DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	
Plaintiff: SCOTT GESSLER v. **Defendant:** DEBRA JOHNSON, *et al.*	
Attorneys for Intervenor-Defendant, Colorado Common Cause	▲ **COURT USE ONLY** ▲
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COLORADO COMMON CAUSE'S RESPONSE TO THE SECRETARY'S C.R.C.P. 56(b) MOTION FOR SUMMARY JUDGMENT AGAINST COLORADO	

INTRODUCTION

This litigation centers on whether the Colorado Secretary of State may lawfully prevent thousands of eligible Colorado voters from participating in elections simply because they failed to vote a single time.

The Secretary has interpreted C.R.S. § 1-7.5-107(3) (the "IFTV Law") of the Mail Ballot Election Act (the "MBE Act") to prohibit the mailing of ballots in mail ballot elections to so called "IFTV" voters—voters who have failed to vote in the previous general election. Colorado Common Cause ("CCC"), an organization that represents and advocates for voters to protect the integrity of our voting system, prevent voter disenfranchisement, promote civic engagement and voter participation, and ensure that all eligible voters in Colorado, including Common Cause members, are able to vote and to have their vote counted accurately, has dozens of members who are IFTV voters. CCC has argued that the Secretary's interpretation of the IFTV law is erroneous, and moreover, unconstitutional under the U.S. and Colorado Constitutions because it would unreasonably burden the right to vote and political expression, and because it would be discriminatory against Colorado voters of color.

As explained below, the Secretary has not met his burden for disposing of this case on summary judgment on either claim because the material facts either support a finding for Defendants and Common Cause, or remain in dispute. First, the record clearly shows that withholding ballots in this manner erects substantial barriers for IFTV electors, impinging their ability to vote and to exercise political expression, and especially burdens members of racial minorities. The Secretary offers no reasonable justification for these burdens. Unambiguous caselaw requires a court evaluating a constitutional challenge alleging that an election regulation impermissibly burdens constitutional rights to weigh the injury to the right to vote against the interests offered as justifications. This "balancing approach" is intrinsically and unavoidably fact-intensive, and therefore summary judgment is inappropriate.

Additionally, the facts demonstrate that the Secretary's attempt to deny mail ballots to IFTV electors constitutes racial discrimination in violation of the Equal Protection Clauses of the U.S. and Colorado constitutions. This can be permissibly inferred as a matter of law from ample and compelling circumstantial evidence.

Accordingly, the Secretary's motion for summary judgment against CCC should be denied and this case should proceed to trial.

DISPUTED FACTS

CCC disputes several of the Secretary's alleged "undisputed" facts. The following facts (as numbered in the Secretary's motion) are disputed as indicated.

4. There are more ways to become a member of CCC than by submitting a membership form. Those who join CCC's on-line activist list, but do not fill out the membership form, are also considered and treated as members of CCC. In addition, those who make a financial contribution to CCC are considered and treated as members regardless of whether they filled out the membership form.

11. While CCC does not collect racial or ethnic minority status information directly from its members, it does have reason to believe that some of its members listed as IFTV are racial or ethnic minorities based on its access to Colorado voter data enhanced with consumer data and modeling. (*See* Dec. 21, 2012 Aff. of Elena Nunez at ¶ 10, attached as Ex. 1)

16. While CCC has no firsthand knowledge of the thoughts or intent of the Secretary or his staff, there is circumstantial evidence of an intent to discriminate against minority voters.

17-19. While CCC does not dispute the contents of the Secretary's responses to CCC's Requests for Admission, CCC disputes the Secretary's assertions that he was unaware prior to

September 2011 that failing to mail ballots to IFTV voters in Denver and Pueblo Counties would have a greater impact on minority voters in those counties and that he was unaware prior to 2011 that African Americans and Latinos participated in disproportionately higher rates in 2008 and disproportionately lower rates in 2010.

21. While CCC had not contacted all of its members across the state to inquire about their burden when it sought to intervene, it had information and belief regarding the burden on IFTV electors in having to re-register in order to receive a ballot and other facts set forth below concerning the burden on IFTV electors.

ADDITIONAL FACTS

In addition, CCC sets forth the following facts in support of this response, some of which may be disputed by the Secretary:

Facts Regarding Colorado Common Cause

1. CCC is a state chapter of Common Cause, a national non-profit citizens' advocacy group that works to ensure open, honest and accountable government at the national, state and local levels. CCC has worked to protect the integrity of our voting system and to prevent voter disenfranchisement at the national, state and local levels, including in Denver, for decades. (*See* Nunez Depo at 10:10-11:5, copy attached as Ex. 2; Pl.'s Answer to Second Am. Counterclaim at ¶ 1)

2. In the fall on 2011, CCC employed only two full-time staff. (*See* Dec. 21, 2012 Aff. of Jennifer Flanagan at ¶ 4 , attached as Ex. 3; Ex. 1 at ¶ 3).

3. A significant portion of CCC's mission relates to promoting fair elections and election protection work as part of its Just Vote! Colorado, ensuring that all eligible voters in

Colorado, including Common Cause members, IFTV electors and racial and ethnic minorities, are able to vote and that their vote is counted accurately. (Ex. 3 at ¶¶ 3, 5, Ex. 1 at ¶¶ 2, 4)

4. In the fall of 2011, it became necessary for CCC to devote significant time and resources to protecting the right of eligible Colorado voters classified as IFTV to receive a mail ballot in the November 2011 coordinated election. (Ex. 3 at ¶ 6, Ex. 1 at ¶ 5).

5. In this regard, CCC spent many, many man-hours communicating with local leaders and members of the media to analyze and address the impact of the IFTV policy, provide research, education and other support to local groups to enable them to understand the issues for voters arising as a consequence of the Secretary's position with regard to Denver's decision to mail to IFTV voters. (Ex. 3 at ¶¶ 7-8, Ex. 1 at ¶¶ 6-7).

6. While CCC's regular work on election issues has included issues related to IFTV electors for a number of years, its planned work during the fall of 2011 did not anticipate the level of outreach and education that was required. (Ex. 3 at ¶ 9, Ex. 1 at ¶ 8).

7. These efforts were a strain on the limited resources of CCC and left it with fewer resources to devote to its other priorities, including Colorado campaign finance reform, efforts to educate and advocate changes to overcome the *Citizens United* decision, and legislative session prep work. (Ex. 3 at ¶ 10, Ex. 1 at ¶ 9).

Facts about IFTV Status and Conduct of Elections

8. Mail ballot elections have become the prevailing mode of conducting odd-year coordinated elections in Colorado. (*See* Ex. 4 to CCC's Oct. 17, 2012 Response to the Secretary's Amended Rule 56(h) Motion (hereinafter "CCC Rule 56(h) Response") at 138:17-

23). Whereas in 2004, only 29 percent of ballots in Colorado were cast by mail, that number rose to 69 percent by January 2011. (*See* Ex. 7 to CCC Rule 56(h) Response).

9. In the November 2011 coordinated election, 60 out of 64 Colorado counties held elections by mail ballot, (Ex. 5 to CCC Rule 56(h) Response), meaning the vast majority of ballots cast in the 2011 were by mail.

10. 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. (*See* December 19, 2012 Affidavit of Teak Simonton at ¶ 5, attached here as Ex. 4; 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. (Ex. 4 at ¶ 5).

11. Denver has conducted seven mail ballot elections since 2008, mailing ballots to both active and IFTV electors in each, with no reported objections from the Secretary prior to the 2011 coordinated mail ballot election. (*See* Ex. 5 at ¶ 19).

12. Colorado's policy of classifying eligible voters as IFTV because those individuals fail to vote in a single general election—and prohibiting them from receiving mail ballots in mail ballot coordinated elections—is one of the most onerous inactive policies in the country. (Ex. 3 at ¶ 14, Ex. 1 at ¶ 12).

13. The assumption that IFTV electors do not vote is incorrect. (Ex. 5 at ¶ 104). Turnout data and other reports confirm that voter turnout—including that for minorities—is significantly higher in presidential elections than in other even-year general elections. (Ex. 5 at ¶ 104-105 (indicating 50% increase in Denver), Ex. 3 at ¶ 18, Ex. 1 at ¶ 16).

14. Conversely, other voters tend to vote only in local elections, thus missing general elections, which would cause them to become IFTV. (Ex. 4 at ¶ 11).

15. There are a wide variety of reasons why eligible voters may fail to vote in a particular election, including lower voter enthusiasm for non-presidential elections and less attention in non-presidential elections from the media, the political parties and civic engagement groups. (Ex. 3 at ¶ 2, Ex. 1 at ¶ 14). This can result in voters having less information about the election and being more likely to skip the election. (*Id*.) In addition, voters sometimes miss an election because they are ill, have work commitments that cannot be avoided, have child care or transportation problems and other such "life" issues that make it difficult for them to vote. (*Id*.)

16. Based on CCC's discussions with voters and elected officials across Colorado and elsewhere, it has learned that voter turnout in non-presidential year elections is less than in presidential years. (Ex. 3 at ¶ 17, Ex. 1 at ¶ 15)

17. Predictably, large numbers of voters, and in particular minority voters, who voted in 2008 did not vote in 2010. (Ex 3 at ¶ 18, Ex. 1 at ¶ 16, Ex. 5 at ¶ 104).

18. Thus, such voters in Colorado are then classified as IFTV electors, and, under the Secretary of State's interpretation of the law, would not be mailed a ballot in the 2011 all mail ballot coordinated elections. (Ex. 3 at ¶ 17, Ex. 1 at ¶ 15).

19. As of November 7, 2011, 1,219,617 (or 36%) of the state's 3,350,067 registered voters were inactive. (*See* Ex. 5 to CCC Rule 56(h) Response).

20. A state-wide voter database produced by the Secretary identified over 430,000 electors as IFTV as of March 2012. (Total from Column G in Excel spreadsheet titled "Precinct

Level Analysis," marked as Ex. 2 to Masket deposition – this document has not been included due to its size, *see also* Seth Masket Deposition at 36:17-19, copy attached here as Ex. 6).

21. In the City and County of Denver, there were 54,357 IFTV electors (over 12% of its registered voters) as of October 5, 2011. (Ex. 5 at ¶ 17).

22. The breakdown of these IFTV electors in Denver at the time is as follows:

	Total IFTV	**Total Active**	**% of IFTV**	**% of Active**	**% IFTV of Total Voters**
Democrats	24,494	123,518	44.67%	52.21%	8.40%
Republicans	6,924	43,488	12.63%	18.38%	2.38%
Unaffiliated	22,833	67,143	41.64%	28.38%	7.83%
Other Minor Parties	580	2,444	1.06%	1.03%	0.20%

(Id. at ¶ 18).

23. When mailed ballots, over 12,000 IFTV electors voted in the 2011 mail ballot elections held in the City and County of Denver. (Ex. 5 at ¶ 105).

24. In the 2008 General Election, over 21,000 people voted in Eagle County, but after lower voter turnout in 2010, approximately 7,200 Eagle County voters were listed as IFTV. (*See* Ex. 4 at ¶ 6.)

25. Whereas in 2008, 95.3% of Black registered voters and 86.7% Hispanic registered voters voted, (compared with 95.4% of White registered voters) in 2010, 67.3% of Black registered voters and 73.2% of Hispanic Voters voted (compared with 81.4% of White registered voters). (Ex. 3 at ¶19).

26. Counties are required by the Secretary to send postcard notices, using a form provided by the Secretary, to all IFTV electors to inform them of their status as an IFTV elector. But these notices do not inform voters of the full consequence of IFTV status, i.e., that they will not receive a mail ballot in odd-year coordinated mail ballot elections, nor is the content and frequency of notice uniform across the counties. (S*ee* Ex. 4 to CCC Rule 56(h) Response at 121:2-128:15, Ex. 4 at ¶ 12).

27. Counties regularly exercise discretion in exceeding statutory minimums, such as mailing out additional notices to IFTV electors in addition to the one required 90 days after a general election (*See* Ex. 4 to CCC Rule 56(h) Response at 124:14-17; 127:16-25; Ex. B to Pl.'s Compl.); including:

a. additional information in notice sent to IFTV electors in addition to the required information (Ex. 4 to CCC Rule 56(h) Response at 127:16-128:15);

b. Having more than the required single drop-off location for electors to drop off voted ballots, (*Id*. at 29:1-11);

c. operating additional walk-in voting locations in addition to the required single location for voters to cast ballots in person in mail ballot elections (*Id*. at 33:19-22); and

d. keeping walk-in voting locations open additional days and longer hours than the required eight days prior to and including Election Day (Sunday excluded) in order to accommodate additional voters (*Id.* at 33:23-34:5).

(*See also* Ex. 5 at ¶ 97; COL. REV. STAT. § 1-7.5-107(4.5)(c) (2012)).

Facts Regarding Burden on IFTV Electors

28. Colorado's IFTV classification imposes a significant burden on eligible voters, essentially penalizing these voters by requiring them to take additional steps that otherwise eligible electors in Colorado do not have to take. (Ex. 3 at ¶ 15, Ex. 1 at ¶13, Ex. 4 at ¶¶ 7-8).

29. 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 to CCC Rule 56(h) Response, at 78:4-14).

30. 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. (Ex. 4 to CCC Rule 56(h) Response at 78:14-20; Ex. 6 to CCC Rule 56(h) Response at Resp. to Interrog. No 6).

31. IFTV voters cannot update their status and access a ballot at a drop-off location (unless it is located at the County Clerk's Office). (Ex. 3 to CCC Rule 56(h) Response at 83:18-23.)

32. But, there are only a few such locations within any given county. (Ex. 4 to CCC Rule 56(h) Response at 83:24-84:8.)

33. The mail ballot plans for the November 2011 coordinated elections, produced by the Plaintiff, shows that 27 of the 60 counties in which mail ballot elections were held had *one* place where an IFTV voter could obtain and cast a ballot in person. In 11 other counties, there were only two places to obtain and cast a ballot in person. (These ballot plans are voluminous and not attached here, but are found at SOS 0063 – 0981.)

34. Publically available information available to electors, including State and county websites, offer little information to voters about their IFTV status, the consequence of being classified as IFTV or on how voters could vote as an IFTV elector, thus leaving these IFTV electors ill informed about their status, the consequences of such status on their ability to receive a ballot in odd-year coordinated elections, and confused about what, if anything, needs to be done about their status. (Ex. 3 at ¶¶ 22-23, Ex. 1 at ¶ 17, Ex. 4 at ¶ 12; *see, e.g.*, Ex. 5 at ¶¶ 77-81).

35. Many voters in Colorado prefer to vote by mail and therefore much of the media coverage about the process for voting in Colorado centers on mail balloting, which may exacerbate the confusion caused by IFTV status, as eligible voters expect to get a ballot when they are sent out. (Ex. 3 at ¶ 24, Ex. 1 at ¶ 18).

36. IFTV electors only receive one specifically-designed notice, which is sent on a postcard 90 days after the previous election. (Ex. 3. At ¶ 26).

37. These postcards do not explain the consequences of IFTV status; namely, that the voters will not receive a mail ballot in the upcoming coordinated election without reactivating.(*Id*.).

38. Because of the timing of these 90-day-post-election notices, voters are likely not focused on an upcoming election. (*Id*.)

39. Because every county varies in terms of what services are provided at voter service centers, there is confusion among voters, civic groups and sometimes county clerk staff about how an IFTV voter can get a ballot. (Ex. 3 at ¶ 27, Ex. 1 at ¶ 20).

40. The limited number of voter service centers (which might only be at the county clerk's office) in mail ballot elections also poses an additional burden to IFTV electors due to lack of public transportation. (Ex. 3 at ¶ 28, Ex. 1 at ¶ 21).

41. IFTV electors who work may have to arrange time off from work. (Ex. 3 at ¶ 29, Ex. 1 at ¶ 22).

42. Because many rural counties only have vote service centers at the county clerk's office, some IFTV electors must travel significant distances, potentially over mountain passes, to get a ballot. (Ex. 3 at ¶ 30, Ex. 1 at ¶ 21).

43. The 2011 mail-ballot election plans show that in-person voting locations in some counties are so few and far between that thousands of Coloradans would have to travel 10, 20, or 40 miles or more to request a ballot and vote in person. (Ex. 3 at ¶ 31). Three counties provide good examples of the situation in many more rural Colorado Counties:

a. In Costilla County, a significant portion of the county's population lives more than ten miles from this voter service center. Just one city in Costilla County, Blanca, Colorado, has a population of over 400 people (making up 11 % of the county population), and t 67% of its residents claim Hispanic ethnicity. Blanca is over a 20-mile drive from the sole voter service center in San Luis. (*Id*.)

b. In Gunnison County, a significant percent of the voting age population live more than 10 miles from the nearest in-person voting location. Just one city in Gunnison County, Crested Butte, Colorado, has a population of over 1,500 people (itself making up approximately 10 % of the county

population). Crested Butte is a 27-mile drive from the sole voter service center in Gunnison. (*Id.*)

c. In Montrose County a significant percent of the voting age population live more than 10 miles from the nearest only in-person voting location. Census tract 9661, which is located on the Western half of the county on the other side of the Uncompahgre Plateau, has over 2,700 people (approximately 7% of the county's population) and is more than a 75-mile drive to the sole voter service center in Montrose (requiring travel around the Uncompahgre National Forest and through neighboring San Miguel and Ouray Counties). (*Id.*)

Facts Regarding Equal Protection

44. IFTV voter status in Colorado is strongly related to race. IFTV electors in Denver and throughout Colorado are more likely to be racial minorities. (*See* Depo. of Seth Masket at 12:8-13:3, copy attached as Ex. 6, Expert report of Seth Masket at 2, copy attached as Ex. 7).

45. Dr. Masket analyzed voter registration data (provided by the Secretary in discovery) at the precinct level against racial composition statistics from the 2010 census to compare racial and ethnic characteristics of precincts with the percentage in each with IFTV status. (Ex. 7 at 3).

46. At the precinct level, for every ten percent the African American population increased, the IFTV population increased 1.6 percent. (*Id.* at 4).

47. For Latinos, the same increase would lead to an IFTV population increase of 1.3 percent (*Id.*).

48. Significantly, this analysis estimated that only 10% of whites in Colorado are IFTV while 37% of African American and 28% are Hispanic are IFTV. (*Id*. at 6-7).

49. The statistical correlation between race and IFTV status was of the strongest order seen in the social sciences (*Id.* at 4).

50. This connection between race and IFTV status is amply demonstrated by these maps, attached as Figure 2 of Dr. Masket's report:

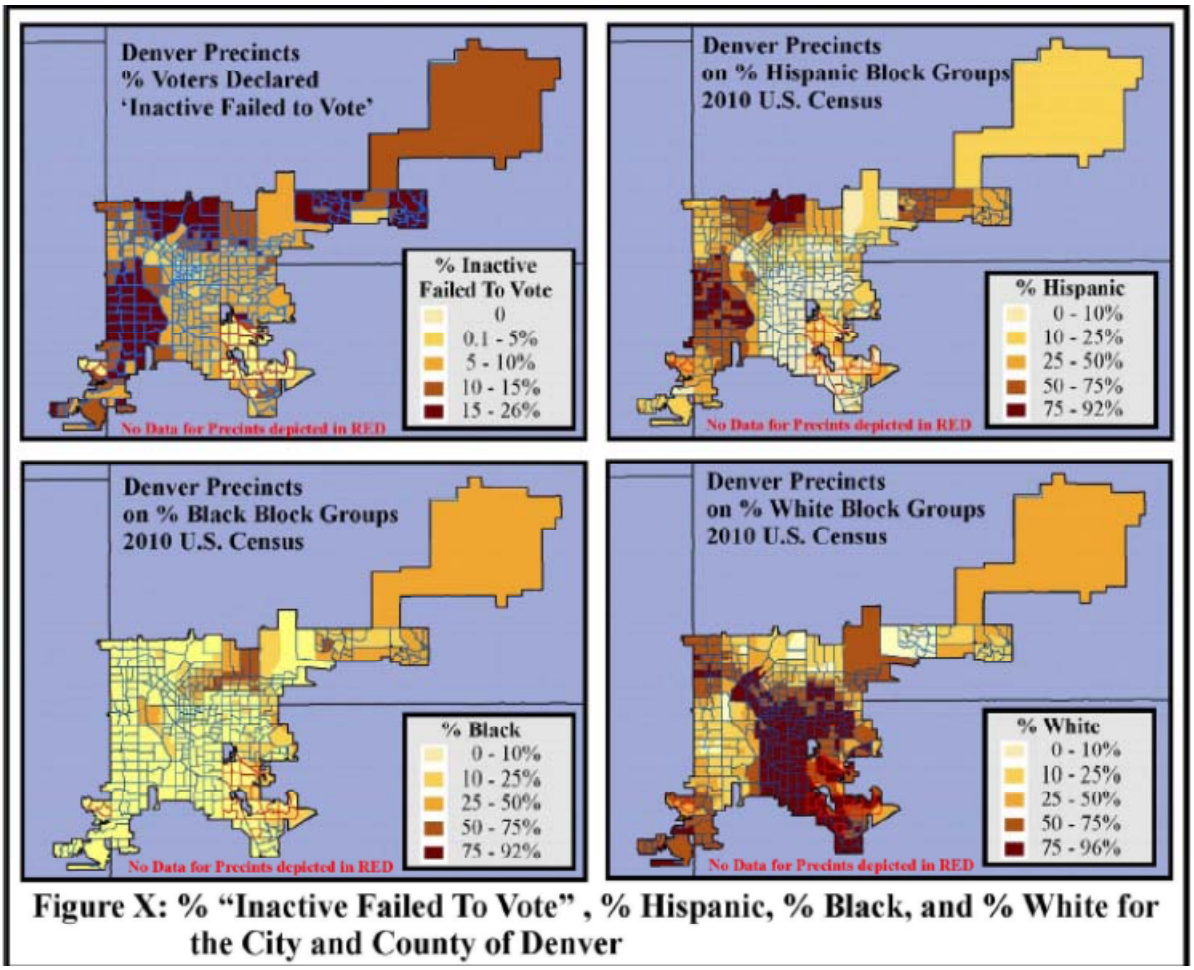

Figure X: % "Inactive Failed To Vote" , % Hispanic, % Black, and % White for the City and County of Denver

(Ex. 7 at 9).

51. Language barriers may be a factor in some voters' inability to vote by mail or understand the need to reactivate in order to receive mail ballots. (Dec. 21, 2012 Aff. of Amber McReynolds at ¶¶ 8-9, attached as Ex. 9)

52. 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. . (*See* 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)).

53. 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. (*Id*.)

54. 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. (*Id*.)

55. Prior to the 2011 coordinated election, the Secretary did not update or revise the template for mail ballot plans (which counties must complete and be approved by the Secretary prior to the election) to indicate any change with respect to IFTV electors or to prohibit mailing ballots to IFTV electors. (*See, e.g.*, Ex. 2, 8, 9, 10 to CCC's Rule 56(h) Response, Ex. 5 at ¶¶ 29-32, 38-64).

56. The Secretary accepted and approved Denver's mail ballot plans that included IFTV electors in the total number of eligible electors to be mailed ballots. (*See,* Ex. 2 to CCC's Rule 56(h) Response).

57. The Secretary's SCORE team indicated to Denver that it could mail to IFTV electors in setting up the election in SCORE. (Ex. 5 at ¶ 65).

58. Neither the Secretary's Election Policy Manual nor any other document instructing election officials in setting up and conducting the 2011 mail ballot coordinated election prohibited mailing ballots to IFTV electors. (Ex. 5 at ¶¶ 29-32, 38-64).

59. It was only after Denver's election was set up in SCORE and it began mailing ballots to certain IFTV electors that the Secretary attempted to order Denver to stop mailing to IFTV electors. (Ex. 5 at ¶ ¶ 66-71).

60. In communicating its sudden prohibition on mailing to IFTV electors to Denver, the Secretary's office indicated that it only cared about the issue because it could affect the statewide ballot measure that appeared on the November 2011 ballot. (Nov. 27, 2012 Depo. of Amber McReynolds at 286:4-17, attached here as Ex. 8).

61. The Secretary's office was well aware of the demographic makeup of Denver County and that it was a Section 203 county for the Voting Rights Act due to its high Hispanic population. (Ex. 9 at ¶¶ 2-7).

62. In fact, the Secretary facilitated routine training sessions with county clerks and staff multiple front-range counties (including Denver, Arapahoe, Jefferson, Adams, and others) regarding best practices and requirements for reaching minority voters in those counties in the event that they became classified under Section 203 of the VRA after the 2010 census. (*Id.*)

63. County clerks have expressed the importance of mailing to IFTV electors. (Ex. 4 at ¶¶ 7-10, Ex 5 at ¶ 96, 103, 105).

64. Indeed, after the Court denied the Secretary's request for a preliminary injunction, eight additional counties besides Denver and Pueblo mailed to IFTV electors in the 2011 coordinated election. (Ex. 4 to CCC Rule 56(h) Response at 232:8-233:3).

65. There is no evidence of voter fraud by IFTV electors or fraud perpetrated using IFTV electors' registrations.

66. There is no evidence of greater fraud in mail ballot elections in which ballots are mailed to IFTV electors.

ARGUMENT

I. CCC HAS BOTH ORGANIZATIONAL AND ASSOCIATIONAL STANDING TO BRING ITS CLAIMS IN THIS CASE

A. CCC Has Organizational Standing

An organization has standing to seek injunctive relief on its own behalf if : (i) it will suffer an imminent injury in fact that is "concrete and particularized"; (ii) there is a causal connection between the injury and the conduct complained of; and (iii) it is "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo.App. 1984) (association may seek judicial relief in its own right). "Colorado does not require as much as federal cases require . . . [a]ccordingly, the test in Colorado has traditionally been relatively easy to satisfy." *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, 2010 Colo. App. LEXIS 847, *6-7 (Colo. App. 2010), *rev'd on other grounds, Colo. Oil & Gas Conservation Comm'n v. Grand Valley Citizens' Alliance*, 279 P.3d 646 (Colo. 2012) (internal citations omitted).

1. CCC Would Suffer Concrete and Particularized Imminent Injury

An organization may establish an imminent and concrete injury in fact by proving that a challenged practice will either frustrate its mission or cause it to divert resources to counteract or compensate for the unlawful practices in question, interfering with its programmatic activities.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); *see also*, *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010) (citing *Havens*); *Crawford v. Marion County Election Bd*., 462 F.3d 949, 951 (7th Cir. 2007) (same); *Fla. Democratic Party v. Hood*, 342 F. Supp.2d 1073, 1079 (D. Fla. 2004) (same). Though the injury must be concrete, "it need not measure more than an 'identifiable trifle.'" *Association of Community Orgs. For Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (quoting *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)).

(a) Frustration of Mission

The Secretary's interpretation of the MBE Act would frustrate CCC's missions of civic engagement, promoting voter participation, supporting fair elections, protecting the integrity of the voting system, preventing voter disenfranchisement, and ensuring that all eligible voters in Colorado, including Common Cause members, are able to vote and to have their vote counted accurately. The record demonstrates that CCC engages in voter empowerment activity. (*See* Additional Facts ¶¶ 1, 3, *supra*). CCC is also an active member of the Election Protection Coalition, which acts to safeguard the elections process and ensure that eligible voters are able to participate. *Id.* at ¶ 3.

An organization can show frustration of mission by demonstrating both that a challenged practice is in conflict with the organization's mission and that the challenged practice will operate to make the organization's ability to achieve its mission more difficult. *Buescher,* 750 F. Supp. 2d at 1269. In this case, facts show that denying mail ballots to IFTV voters in mail-only elections would operate to frustrate CCC's missions of registering voters and engaging citizens in democracy. *Id*. at ¶¶ 2-7. Preventing eligible individuals from voting simply because they

missed a single election, is clearly at odds with CCC's mission of encouraging voter registration, voter participation and preventing disenfranchisement. Moreover, the Secretary's interpretation would disrupt the integrity of the voting system at large by subjecting voters to a confusing and unclear set of voting rules in which an otherwise eligible elector's ability to vote in an election would depend on the county and type of election, without any justification for these distinctions.

(b) Diversion of Resources

Moreover, the Secretary's interpretation interferes with CCC's programmatic activities causing it to divert resources to counteract the harmful and unlawful effects of preventing IFTV voters from participating in Elections. The Supreme Court established that this interference and diversion of resources suffices to establish injury in fact for standing purposes. *Havens*, 455 U.S. at 379. In the fall of 2011, CCC did not anticipate that it would have to devote significant time and resources to protecting the right of IFTV voters to receive a mail ballot in the November 2011 coordinated election and future elections. CITE

CCC already spent substantial resources lobbying the legislature, working with state and local officials, and communicating with voters in attempts to mitigate the harm to voters caused by the Secretary's attempt to prevent IFTV voters from participating. (Additional Facts at ¶¶ 5-7, *supra*.) Were the Secretary successful in prohibiting counties from mailing ballots to IFTV voters, CCC would be forced to divert further resources that would otherwise be devoted to its other priorities, including Colorado campaign finance reform, *Citizens United* activity, and legislative-session preparation. (*Id.* at ¶ 7). Instead, CCC would have to take action in order to mitigate the harmful effects of the practice through direct voter education, working with

community organizations and county officials to improve their voter education, and lobbying to get the law changed. (*Id.* at ¶¶ 5-6).

2. There is a Clear Causal Connection Between the Injury and the Secretary's Interpretation of the MBE Act

The pleadings show a clear causal connection between the Secretary's interpretation of the MBE Act and CCC's injuries. If the MBE Act is interpreted to permit mailing ballots to IFTV Electors, the harms to voters and the election system as well as the corresponding injuries to CCC would be averted. Only the Secretary's attempt to interpret the statute in such a way that these eligible individuals are prevented from voting causes this injury.

3. A Favorable Decision Would Redress These Injuries

Because the Secretary's interpretation of the MBE Act is the sole source of the imminent injuries described above, a ruling that the Secretary's interpretation would render the statute unconstitutional and is thus impermissible would prevent the injuries from occurring. A favorable decision in this case relieves CCC of its injuries. CCC has clearly established that it has standing to proceed in its own right.

B. CCC Has Associational Standing

To establish "associational standing," CCC must show that: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo.App. 1984) (*citing Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Because Secretary Gessler does not contest that the interest CCC seeks to protect is germane to its organizational purpose, *see* Secretary's Answer to Second Amended Counterclaim ¶ 1, the only questions in this associational standing inquiry are the first and third *Hunt* prongs: whether any one of CCC's members would otherwise have standing to sue in his or her own right and whether the relief requested requires the participation of individual members in the lawsuit. *See, Mental Hygiene Legal Serv. v. Cuomo*, 785 F. Supp. 2d 205, 215 (S.D.N.Y. 2011) (summarizing *Hunt*).

1. CCC's Members Would Have Standing to Sue on Their Own Behalf

Lujan determines whether any individual member of an organization has standing. There must be imminent injury in fact, a causal connection, and redressability. *Lujan*, 504 U.S. at 560-61. The injury here is both actual and imminent because the classifications created by the Secretary's interpretation – IFTV voters registered to vote cannot receive a ballot – and the burden the Secretary's interpretations imposes on IFTV voters – that they must "reregister to vote – is certain. A finding that the Secretary's interpretation is impermissible redresses the injury.

(a) CCC Members Will Suffer Imminent Injury Because of the Interpretation

The Secretary does not dispute that there are multiple CCC members who are, and have at all times been, IFTV voters. As explained below, the practice of denying mail ballots to IFTV voters impermissibly burdens the constitutional rights of voting and freedom of expression. The practice also poses special burdens on minority voters. It also constitutes discrimination against racial minorities thereby violating equal protection. CCC members who are IFTV voters will suffer imminent injury under the Secretary's interpretation of the IFTV Law because the

"challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Anderson*, 460 U.S. at 793 (internal quotes omitted).

Minority voters suffer the injury of racial discrimination. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That it may be possible for IFTV electors to vote through in-person ballot at a limited number of walk-in voting locations or by reregistering to reinstate active voting status does not eliminate this injury. IFTV voters would still treated differently and in a way that makes it more difficult to cast a ballot because the Secretary's process for obtaining and casting a mail-in ballot is more complex. *See e.g.*, 8 CCR 1505-1, Rule 12.4(d) (2012) ("the designated election official may not issue a mail-in ballot to an elector whose record is marked inactive – failed to vote *until the elector submits a timely application for mail-in ballot*") (emphasis added).

Moreover, for the reasons explained above, these constitutional injuries are caused by the Secretary's interpretation of the MBE Act and that the injuries would be redressed by an order that the Secretary's interpretation is impermissible.

2. CCC Need Not Name Individual IFTV Voters to Demonstrate Member Standing

There is no merit to the Secretary's argument that CCC lacks associational standing because it did not identify specific members who (1) are IFTV voters and ethnic or racial minorities, or (2) have already been or will be harmed by not receiving a ballot. Organizations need not have the "oracular vision," *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006), to demonstrate particular members to be injured in the future in order to demonstrate standing, as long as the threat of future harm is real and immediate. *See NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp.2d 461, 468 (S.D.N.Y. 2004) ("There is[ ] no absolute requirement that

individual members be identified in order to confer organizational standing."). Courts have repeatedly found that a demonstrated increased risk of injury to members—and therefore to each given member—due to a challenged act suffices to establish this real threat of immediate future harm. S*ee*, *Wernsing v. Thompson*, 423 F.3d 732, 743-44 (7th Cir. 2005) (finding that for facial challenges, an organization or person seeking standing is not required to prove actual denial of the right they seek to protect in order to demonstrate an injury-in-fact).

Indeed, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, the U.S. Supreme Court found associational standing for a plaintiff organization seeking prospective relief notwithstanding the organization's inability to specify an injured member. 551 U.S. 701, 718-19 (2007). Rejecting the argument that the plaintiff's alleged injuries were too speculative to establish standing, the Court held that the mere fact that the plaintiff's members had children in the school district's public schools subject to the challenged plan was sufficient to establish associational standing. *Probability* of harm to members was sufficient. "The fact that it is possible that children of group members will not be denied admission to a school based on their race . . . does not eliminate the injury claimed." *Id.*; *cf. Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980) (finding standing based on the increased *probability* of harm to residents from a water-distribution policy affecting land they did not yet own); *Village of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) ("The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability.").

This principle applies with particular force to voting-rights cases. Numerous courts have held that organizational parties have standing to assert claims on behalf of members who are in danger of losing their voting rights. *See e.g.*, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (holding that the Democratic party had standing to present claims of members who might be affected by challenged electoral practice, but who could not be discerned prior to the election); *LULAC v. Ferrera,* 792 F. Supp. 2d 1222 (D.N.M. 2011); *Bay County Democratic Party v. Land*, 347 F. Supp.2d 404 (E.D. Mich. 2004); *Fla. Democratic Party v. Hood*, 342 F. Supp.2d 1073, 1079 (N.D. Fla. 2004); *Wernsing v. Thompson*, 423 F.3d 732, 743-44 (7th Cir. 2005). Any contrary rule requires an organization to sit idly by for at least one election as its members are disenfranchised. As the Supreme Court explained in *Babbit v. UFW Nat'l Union*, "[c]hallengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment." 442 U.S. 289, n.12 (1979). As a result, "[j]usticiability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Id.* Since organizational parties in election cases do not have to wait until the injury actually occurs to bring suit, it cannot be that an otherwise legitimate and real claim can be dismissed for want of a particularly named injured person. Rather, standing is established where there is a 'credible threat' to the right to vote—in a future election that arises from "'an objectively justified fear of real consequences.'" *ACLU v. Santillanes*, 506 F. Supp.2d 598, 621 (D.N.M. 2007), *rev'd on other grounds*, 546 F.3d 1313 (10th Cir. N.M. 2008).

Further, under Article III's established doctrines of representational standing, a party suing as a representative does not need to specifically name the individual on whose behalf the

suit is brought. *Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999); *see also Congress of Racial Equality v. Douglas*, 318 F.2d 95, 102 (5th Cir. 1963) (upholding right of civil rights organization to assert the constitutional rights of its members despite the fact that pleadings did not seek relief on behalf of any specific member). It is enough for the representative entity to allege that one of its members or constituents has suffered an injury that would allow it to bring suit in its own right. *Buffalo Park Dev. Co. v. Mt. Mut. Reservoir Co.*, 195 P.3d 674, 688 (Colo. 2008). Again, the Secretary does not dispute that there are multiple CCC members who are IFTV electors since CCC provided a list of its IFTV members.

Injury-in-fact occurs where "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The member of the burdened group need not allege that they would have obtained the benefit but for the barrier. *Fuller v. Norton*, 86 F.3d 1016, 1027 (10th Cir. 1996) (discussing *City of Jacksonville*); *see also Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1300 (10th Cir. 2008) ("[A] contingent liability can present a sufficient injury for Article III standing."). The fact that they were being treated differently from other applicants is sufficient to establish injury. *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (affirming that injury in fact under Article III arises from an inability to compete on an equal footing.); *see also, Tarpley v. Jeffers*, 96 F.3d 921, 923 (7th Cir. 1996).

Registered, eligible IFTV electors will suffer injury because of the undue burden the Secretary's statutory interpretation places on them, regardless of whether they are actually disenfranchised by its operation. CCC seeks only prospective relief and does not need to

publically identify individuals who are specifically harmed. Moreover, because the Secretary has not yet been permitted to enforce his interpretation and thereby prevent counties from mailing ballots to IFTV voters, it is not yet possible for CCC to demonstrate that individuals have been harmed at this juncture. CCC's burden is rather to show that the Secretary's interpretation *will* harm IFTV voters, a fact which the record will demonstrate amply. *City of Jacksonville,* 508 U.S. at 666 ("The 'injury in fact' . . . is the denial of equal treatment resulting from the *imposition of the barrier,* not the ultimate inability to obtain the benefit."). Therefore, CCC has associational standing to bring all of its constitutional claims based upon the undisputed fact that CCC has members who are IFTV voters.

Thus, the Secretary's objection that CCC has not named an individual member who can predict exactly how and why she will be impacted by the Secretary's challenged interpretation is irrelevant. As explained below, the prospect of imminent injury to numerous voters is clear. As for the Secretary's contention that CCC's failure to identify a member who is ***both*** IFTV ***and*** a racial or ethnic minority deprives the organization of standing to make constitutional arguments based on burden on voting and racial discrimination, this argument misapprehends the showing necessary to establish associational standing. The record demonstrates CCC's good faith and well-founded belief that its membership includes both IFTV voters and racial minorities, and IFTV voters who are racial minorities. (Disputed Facts at ¶ 11, *supra*). CCC, however, does not have to show that its members are ***both*** IFTV ***and*** racial or ethnic minorities to establish standing. Contrary to the Secretary's suggestion, constitutional deprivations alleged by CCC are not solely limited to racial or ethnic minorities, nor is the injury suffered by the race

discrimination alleged by CCC limited to IFTV voters. To have associational standing, CCC need only establish that any of its members that are IFTV could bring a claim.

3. The Relief Requested Does Not Require the Participation of Individuals

Since CCC seeks only a judgment that the Secretary's interpretation of the MBE Act is impermissible, the participation of individuals in the suit is not needed.

Where "[an] association seeks a declaration, injunction, or some other form of prospective relief individuals need not participate." *Hunt*, 432 U.S. at 343; *see also Playboy Enters. v. Public Serv. Comm'n*, 906 F.2d 25, 35 (1st Cir. 1990) (differentiating participation based on the pursuit of injunctive or and monetary relief). If an association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 285 (3d Cir. 2002); see also . Given the relief requested, individual participation is unnecessary.

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

CCC has argued in its October 17, 2012 Rule 56(h) Response that the Secretary's interpretation of the IFTV law, in addition to being unconstitutional, was contrary to the statute's plain text and inconsistent with its legislative intent. The Secretary's motion that is currently before the Court includes an argument concerning the statutory interpretation of the IFTV Law (Mot. at 10-18) that is based on the exact same statutory interpretation argument that he made in his Rule 56(h) Motion for Determination of Question of Law. CCC has responded in full to this argument in its October 17, 2012 Rule 56(h) Response and hereby incorporates that brief (and

supporting exhibits) here in response to Section II of the Secretary's summary judgment motion against CCC.

III. THE SECRETARY'S INTERPRETATION PROHIBITING MAILING BALLOTS TO IFTV ELECTORS UNREASONABLY BURDENS THE RIGHTS TO VOTE AND POLITICAL EXPRESSION PROTECTED BY THE U.S. AND COLORADO CONSTITUTIONS

CCC has presented uncontested evidence that the right to vote and right to political expression are burdened by the Secretary interpreting the IFTV law to prohibit the mailing of ballots to IFTV voters in certain elections. The Secretary's motion for summary judgment is not only unsupported by the material facts, it is predicated on an incorrect theory of CCC's claim, and an inapplicable attendant legal framework, and therefore should be rejected.

A. When Evaluating Constitutional Challenges to Election Laws, Courts Must Make a Fact-Based Inquiry to Weigh the Burden Against the Proffered State Interest

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); *Santillanes*, 546 F.3d at 1324. Mere months ago, the Sixth Circuit explained that this framework applies to a broad array of election practices, including voter qualifications and the voting process. *See Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). Colorado courts must evaluate state constitutional challenges to election laws—including the MBE Act—***in the same manner***. In *Bruce v. City of Colorado Springs*, the Colorado Court of Appeals evaluated a constitutional challenge to the MBE Act. 971 P.2d 679, 683 (Colo. App. 1998). In so doing, it expressly utilized the flexible *Anderson* approach in holding that "[i]n considering a challenge to a state election law, a court

must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that a plaintiff seeks to vindicate against the interests put forward by the state as justification for the burden imposed by its rule." *Id.* (*citing Burdick v. Takushi*, 504 U.S. 428 (1992)); *see also, National Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988) (applying *Anderson* to election law constitutional challenges).

This approach entails a flexible and fact-specific inquiry. The 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.*

In the present case, the Court must determine, in light of the specific facts and circumstances of the case, whether denying mail ballots to IFTV voters in mail ballot elections unconstitutionally burdens the right to vote and the right to political expression. Under *Anderson*, the first step would be to consider the extent to which preventing eligible individuals who have missed a single election from receiving a mail ballot in the subsequent election burdens these rights. The next step would be to evaluate what, if any, state interest is served by prohibiting IFTV voters from participating in mail ballot elections. The burdens imposed by the IFTV law

on the right to vote and political expression are legally permissible only if the state's interest in prohibiting the mailing of ballots to IFTV voters is sufficient to justify those burdens.

With regard to CCC's claims that denying mail ballots to IFTV voters will place special burdens on minority voters, the Court must also consider the extent to which the Secretary's proposed interpretation would burden this class of voter's right to participate in light of fact that the population of IFTV voters is drawn from minority communities to an overwhelming degree. If this class of voter is burdened to an even greater degree than the IFTV voter population at large (a fact which record evidence will show to be true), the burden must be justified by an even weightier state interest in denying mail ballots to IFTV voters. *See e.g. Crawford*, 553 U.S. at 199–200 (suggesting that a state interest that is sufficient to justify the minimal burdens placed on the electorate as a whole may nevertheless be insufficient to justify heavier burdens that are placed on particular classes of voters).

1. "Disparate impact" doctrine is inapplicable.

The Secretary's motion, which inexplicably mischaracterizes CCC's argument as a "disparate impact" claim, depends on ignoring entirely the inherently flexible and fact-specific analysis of *Anderson*. Rather, the Secretary relies on an antiquated doctrine applicable in inapposite scenarios like challenging federal employment exams and is at odds with the well-settled approach to evaluating constitutional challenges to election laws. There can be no question that the Secretary's interpretation of the IFTV law must be analyzed under the *Anderson* framework because it is plainly an election practice that implicates the right to vote and the right to political expression, both of which are protected by the Colorado and U.S. Constitutions. Indeed, when analyzing a constitutional challenge to the MBE Act itself, the Colorado Court of

Appeals did so using the *Anderson* standard. *Bruce,* 971 P.2d at 683. While it is true that the line of claims referred to as "disparate impact" claims under the Constitution routinely fail without a showing of intent, there is no such showing required when evaluating a burden on the right to vote.

2. *McDonald* is unavailing.

The Secretary invokes *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969), but that case is at best outdated, but more importantly, irrelevant. Specifically, it ignores the doctrinal evolution regarding the importance of voting by mail, predates *Anderson* by 14 years and therefore does not employ the appropriate standard for evaluating constitutional challenges to election laws. *See Crawford,* 553 U.S. at 204 (Scalia, J. concurring) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick . . . .*"); *Obama for America v. Husted,* 697 F.3d 423, 442 (6th Cir. 2012) (concluding that *McDonald* does not apply to state's rollback of early-voting hours because, after *Anderson,* "[w]hen a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the 'flexible standard' outlined in *Anderson*"), *stay den'd, Husted v. Obama for America,* 133 S.Ct. 497, 81 (2012). Further, *McDonald* involves a factual scenario where voting by mail is a convenience rather than the intended and predominant method of voting.

The Colorado Supreme Court unequivocally stated that voting by mail is a fundamental component of the right to vote. In *Erickson v. Blair,* 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.

670 P.2d 749, 754 (Colo. 1983).

The Court stressed 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.* It 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.

Id. Mail ballots under the MBE Act are a separate component to the right to vote because, unlike an absentee ballot, a mail ballot is ***the primary method*** of voting in a mail ballot election where there are no widespread polling places.

Moreover, *Erikson* and *Bruce* dispel any argument that the Court should categorically refuse to consider claims challenging denial of mail ballots. Instead, the Court should weigh the burden on voters against the proffered state interests to determine whether the state interests are "sufficiently weighty to justify the limitation." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (*quoting Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Finally, plaintiffs in *McDonald* 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. *McDonald*,

394 U.S. at 809 (emphasis added). In mail ballot elections, on the other hand, voting by mail is not a privilege or an accommodation. Voting by mail is the ordinary method of voting. There are no widespread polling places like in a polling place election. (*See* Additional Facts at ¶¶ 30-33, *supra*). By denying mail ballots to IFTV electors, the Secretary is not simply withholding an accommodation for convenience. The Secretary is instead preventing registered IFTV electors from voting like other all other eligible electors.

B. Prohibiting the Mailing of Ballots to IFTV Voters Impermissibly Burdens the Right to Vote and the Right to Political Expression

Preventing IFTV voters from participating in mail ballot elections burdens the rights of voting and political expression to a significant degree. These voters, despite being eligible to participate, are prevented from receiving ballots if they miss a single election. (*See* Additional Facts at ¶ 10, *supra*). In some election cycles, particularly those following mid-term elections such as in 2010, IFTV electors number in the hundreds of thousands. (*Id.* at ¶ ¶ 16-22). In order to participate, these voters are essentially required to re-register to vote by "reactivating," which in most cases must be done on a form similar to a voter registration application, or by visiting an election office in person. (*Id.* at ¶¶ 29-30). The burden is compounded by the fact that these individuals receive limited notice of their IFTV status, none of which clearly explains the consequences of being IFTV; namely, that even though they are eligible and registered, they will not get to vote in the next election unless they take additional steps to receive a ballot, and is not sent at a time that is likely to effectively induce action. (*Id.* at ¶¶ 34, 36-38). Although IFTV voters who do not receive ballots admittedly have a theoretical option of voting in person at walk-in voting locations or voter service centers, this is not a meaningful option for voters because they receive little or no notice of either the necessity or opportunity through county

notifications, and counties have limited information about how to vote in person and where in-person voting locations are available. (*Id.* at ¶¶ 35, 39_). Moreover, voters are likely uncompelled to act because they believe they will receive a mail ballot in coordinated elections, because they do in other elections. (*Id.* at ¶ 35). And unlike traditional polling-place elections, walk-in locations and voter service centers are scarce during coordinated elections, with some geographically large counties having only a single location at which voters may cast ballots in person. (*Id.* at ¶¶ 32-33, 43). IFTV voters who must ultimately appear in person to vote are forced to spend money on transportation, to take time off of work, to obtain child care or otherwise cover their daily responsibilities, and so on. (*Id.* at ¶ 40-41).

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 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.

Moreover, members of racial minorities are especially burdened by the practice of not mailing ballots to IFTV voters. The uncontroverted evidence demonstrates that the population of IFTV voters is drawn from overwhelmingly minority communities, particularly in Denver

County. (*Id.* at ¶¶ 44-48, 50). Dr. Masket's expert report confirms the special burden that the IFTV status, coupled with not mailing ballots to voters with that status, would pose to minority electors. (*Id.*, *see also* Ex. 7). Furthermore, due to their lower average socioeconomic status, 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, meaning that they will have increased difficulty navigating the bureaucratic hurdles put in front of IFTV voters by the new Rules. (Additional Facts at ¶¶52-54, *supra*).

Fatal to the Secretary's case is that he has put forth no evidence demonstrating that this prohibition is necessary to serve any state interest. The Secretary's brief alludes to the need to maintain "uniformity," but a state cannot have a legitimate interest in a uniformly unconstitutional election practice. And uniformity by itself, without an underlying rationale, is not a legitimate regulator interest. *See Obama for America v. Husted*, 697 F.3d 423, 442 (6th Cir. 2012) ("uniformity without some underlying reason for the chosen rule is not a justification in and of itself"), *stay den'd*, *Husted v. Obama for America*, 133 S.Ct. 497, 81 (2012). In any case, as explained below, uniformity, even if it is a legitimate interest, is not one of high importance to the Secretary because he permits a lack of uniformity in countless other areas of mail ballot election administration. (*See* Undisputed Facts, ¶ 27, *supra*). The Secretary also suggests that not mailing ballots to IFTV voters helps prevent fraud, even though there is no evidence to suggest that IFTV voters are more likely to commit fraud or that there is any problem with these eligible electors' registrations.

It may be the case that not mailing to IFTV voters would save counties money, but this interest is unavailing for a number of reasons. First, there is no evidence that the county defendants in this case requested additional compensation to mail to IFTV voters, so the State would not have had to expend additional funds to mail to these voters. Second, the cost savings of not mailing to IFTV voters, compared to the overall cost of a mail ballot election, is marginal. Third, it is difficult to see how saving money by preventing eligible electors from participating in elections is a valid state interest, and in any event it is not one that is sufficiently weighty to justify the burden on voters.

In sum, the evidence demonstrates that denying mail ballots to IFTV voters impermissibly burdens constitutionally protected rights without serving any state interest that would justify the burden.

Notwithstanding the power of these facts, summary judgment in favor of the Secretary is inappropriate because a number of issues of fact remain in dispute, for instance, the efficacy of the notice provided to voters and various facts related to intentional discrimination on the part of the Secretary's office in prohibiting IFTV electors from receiving ballots. 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 would have to travel 10, 20, or even 40 miles to request a ballot and vote in person. (*See* Undisputed Facts, ¶ 42-43, *supra*). Three counties provide good examples of the situation in many more rural Colorado Counties:

- In Costilla County, a significant portion of the county's population of live more than ten miles from this voter service center. Just one city in Costilla County, Blanca, Colorado, has a population of over 400 people (making up 11 % of the county population), and reports that of 67% of its residents claim Hispanic ethnicity, is over a20-mile drive from the sole voter service center in San Luis. (*Id*. at ¶ 43(a)).

- In Gunnison County, a significant percent of the voting age population live more than 10 miles from the nearest in-person voting location. Just one city in Gunnison County, Crested Butte, Colorado, has a population of over 1,500 people (itself making up approximately 10 % of the county population) is a 27-mile drive from the sole voter service center in Gunnison. (*Id*. at ¶ 43(b)).

- In Montrose County a significant percent of the voting age population live more than 10 miles from the nearest only in-person voting location. Census tract 9661, which is located on the Western half of the county on the other side of the Uncompahgre Plateau, has over 2,700 people (approximately 7% of the county's population) and is more than a 75-mile drive to the sole voter service center in Montrose (requiring travel around the Uncompahgre National Forest and through neighboring San Miguel and Ouray Counties). (*Id*. at ¶ 43(c)).

C. The Secretary's Interpretation of the MBE Act Constitutes Discrimination Against Minority Voters

In addition to the unconstitutional burden claims described above, CCC claims that the Secretary's interpretation of the MBE Act discriminates against members of racial minorities in violation of the Equal Protection Clause of the Colorado and U.S. Constitutions. As set forth in the factual statements above, CCC presents ample circumstantial evidence of intentional discrimination proving its burden, and at a bare minimum, precluding disposition on summary judgment.

A party challenging a practice on the grounds that it violates the Equal Protection Clause makes a threshold showing of unconstitutional conduct by demonstrating that invidious discriminatory purpose was a motivating factor in the decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977); *People v. Sepeda*, 581 P.2d 723, 728 (Colo. 1978) (applying *Arlington Heights* standard to race discrimination claim in Colorado). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*

Among the factors the Court must examine are: (1) whether the impact of the decision bears more heavily on one race than another; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision; (4) any procedural and substantive irregularities in connection with the decision or action, and; (5) any administrative history of the decision or action. *Id*. CCC has produced strong circumstantial evidence of intentional discrimination. The undisputed facts are sufficient for this court to infer intentional discrimination on the part of the Secretary.

First, the impact of the Secretary's interpretation would disproportionally affect minority voters. More minority voters are IFTV, and therefore more minority voters would not receive a mail ballot if the Secretary is allowed to impose his interpretation. Dr. Masket's report indicates that IFTV status is strongly tied to race, and that denying mail ballots to IFTVs would have a disproportionate impact on African Americans and Latinos. The report also indicates that the correlation between race and IFTV status holds true statewide. (See Additional Facts at ¶ 44, *supra*). The report also indicates that the statistical correlation between race and IFTV status was of the strongest order seen in the social sciences (*Id*. at ¶ 49). Dr. Masket found that, at the precinct level, for every ten percent that the African American population increased, the IFTV population increased by 1.6 percent. (*Id*. at ¶ 46).For Latinos, ten-percent population increase would lead to an IFTV population increase of 1.3 percent (*Id*. at ¶ 47). The closeness of the connection between race and IFTV status is amply demonstrated by Figures 1 and 2 of Dr. Masket's report, in addition to the maps produced by Denver County. (*See* Ex. 7). Such an outcome is also predictable based on Census data showing African American and Latino voter turnout spiking in 2008 before dropping in 2010. (*Id*. at ¶ 25). In 2008, 95.3% of Black

registered voters and 86.7% Hispanic registered voters voted, compared with 95.4% of White registered voters, In 2010, 67.3% of Black registered voters and 73.2% of Hispanic Voters voted, compared with 81.4% of White registered voters). (*See Id.* ; http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (Table 4b); http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (Table 4b).. This impact was particularly stark in Denver County, creating a higher number of minority IFTV electors in 2011. (*Id.* at ¶ 17). Further, the importance of voting by mail for members of racial minorities has been well known since at least 2007. (See Colorado Common Cause, Latino Voters Do Vote By Mail—But Only if We Let Them (October 2007), attached here as Ex. 10).

Second, the historical background of the decision suggests a sudden shift from permitting counties to mail ballots to IFTV voters to prohibiting the practice. Record evidence demonstrates that Denver County has repeatedly mailed ballots to IFTV electors since 2009 (*see* Additional Facts at ¶ 11, *supra*), and other counties have done so as well (see Ex. 4 at ¶¶ 3-4). Even after the sunset of the provision of the IFTV law that the Secretary claims justifies his attempt to prohibit counties from mailing ballots to IFTV voters, the Secretary took no action to enforce this newfound interpretation by updating or revising the template for mail ballot plans (which counties must complete and which must be approved by the Secretary prior to the election) to indicate any change with respect to IFTV electors or to prohibit mailing ballots to IFTV electors. (Addition Facts at ¶ 55, *supra*). Nor did the Secretary update the Election Policy Manual or the SCORE setup guide in light of his position that statutes did not prohibit mailing ballots to IFTV

electors. (*Id*. at ¶¶ 55, 58). The Secretary's interpretation was a stark break from historical precedent.

Third, the sequence of events leading up to the Secretary's attempt to prohibit counties from mailing to IFTV voters demonstrates intentional motivation on the part of the Secretary. In communicating its new-found prohibition on mailing to IFTV electors to Denver, the Secretary's office indicated that it only cared about the issue because it could affect the statewide ballot measure that appeared on the November 2011 ballot. (*Id*. at ¶ 60). The Secretary's office is well aware of the demographic makeup of Denver County—it knows that Denver County is a county covered by Section 203 of the Voting Rights Act due to its high Hispanic population. (*Id*. at ¶ 61). In fact, the Secretary facilitated routine training sessions with county clerks and staff in multiple front-range counties (including Denver, Arapahoe, Jefferson, Adams, and others) regarding best practices and requirements for reaching minority voters in those counties in the event that they became classified under Section 203 of the VRA after the 2010 census. (*Id*. at ¶ 62). County clerks have maintained the importance of mailing to IFTV electors. (*Id*. at ¶ 55). Indeed, after the Court denied the Secretary's request for a preliminary injunction, eight additional counties besides Denver and Pueblo mailed to IFTV electors in the 2011 coordinated election. (*Id*. at ¶ 64). Despite these facts, the Secretary has steadfastly maintained his interpretation and unilaterally passed election rules that would prohibit counties from mailing to IFTV electors in all coordinated mail ballot elections. The racial demographics of Denver County are well known; it is one of the most racially diverse counties in the state. The non-Hispanic White population in Denver County is 52.6%, compared with 69.7% for the state of

Colorado; the Black population is 10.3%, compared with 4.3% for the state; and the Hispanic population is 31.8%, compared with 20.9% for the state.

Fourth, the evidence demonstrates an illogical and arbitrary process by which the Secretary decided to prohibit mailing to IFTV electors. The Secretary accepted and approved both Denver's and Pueblo's mail ballot plans that included IFTV electors in the total number of eligible (not active) electors to be mailed ballots. (*Id*. at ¶ 56). The Secretary's SCORE team, the officials normally responsible for administering and enforcing the rules for mail ballot elections, indicated to Denver that it could mail to IFTV electors in setting up the election in SCORE. (*Id*. at ¶ 57). It was only after Denver's election was set up in SCORE and the county began mailing ballots to certain IFTV electors that the Secretary ordered Denver to stop mailing to IFTV electors. (*Id*. at ¶ 59). Moreover, the Secretary's insistence that counties could not exceed minimum standards by mailing to IFTV voters in addition to active voters is highly unusual in light of the fact that the Secretary permitted counties to exceed minimum standards in numerous other contexts. For instance, the Secretary permitted counties to: mail additional notices beyond those specifically required by law (*Id*. at ¶ 27), vary in content the information provided in the notices (*Id*. at ¶ 27(a)), provide additional drop-off locations, voter service centers, and walk-in locations (*Id*. at ¶ 27(b) and (c)), maintain additional hours at voting locations (*Id*. at ¶ 27(d)), and even decide whether to hold a mail ballot election at all. Only with regard to the IFTV issue did the Secretary insist on a "uniform" statewide practice. Furthermore, the Secretary did not hold hearings or promulgate any rule in connection with his new interpretation of the statute; he merely announced this interpretation in discussions with the counties and through a letter from Elections Director Judd Choate. (Ex. 5 at ¶ 70).

Finally, the administrative history merely confirms the arbitrary and discriminatory nature of the decision. Following the 2011 Coordinated Election, and during the course of litigation challenging his interpretation of the MBE Act, the Secretary codified his interpretation of the statute in a formally-promulgated rule. The rule did not reflect substantive input from Denver or Pueblo counties nor from minority voter constituencies. The Secretary's office has demonstrated its purpose in doing so by arguing in its motion that these rules required the Court's "deference" that is usually afforded to formal interpretations of agencies administering the law. (Mot. at 17-18).

It is worth noting that the justifications offered for the interpretation uniformity, and fraud prevention are fairly characterized as pretextual. As indicated below, the Secretary has a high tolerance for the absence of uniformity in an innumerable aspects related to mail ballot elections, and there has been no evidence proffered that mailing ballots to IFTV voters has resulted in, or facilitated, voter fraud.

Based on this circumstantial evidence, the Court should reasonably conclude that the Secretary intended to discriminate against IFTV electors, including the disproportionate number of IFTV electors who are minorities. If the Court does not infer intentional discrimination as a matter of law on the record before it, a trial is necessary to resolve issues of fact that are in dispute and material to the question of intentional discrimination. For instance, the Court may wish to scrutinize the Secretary's remarkable claim that, despite being a statewide elected official and the chief election officer of the state, he was unaware of the racial demographics of IFTV voters and voters in Denver County, and unaware that minority voter participation dropped significantly and disproportionately from 2008 to 2010, even though these facts were widely

reported in media outlets (*See* Additional Facts. at ¶¶ 17-18, 25, 61). Since the Secretary flatly refused to be deposed in this case, CCC has not been permitted to question the Secretary about these claims, but believes that he would testify at trial that he had some personal knowledge of the racial demographics of Denver based on his experiences, and therefore knowledge of what his interpretation would do to minority voters. The Court could resolve additional issues about the extent of the Secretary's knowledge about the racial effects of denying mail ballots to IFTV voters, including those described above, at trial.

Based on this persuasive circumstantial evidence, the Court could reasonably conclude that the Secretary had an intention to discriminate against minority voters. Because intentional discrimination is a necessary element, a searching inquiry will be required. *Arlington Heights*, 429 U.S. at 266-67.Therefore, the Courts should at a minimum, reserve for trial the question of whether intentional discrimination has been shown.

CONCLUSION

CCC respectfully submits that the undisputed facts demonstrate that the Secretary's interpretation of the IFTV law, if accepted, would render the law unconstitutional because it would impose an unreasonable burden on the right to vote and constitute discrimination against minority voters. In any event, the Secretary's 56(b) motion for summary judgment against CCC should be denied and the disputed facts should be resolved at trial.

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Respectfully submitted,

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