFTV electors, (*id*.), and Denver County planned to send mail ballots to active voters and IFTV voters, as the County had in past elections (Def.'s Resp. to Pl.'s Interrog. No. 7, May 14, 2012, Ex. 3).

On September 16, 2011, following oral correspondence between the Secretary and Denver County, the Secretary's Director of the Division of Elections, Judd Choate, sent a letter to Denver stating that the Secretary interpreted the IFTV Law to prohibit mailing ballots to IFTV voters and ordering Denver not to send mail ballots to IFTV voters in accordance with that interpretation. (*See* Ex. B to Compl.). Thereafter, the Secretary brought the present action, initially seeking a preliminary injunction to prevent Denver from mailing ballots to IFTV voters. (*See* Pl.'s Mot. for Prelim. Inj., Sep. 26, 2011). CCC intervened to argue that the Secretary's interpretation of the IFTV Law was unlawful and unconstitutional. (*See* Order Granting Intervenor-Def. Mot. to Intervene, Nov. 16, 2011). The Court denied the Secretary's motion for a preliminary injunction, and Denver proceeded to send mail ballots to active and IFTV electors. Nine other counties also mailed ballots to IFTV electors. (Stecklein Dep. 232:21-233:3, Ex. 4; Election Activity Report CE-043, Nov. 8, 2011, Ex. 5.)

As noted above, discovery is currently ongoing, and the record does not yet contain the exact number of IFTV voters who voted in 2011 when they were sent ballots—in large part because the Secretary did not keep records of IFTV voters in the SCORE database until March 2012 (Pl. Resp. to Intervenor-Def CCC Interrog. No. 7, Feb 29, 2012, Ex. 6). Available evidence indicates, however, that mailing ballots to IFTV voters facilitated the voting of thousands of

eligible voters. According to the Secretary's own information, 5,887 IFTV voters cast ballots in the 2011 coordinated election (Ex. 6, Resp. Interrog. No. 9).

After the election, the Secretary issued a new rule codifying his interpretation of the IFTV Law as prohibiting mailing ballots to IFTV voters. The rule states that "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").

II. Undisputed Facts

Mail ballot elections have become the prevailing mode of conducting odd-year coordinated elections in Colorado. (Ex. 4, Rudy Dep. 138:17-23). Whereas in 2004, only 29 percent of ballots in Colorado were cast by mail, but that number rose to 69 percent by January 2011. *See* PEGGY CUCITI AND ALLAN WALLIS, CHANGING THE WAY COLORADO VOTES: REPORT FOR THE BEST PRACTICES AND VISION COMMISSION OFFICE OF THE COLORADO SECRETARY OF STATE, p. 17 (Feb. 2011), Ex. 7. In the November 2011 coordinated election, 60 out of 64 Colorado counties held elections by mail ballot, (Ex. 5), meaning the vast majority of ballots cast in the 2011 were by mail.

While there are other ways a voter can be deemed "inactive," IFTV voters are so designated simply because they did not vote in the most recent general even-year election. COL. REV. STAT. 1-2-605(2) (2012). Thus, a voter who voted in the 2008 presidential election but not

the 2010 congressional election would become IFTV. Unlike other types of inactive voters, there is no known problem with IFTV voters' registrations.[2]

More than 1 million registered voters in Colorado held "inactive" status as of the 2011 coordinated election. As of November 7, 2011, 1,219,617 of the state's 3,350,067 registered voters were inactive—a whopping 36 percent. (Ex. 5). While further discovery is needed to ascertain how many of these voters were specifically IFTV, available data suggests that the total number was in the hundreds of thousands and significantly higher than in previous years. To illustrate: In 2008, there were approximately 2.6 million active registered electors, but only 2.4 million voted, leaving up to 200,000 as IFTV in 2009. COLORADO SEC'Y OF STATE, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2008 PRIMARY & GENERAL ELECTIONS, *available at* http://www.sos.state.co.us/pubs/elections/Results/2008/2008_Abstract.pdf. In the 2010 election, however, only 1.8 million of 2.5 million active registered electors voted, meaning that three times as many voters could have been designated as IFTV following the 2010 election. COLORADO SEC'Y OF STATE, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2010 PRIMARY & GENERAL ELECTIONS, *available at* http://www.sos.state.co.us/pubs/elections/vote/Abstract20110630.pdf. Under the interpretation of the IFTV Law proffered by the Secretary and codified in Rule 12.4, those IFTV voters—though properly registered and eligible to vote—would not be able to vote in the ordinary fashion without first activating their status through a re-registration process.

[2] This case does not involve other kinds of inactive voters, for example "inactive-undeliverable" voters, who are designated as such if a communication from an election official to the voter is returned by the post office as undeliverable. COL. REV. STAT. § 1-2-605(1)(c) (2012). With regard to this class of inactive voters, election officials have reason to believe the voter may no longer live at her address of registration, or that there is some other problem with the address.

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—in other words, they must effectively re-register to vote. (Ex. 4. at 78:4-14). The record is unclear as to whether all IFTV voters receive notices notifying them of their status. But available evidence shows that they are not routinely informed of the full consequence of IFTV status, nor is the content and frequency of notice uniform across the counties. (*Id.* at 121:2-128:15).

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—which is undeniably more burdensome than voting by mail or voting in person in traditional elections. *(Id*. 78:14-20; Ex. 6, Resp. to Interrog. No 6). Indeed, during a mail ballot election, counties have no polling places spread out in precincts through the county. Instead, IFTV voters must fill out a form to "update" their status and cast a ballot at a designated "walk-in voting location" (or at any "drop-off location" that happens to be located at the County Clerk's Office and is separate from a walk-in voting location).[3] But, there are only a few such locations within any given county. (Ex. 4 at 83:24-84:8.) CCC's review of all mail ballot plans submitted for the November 2011 elections shows that of the 60 counties in which mail ballot elections were held, 27 counties had *one* place where an IFTV voter could cast a ballot. In 11 others, there were only two places to cast a ballot.

These inter-county disparities highlight an important fact about the implementation of mail ballot elections in Colorado. While the MBE Act sets forth various requirements for these

[3] Unless a drop-off location is located at the County Clerk's Office, IFTV voters cannot update their status and access a ballot at a drop-off location. (Ex. 3 at 83:18-23.) Notably, while counties are required to maintain at least one walk-in voting location under law, the State does nothing to monitor on-the-ground activities and can offer no assurance of compliance. (Ex. 3 at 39:25-40:6; 42:16-19.)

elections, in practice counties almost always have discretion to provide additional voter services in order to encourage higher voter participation. *See* Ex. 1, Sec. Reply in *Buescher v. Doty* at 5 ("Counties may exceed minimum standards for conducting elections"). Moreover, counties have in fact exercised this discretion to provide additional services. For example:

- Notice must be mailed out to IFTV electors 90 days after a general election, but counties have discretion to mail additional notices (Rudy Dep. 124:14-17; 127:16-25; Ex. B to Pl.'s Compl.);
- Notice must contain certain information, but counties have discretion to provide additional information (Ex. 4 at 127:16-128:15);
- Counties must have one drop-off location for electors to drop off voted ballots, but counties have discretion to provide more than one drop-off location (*Id*. at 29:1-11);
- Counties must have one walk-in voting location for voters to cast ballots in person in mail ballot elections, but counties have discretion to operate additional walk-in voting locations (*Id*. at 33:19-22);
- Counties must have voting locations open on the eight days prior to and including Election Day (Sunday excluded), but counties have the discretion to keep walk-in voting locations open additional days and longer hours to accommodate additional voters. COL. REV. STAT. § 1-7.5-107(4.5)(c) (2012); (*Id.* at 33:23-34:5).

LEGAL STANDARD

Under Rule 56(h), "[i]f there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." C.R.C.P. 56(h). The same standards that apply to full summary judgment motions also apply to a motion under Rule 56(h). *In re Estate of McCreath,* 240 P.3d 413, 417 (Colo. App. 2010). Thus, in order to prevail on a Rule 56(h) motion for a determination of question of law, the moving party has the burden of clearly demonstrating that no genuine issues of fact exist and that the party is entitled to judgment as a mater of law. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 865 (Colo. 2005). As the nonmoving party, CCC is "entitled to the

benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Id.*

The Secretary does not simply seek determination of certain legal questions under Rule 56(h). Instead, he seeks to prematurely resolve the entire matter by summary judgment on all claims *and counterclaims* in this case *(see, e.g.*, Pl.'s Mot. at 21-27) despite the outstanding material factual issues that are the subject of on-going expert and fact discovery. As such, with respect to the statutory interpretation and constitutionality issues, the Secretary's motion is really a summary judgment motion under both Rule 56(a) and (b) that should either be denied or deferred until after the parties complete discovery.[4]

Finally, summary judgment is particularly inappropriate where potentially unconstitutional motivations are at issue—which is true in this case. *Ridgeway v. Kiowa School Dist. C-2*, 794 P.2d 1020, 1024 (Colo. App. 1989) ("Summary judgment is usually inappropriate in cases dealing with potentially unconstitutional motivations. Because evidence concerning motive is almost always subject to a variety of conflicting interpretations, a full trial on the merits is normally the only way to separate permissible motivations from those that merely mask unconstitutional actions.").

[4] CCC is filing a separate motion under Rule 56(f) requesting the Court to deny the Secretary's motion as premature or stay resolution pending the necessary discovery.

ARGUMENT

I. THE BEST TEXTUAL READING OF THE STATUTE PERMITS MAILING BALLOTS TO IFTV VOTERS IN ALL MAIL BALLOT ELECTIONS

A. The Secretary's Interpretation Requires Inserting a Prohibition Not Present in the Text

The Secretary's reading of the IFTV Law as prohibiting the mailing of ballots to IFTV voters does violence to the plain text of the statute by inserting words of prohibition where none exist. Clearly, the statute requires mailing ballots to active voters in mail ballot elections – that fact is not in dispute. But the Secretary has no basis to transform mandated mailings to active voters into a system that arbitrarily shuts out IFTV voters. The legislature clearly knows how to specifically limit who shall receive ballots—it did so in partisan primary elections by mandating that ballots "shall be mailed only to those registered electors described in subparagraph (A) of this subparagraph (II) who are affiliated with the minor political party of such candidate." (emphasis added). C.R.S. § 1-7.5-107(3)(a)(II)(B). In contrast, there is no such limitation in the plain language of the IFTV Law.[5]

At best, the Secretary can argue that the statutory text is silent on whether IFTV voters receive mail ballots in mail ballot election. In that case, the best reading of the IFTV Law is that, while it requires ballots to be mailed to active electors, the IFTV Law grants local election officials the discretion to mail to IFTV electors in order to facilitate the stated legislative

[5] The Secretary makes the nonsensical claim that CCC's argument would turn all instances of the word "must" into "may." *See* Pl.'s Mot. at 16. This proposition is absurd. CCC does not contend that county clerks are free to disregard the mandates of the Election Code or MBE Act—CCC agrees that the word "shall" sets a minimum requirement that must be followed. But it is not, by itself, a limitation which prohibits county clerks from taking additional steps to further the purpose of increasing voter participation—as they do with respect to the number of walk-in or drop off locations in their counties. CCC's proposed interpretation in no way changes the other provisions cited by the Secretary.

objective of increased voter participation. This interpretation is consistent with accepted canons of statutory interpretation.

B. The Mail Ballot Election Act Is Meant to Increase Voter Participation, and is Consistently Applied to Facilitate Voting

The intent of the legislature is quite clear. As plainly set forth in the statute, the General Assembly's purpose in passing the MBE Act was to increase voter participation. COL. REV. STAT. § 1-107.5-102 (2012). Moreover, the Uniform Election Code as a whole, including the MBE Act contained within it, "shall be liberally construed so that all eligible electors may be permitted to vote…." *Id*. § 1-1-103(1) (emphasis added); see also *id*. § 1-1-103(3) (allowing "substantial compliance" with "provisions or intent of this code" rather than mandating strict, narrow compliance with exact statutory terms).

Colorado courts assume that the legislature "intends a just and reasonable result when it enacts a statute, and a statutory construction that defeats the legislative intent will not be followed." *Kauntz v. HCA–Healthone, LLC*, 174 P.3d 813, 816 (Colo. App. 2007). Thus, state courts have rejected crabbed statutory readings that would disregard legislative purpose in favor of interpretations that further legislative intent. *See*, e.g., *People ex rel. C.L.S.*, 2011 WL 5865898, *3-4 (Colo. App. 2011) (holding that court must liberally construe paternity statutes that were part of the Colorado Children's Code to serve the purpose of the Children's Code, which is the welfare of children and the best interests of society, and must "avoid any technical reading that would disregard the best interests of the child.") (internal citations omitted); *Colorado for Family Values v. Meyer*, 936 P.2d 631, 633 (Colo. App. 1997) ("A statute will not be narrowly interpreted when it is designed to declare and enforce a principle of public policy.").

For this reason, the MBE Act has been consistently implemented and interpreted to give effect to the purpose of assuring increased voter participation. *See Bruce v. City of Colorado Springs*, 971 P.2d 679, 684 (Colo. App. 1998) (holding that compelling state interest served by MBE Act is increased voter participation). As noted above, myriad requirements of the MBE Act have been interpreted as minimum requirements for county clerks, setting a floor—not a ceiling—for the actions of local officials. As a result, counties have regularly exercised this discretion to encourage voting. *See* examples listed on page 8, *supra*.

Similarly, the IFTV Law is best read to contain a minimum requirement that the county clerk "shall mail to each active registered elector" a ballot for the mail ballot election. COL. REV. STAT. § 1-7.5-107(3)(a)(I). Allowing election officials to exceed this minimum requirement and mail to IFTV electors—just like having multiple voting locations—does not contradict this statutory mandate, but rather furthers the legislative intent of increased participation.

C. The Secretary's Discussion of Legislative History Does Not Alter the Legislature's Clear Intent to Increase Voter Participation through the MBE Act

The Secretary also argues that H.B. 08-1329, which was passed in 2008, and H.B. 12-1267, which failed to pass in 2012, support his proposed interpretation of the IFTV Law. *See* Pl.'s Mot. at 15, 17-18. But these laws do not alter the legislature's clear intent to increase voter participation through the MBE Act.

As an initial matter, the Secretary's argument with respect to H.B. 08-1329 cites to no admissible evidence supporting the alleged legislative history set forth. *See* Pl.'s Mot. at 15. The Court should not entertain this unsupported argument. *See* C.R.C.P. 56(c) (listing types of admissible evidence to be considered as "pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any"). But, even if the Court decides to consider this assertion, H.B. 08-1329 does not support the Secretary's interpretation. According to the Secretary, H.B. 08-1329 was passed in response to "unique election problems in Denver and Douglas County in 2006." Pl.'s Mot. at 15. Yet the bill required election officials *in all counties* to mail ballots to IFTV electors—not just those in Denver and Douglas Counties. This broad mandate comports with the MBE Act's purpose of assuring increased voter participation, and thus supports the broader interpretation proposed by CCC. Further, the stated sunset of this provision is best read as ending the statewide mandate to mail to IFTV voters in all mail ballot elections—it does not indicate the legislature's intent to suddenly prohibit counties from doing so, in contradiction of the MBE Act's purpose.

Likewise, the secretary's argument concerning H.B. 12-1267 does not support his narrow, prohibitive interpretation. H.B. 12-1267 is not on point; that law would have done away with the entire IFTV status and was therefore much broader than the discrete questions presented here. As such, the failure to pass H.B. 12-1267 does not directly bear on the issue at hand.

II. ANY AMBIGUITY IN THE STATUTE MUST BE RESOLVED TO AVOID CONSTITUTIONAL CONCERNS

For the reasons laid out above, the statutory text is best read to permit mailing ballots to IFTV voters. But, to the extent this Court finds the statutory meaning ambiguous, there is an independent reason to reject the interpretation urged by the Secretary—the doctrine of constitutional avoidance.

A. The Doctrine of Constitutional Avoidance is Well-Established

It is settled that:

> [S]tatutory terms should be construed in a manner that avoids constitutional infirmities. Thus, if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted.

People v. Zapotocky, 869 P.2d 1234, 1240 (Colo. 1994) (citations omitted); *accord Dept. of Labor & Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008); *State Dep't of Labor & Employment v. Esser*, 30 P.3d 189, 194 (Colo. 2001); *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984) ("[W]here a statute or ordinance admits of more than one possible construction, one of which is constitutional, the constitutional construction must be adopted."). "Matter[s] of statutory construction" are "the traditional province of the courts," rendering the judiciary particularly well suited to evaluate legislative intent and ascertain the best interpretation of an ambiguous statute. *Esser*, 30 P.3d at 194 (citing *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1272 (2001)).

Colorado courts assume "that the legislative body intends the statutes it adopts to be compatible with constitutional standards"—meaning that the constitutionally-compatible interpretation is always the one that best accords with legislative intent. *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993). These principles are "particularly important…where [courts] must give effect to the language and purpose of statutory provisions ostensibly placing limitations on the ability of registered voters to exercise their fundamental right to cast their ballots in elections." *Id*. Although agencies are entitled to some deference in implementing statutes, agency interpretations must avoid any potential constitutional problems. *See Hernandez-Carrera*, 547 F.3d at 1249. Ultimately, Colorado courts review an agency's interpretation of a statute *de novo*. *Lobato v. Indus. Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005) (citing *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004).

B. The Secretary's Interpretation Raises Serious Constitutional Concerns

1. Prohibiting the Mailing of Ballots to IFTV Voters Impermissibly Burdens their Right to Vote

There is no question that " 'the right to vote is a fundamental right of the first order.' " *Meyer*, 846 P.2d at 872 (quoting *Erickson v. Blair*, 670 P.2d 749, 754 (Colo.1983)). The right to vote is protected by the U.S. Constitution, *see, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[voting] is regarded as a fundamental political right, because preservative of all rights"), and by Article II, Section 5 of the Colorado Constitution. Colorado courts have long recognized that "[c]oncomitant with the right to cast a vote is the right to have that vote counted without undue interference with the exercise of that right." *Meyer*, 846 P.2d at 872. Accordingly, as detailed *supra*, when state action burdens the right to vote, the state must validate its actions with "precise state interests" weighty enough to justify that injury. *See ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008)).

While the parties have not yet had the benefit of full discovery, see *infra*, record evidence already shows that failing to mail ballots to IFTV voters impermissibly encumbers voting. For instance, many IFTV voters must ultimately appear in person to vote—forcing those voters to spend money on transportation, to take time off of work, to obtain child care or otherwise cover their daily responsibilities, and so on. And, preliminary examination of the record evidence and publicly-available census data reveals that these distances are likely to be substantial for sizable portions of IFTV voters. For instance:

- In Costilla County, at least 53.1 percent of the voting age population live more than 10 miles from the nearest voting location; 5.3 percent live more than 20 miles away.

- In Gunnison County, at least 37.5 percent of the voting age population live more than 10 miles from the nearest voting location; 26.3 percent live more than 20 miles away.

- In Montrose County, at least 17.3 percent of the voting age population live more than 10 miles from the nearest voting location; 6.9 percent live more than 20 miles away.[6]

Moreover, preliminary analyses by CCC's expert witnesses confirm that IFTV voters are more likely to be racial minorities, who are themselves a protected class. *See* Intervenor-Def CCC's. 2nd Am. Countercl. ¶ 17 ("Upon information and belief, the new rules impose a substantial burden on the ability of IFTV electors to vote, and imposes particularly significant burdens upon the voting rights of racial and ethnic minorities."). Thus, when counties are prevented from mailing ballots to IFTV voters, minority voting rights are especially and unequally burdened.

Furthermore, due to their lower socioeconomic status on average, IFTV voters who are racial minorities likely suffer amplified burdens when they do not receive a ballot by mail. To illustrate: Recent Census data shows that non-white, voting-age residents of Colorado are almost twice as likely to lack access to a vehicle, making travel to walk-in voting locations more difficult. And, non-white residents are over four times more likely to lack a high school diploma,

[6] 2010 Census Block data shows the voting-age population in the state, available here: https://www.census.gov/rdo/data/2010_census_redistricting_data_pl_94-171_summary_files.html (TABLE P4). To determine the number of voting-age people living more than 10 miles from their nearest voting location, one must add the number of voting-age people living in 2010 Census Blocks that were in their entirety more than 10 miles from that voting location. In other words, if any part of a Census block fell within a 10-mile radius of a voting location, then all voting-age people in that block would not be included in this estimate. Therefore, counts substantially *underestimate* the number of voting-age people who live 10 or more miles from their nearest voting location. Moreover, all distances discussed are straight-line distances rather than travel distances. This is another independent reason those counts underestimate the number of people who must actually travel more than 10 miles to vote.

meaning that they will have increased difficulty navigating the bureaucratic hurdles put in front of IFTV voters by the new Rules.[7]

In sum, the record evidence to date indicates that failing to mail ballots to IFTV voters—who, as a group, are disproportionately racial minorities—imposes a substantial burden on their right to vote in violation of the U.S. and Colorado constitutions. Such arbitrary barriers to political participation are precisely what the General Assembly sought to abolish by allowing mail ballot elections, underscoring that the Secretary's interpretation cannot be reconciled with the MBE Act. Accordingly, this Court should reject the Secretary's interpretation and Rule 12.4.

2. Prohibiting the Mailing of Ballots to IFTV Voters Impermissibly Burdens their Right of Free Expression

Denying mail ballots to IFTV voters also impinges registered voters' free expression by placing special burdens on those who choose to refrain from voting. The Colorado Supreme Court has made clear that: "The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice." *Erickson v. Blair*, 670 P.2d 749, 755 (Colo. 1983) (*en banc*). Part and parcel of the right to speak and be heard through the electoral process is the right to send a message by *refraining* to vote. *Hoffman v. Maryland*, 736 F. Supp. 83, 87-88 (D. Md. 1990). Failing to mail ballots to IFTV voters penalizes such voters

[7] Specifically, the percentage of non-white, voting age residents of Colorado lacking access to a vehicle is 6.12 percent versus 3.12 percent percentage of white, voting age residents. The percentage of non-white, voting age residents of Colorado lacking a high school diploma is 27.52 percent versus 5.86 percent of the white, voting age residents. These figures are based on information from the Census' American Community Survey, Five-Year Estimates, 2006-2010 (data extraction from the Census Bureau's Data Ferrett application, available at http://dataferrett.census.gov).

for their protected decision to refrain from voting for just one election. This penalty comes in the form of an extreme burden on voting in future elections.

The Court should reject the Secretary's interpretation of the IFTV Law and any rules implementing that interpretation. County officials should be permitted to mail ballots to IFTV voters in non-primary coordinated elections, thereby ensuring that their own actions stand on firm constitutional ground.

III. SUMMARY JUDGMENT WITH REGARD TO ANY CONSTITUTIONAL CLAIM IS INAPPROPRIATE BECAUSE THERE ARE NECESSARY BUT UNRESOLVED ISSUES OF MATERIAL FACT

The Court should deny the Secretary's motion for summary judgment on CCC's claims that denying mail ballots to IFTV voters violates rights protected by the United States and Colorado Constitutions. A fact-specific inquiry is necessary to resolve constitutional challenges to election laws. The Secretary's suggestion that the Court may resolve these questions summarily—without the benefit of a factual record—is flatly wrong.

A. When Evaluating Constitutional Challenges to Election Laws, Courts Must Make a Fact-Based Inquiry

Courts evaluate the constitutionality of election laws by weighing the burden the law places on constitutional rights against the state interests promoted by that regulation. *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983); *accord Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008)*; Burdick v. Takushi*, 504 U.S. 428 (1992); *Obama for America v. Husted*, Case No. 2:12-cv-00636 (6th Cir. Oct. 5, 2012); *American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1324 (10th Cir. 2008). The *Anderson* approach entails a fact-specific inquiry: the Court must assess the magnitude of the constitutional injury, what (if any) important state interests are advanced, and whether the law is properly tailored to advance those

interests. The Secretary asks the Court to apply standards of review that are either outdated or wholly irrelevant to the election law controversy at issue. The Secretary fails to cite a single case where the *Anderson* analysis was used to dismiss a constitutional challenge to an election law before the specific facts at issue had been fully vetted and thoroughly examined.[8]

Courts apply a flexible and fact-specific standard when evaluating constitutional challenges to state rules that burden the right to vote. *Anderson*, 460 U.S. at 789–90. Under this approach, a court must "first consider the character and magnitude of the asserted injury to [the right] that the plaintiff seeks to vindicate," and "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. To pass constitutional muster, the State must demonstrate "a corresponding interest sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 190.

There is no "'litmus test' that would neatly separate valid from invalid restrictions." *Id*. Instead, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.*

Colorado courts evaluate state constitutional challenges to election laws in the same manner. *National Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988) (applying *Anderson* test to constitutional challenge to election law). Thus, just as the Court must evaluate any federal

[8] As for the Secretary's suggestion that *Crawford* supports summary disposition of the constitutional claims in the instant litigation, the *Crawford* court issued its decision only *after* reviewing substantial record evidence. 553 U.S. at 179.

constitutional challenge in light of the specific facts at issue, courts must also look to the specific facts to determine whether a state constitutional violation has occurred.[9]

There can be no question that this case is to be analyzed under the *Anderson* framework because the Secretary's interpretation of the IFTV Law plainly implicates the right to vote. The Colorado Supreme Court has unequivocally stated that voting by mail is a fundamental component of the right to vote. In *Erickson v. Blair*, 670 P.2d 749 (Colo. 1983), the Court found that absentee voting has come to occupy a significant place in modern election administration:

> We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage. We live in a society which, to a great extent, depends upon mobility as an indispensable condition of progress. Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of election. These electors, no less than in-person voters, should be able to present their views on issues of public importance without being encumbered by an unyielding standard of statutory exactitude.

Id. at 754.

The Court went on to stress that in light of this modern reality, the right to vote by mail is an essential component of "the right to vote…a right of the first order." *Id.* The Court explained that:

> Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote….A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.

[9] The Secretary's invocation of *Duprey v. Anderson*, 184 Colo. 70, 518 P.2d 807 (1974), does not alter the analysis. That case was decided eight years prior to *Anderson v. Celebrezze*, and has thus been superseded by the applicable case law.

Id.

In fact, the Secretary of State's Office has emphasized the importance of mail ballots in recent litigation. In its 2010 brief in *Buescher v. Doty*, the Secretary stressed the local government's duty to facilitate voting by mail:

> At one time, absentee voting may have been deemed a "convenience." In fact, absentee voting eventually became a fundamental component of the right to vote….Voting process must be judged in light of the realities of modern life and the fundamental character of the right of suffrage. As society becomes increasingly mobile, new methods of voting must be employed to accommodate the practical needs of voters.

Sec. Reply in *Buescher v. Doty* at 4 (quoting *Erickson v. Blair*, 670 P.2d 749 (Colo. 1983) (internal citations omitted). If the Secretary has indeed retreated from these ideals, he has not adequately explained to this Court why a law that squarely affects "a fundamental component of the right to vote" does not implicate constitutional rights.

Furthermore, the Secretary's heavy reliance on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), is unavailing for a number of reasons. One, it predates *Anderson* by 14 years and is no longer good law. Two, *Erikson* and *Doty* dispel any argument that the Court should categorically refuse to consider claims challenging denial of mail ballots. Three, the plaintiffs' claims in that case were rejected not because they asserted a right to mail ballots but "because they had presented *no evidence* to support their allegation that they were being prevented from voting." *Obama for America v. Husted* at *11, Case No. 2:12-cv-00636 (6th Cir. Oct. 5, 2012) (citing *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) ("Essentially

the Court's disposition of the claims in McDonald rested on failure of proof."); *Goosby v. Osser*, 409 U.S. 512, 520–22.[10]

Similarly, the Secretary's responses to CCC's claims of racial discrimination are meritless. The Secretary incorrectly seeks to characterize these as "disparate impact" and "disparate treatment" claims, thereby attempting to import standards from cases unrelated to voting rights and election law.[11] As explained above, the proper standard for analyzing constitutional challenges to election laws is the flexible standard described in *Crawford*, 553 U.S. at 191.

The Secretary also cites cases, including *Washington v. Davis*, 426 U.S. 229 (1976), that call for a rigid "tiers of scrutiny" level of analysis in evaluating any claim implicating race.

[10] *McDonald* is also factually distinct from the present case. There, the plaintiffs requested absentee ballots in a polling place election, so the question was whether the state was required to "make voting easier for all concerned by extending absentee voting *privileges*" to all voters who could not appear at the polls. *Id.* at 809 (emphasis added). In mail ballot elections, on the other hand, voting by mail is not a privilege or an accommodation; it is the ordinary method of voting. By denying mail ballots to IFTV voters, the state is not withholding an accommodation that makes voting easier but instead preventing them from voting like other voters.

[11] The Secretary also inexplicably asserts that this court should find an absence of intentional discrimination as a matter of law because CCC fails to "allege" intentional discrimination in its Counterclaim. Pl.'s Mot. at 25. To the extent the Secretary argues there is a defect in the form of pleading, this is not the proper subject for a motion for summary judgment under Rule 56(h). If the Secretary believes that CCC has failed to state a claim upon which relief may be granted, the relevant standard is found in C.R.C.P. 12(b). Under this standard, however, a plaintiff faces a heavy burden: "Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted." *Davidson v. Dill*, 180 Colo. 123, 131-132 (Colo. 1972); *see also Conley v. Gibson*, 355 U.S. 41 (1957) (A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")

These cases are inapposite.[12]. *Washington* did not consider a challenge to an election law and it predates the *Anderson* and *Crawford* decisions.[13]

B. Issues of Material Fact Remain Unresolved

As discovery is ongoing, myriad necessary facts remain unknown or in dispute, rendering summary judgment inappropriate. Discovery in this case does not close until November 26, 2012. CCC has pending written discovery requests to the Secretary, whose responses are due on October 26, 2012. In addition, CCC has requested that Secretary supplement his responses with respect to the decision-making process behind the decision to actively prohibit mailings to IFTV electors. Additional fact finding is necessary to determine the extent of the burden this action places on constitutionally-protected rights, including the special burdens upon minority voters, as well as to what extent not mailing ballots to IFTV voters serves legitimate state interests.

For instance, numerous facts relevant to the burden of not sending mail ballots to IFTV voters remain outstanding.

- The precise number of inactive and IFTV voters remains unclear. (*See* Ex. 5, Ex. 4 at 87:24-89:4). Indeed, the State only recently began generating SCORE reports with information about IFTV voters statewide. (Ex. 4 at 105:7-106:6.)

- Initial document review shows that the population of IFTV voters varies significantly across counties and demographic groups, raising unanswered questions. (Adams County 2011 Election Plan, SOS00067, Ex. 8; El Paso County 2011 Election Plan,

[12] To the extent the Court evaluates the Secretary's actions for intentional discrimination, a searching inquiry will be required. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977). For the Court to conduct this searching analysis without the benefit of a factual record would be difficult to say the least.

[13] Similarly, *Snowden v. Hughes*, 321 U.S. 1 (1946), which the Secretary cites for the proposition that equal protection claims based on race require a showing of intentional discrimination, has long been disfavored as the controlling standard for voting cases. *See Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011). Nor does Justice Scalia's concurring opinion in *Crawford*, also cited by the Secretary, set out the controlling standard.

SOS000371, Ex. 9.) Expert analysis of the SCORE database remains necessary. (*See* Ex. 4 at 93:5-95:25.)

- CCC's expert witnesses are still working on expert reports to be served on October 22, 2012. The preliminary work performed to date indicates that IFTV electors are overwhelmingly made up of Latino and African American citizens and the Secretary's prohibition against mailing ballots to IFTV electors will, thus, have a greater affect on these minorities than it will on Caucasian electors. Completion of this analysis is necessary.

Moreover, a number of issues of fact remain in dispute with regard to the steps IFTV voters must take when they seek to update their status, whether voters are adequately informed of the consequences of being IFTV, and how difficult it is for IFTV voters who are not initially mailed ballots to actually vote. These issues are all directly relevant to the burden on voting created by denying mail ballots to IFTV voters. To illustrate:

- As noted above, the mail-ballot election plans show that in-person voting locations in some counties are so few and far between that thousands of Coloradans could have to travel 10, 20, or even 40 miles to vote. (Gunnison County 2011 Election Plan, SOS000466-77, Ex. 10; Montrose County 2011 Election Plan, SOS000687-99, Ex. 11; and Weld County 2011 Election Plan, SOS000955-65, Ex. 12). And these are straight-line distances, meaning the actual travel distance, particularly in mountainous counties, could be much longer.

- Further analysis is needed to more precisely ascertain the characteristics of the IFTV population, and how it differs among counties, communities, and ethnic groups.

- The Secretary did not respond to initial discovery requests concerning his sudden decision to interpret the IFTV Law to prevent Denver County from mailing ballots to IFTV voters in the November 2011 election. (Ex. 6, Resp. to Interrog. No. 12 and. Req. Produc. No. 11). CCC is still waiting for a response to additional requests on the topic. (Intervenor-Def CCC's Interrog. Nos. 18-22, Sept. 21, 2012, Ex. 13). A substantive response is necessary to determine whether any impermissible motives underlay the Secretary's action.

- The Secretary has produced only its model notice and notices from a few counties, so additional discovery is needed to ascertain the information that IFTV voters in various counties actually receive. (Ex. 4 119:4-14; Form Election Notice, SOS000040-41, Ex. 14).

In short, although the Secretary describes to this Court an orderly process in which IFTV voters are notified of their status, given multiple opportunities to reactivate, and provided with a meaningful opportunity to vote, the record already shows that he knows very little about the experiences of IFTV voters in different counties. (Schler Dep. 18:3-12; Rudy Dep. 87:24-90:4; 130:23-132:14). Indeed, the Secretary made clear that he does little to ensure compliance with the mail-ballot election laws other than a summary review of each county's mail-election ballot plan. (Schler Dep. 39:25-40:16).

Further fact-finding is necessary to ensure that Court considers the burden on vote based on the *reality* of mail-ballot elections in Colorado, not merely the Secretary's court filings. These are precisely the types of facts the court should consider on the full record before ruling on the constitutionality of an election law.

CONCLUSION

For these reasons, CCC respectfully submits that the Secretary's 56(h) motion be denied.

Dated: October 17, 2012.

Respectfully submitted,

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I certify that on October 17, 2012, I served a copy of the foregoing document to the following *via* Lexis-Nexis File and Serve:

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