

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	
SCOTT GESSLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO, Plaintiff, v. DEBRA JOHNSON, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER FOR THE CITY AND COUNTY OF DENVER Defendant.	
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7 th Floor Denver, CO 80203 Telephone: (303) 866-5380 FAX: (303) 866-5671 E-Mail: maurie.knaizer@state.co.us Registration Number: 05264 *Counsel of Record	▲ COURT USE ONLY ▲ Case No.
COMPLAINT	

Scott Gessler, in his official capacity as the Secretary of State for the State of Colorado (hereinafter "the Secretary") hereby submits this Complaint.

INTRODUCTION

1. The Secretary brings this Complaint against Debra Johnson, in her official capacity as Clerk and Recorder for the City and County of Denver (hereinafter "the Clerk"), to enforce the provisions of the Election Code, to ensure uniformity of election processes throughout the State and to reduce the potential for fraud.

JURISDICTION

2. This court has jurisdiction pursuant to § 1-1-107(2)(d), C.R.S. (2011).

VENUE

3. Venue is proper in the County and County Denver because the actions taken by the Clerk have occurred in the City and County of Denver. The Secretary may bring suit in the district court for the judicial district in which the alleged violation occurs. Section 1-1-107(2)(d). See also C.R.C.P. 98.

PARTIES

4. The Secretary has the duty to supervise the conduct of primary, general, congressional vacancy and ballot issue elections in Colorado. Section 1-1-107(1)(a), C.R.S. (2011). The Secretary has the power to file an action for injunctive relief. Section 1-1-107(2)(d), C.R.S. (2011).

5. The Clerk is the duly elected clerk and recorder for the City and County of Denver (“the Clerk”). The Clerk is the chief election official for the City and County of Denver. The Clerk must follow the rules and orders promulgated by the Secretary. Section 1-1-110, C.R.S. (2011).

FACTUAL BACKGROUND

6. Colorado law permits counties to conduct mail ballot elections under specified circumstances. Section 1-7.5-102 (Colo. 2011). A mail ballot election is “an election for which eligible electors may cast ballots by mail and in accordance with [the Election Code] in a primary election or an election that involves only nonpartisan candidates or ballot questions or ballot issues.” Section 1-7.5-103(4), C.R.S. (2011).

7. Political subdivisions have the option to conduct mail ballot elections. A political subdivision that chooses to conduct a mail ballot election must do so “under the supervisions of the secretary of state” and “subject to rules which shall be promulgate by the secretary of state.” Section 1-7.5-104(1), C.R.S. (2011). Mail ballot elections must be conducted as provided in article 7.5 of title 1 of the Colorado Revised Statutes. Section 1-7.5-104(3), C.R.S. (2011).

8. The Clerk supervises the distribution of mail ballots for the City and County of Denver. Section 1-7.5-105(3), C.R.S. (2011). The Secretary supervises the conduct of mail ballot elections by the election officials. Section 1-7.5-106(1)(c), C.R.S. (2011).

9. If the Clerk decides to conduct a mail ballot election, she “shall mail to each *active* registered elector.” (Emphasis added) Section 1-7.5-107(3)(a)(I), C.R.S. (2011).

10. In 2008, the General Assembly enacted H.B. 08-1329. This measure added section 1-7.5-108.5(2)(b), which provided:

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

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

(Exhibit A, attached hereto) The General Assembly required clerks to send mail ballots to persons who were inactive and failed to vote as well as to active voters. The intent of the measure was to reduce the number of persons who were designated as “inactive failed to vote” due unique election problems in Denver and Douglas County in 2006. The authority to send mail ballots to voters who were inactive and failed to vote expired on July 1, 2011.

11. An “inactive failed to vote” elector is defined in Colorado statute as “a registered elector who ... fails to vote in a general election.” Section 1-2-605(2), C.R.S. (2011). An “inactive failed to vote” elector is “eligible to vote in any election where registration is required [if] the elector meets all other requirements.” Section 1-2-605(3), C.R.S. (2011). An elector deemed inactive for failure to vote can make active his/her record by notifying the clerk or voting in an election. Section 1-2-605(4)(a)-(d), C.R.S. (2011).

12. Between 2010 and the present, Denver voters who are now deemed “inactive-failed to vote” received at least four notices of their inactive status. They also received at least two mail ballots from the City and County of Denver, which they failed to vote. For instance:

a. In 2010, Denver’s inactive voters received a mailing from the county prior to the August primary, a ballot in the August primary if they were affiliated with a political party, and a notice from the county alerting them of their inactive status prior to the November general election. They then failed to vote in that general election.

b. In 2011, these electors received a mailing that again notified them of their inactive status prior to the mayoral election. They then received a ballot in the mayoral election and another ballot in the mayoral run-off election. Each “inactive failed to vote” elector chose not to cast a ballot in these elections.

c. In addition, these electors were sent yet another notice of their inactive status last month (August), which they failed to heed.

d. Denver’s “inactive failed to vote” electors would receive a mail ballot from the City and County of Denver in the upcoming statewide election if they had responded to even one of the notices sent them or voted in any of the aforementioned elections. They have fallen into inactive status because these they failed to heed repeated notifications of inactive status and failed to vote in each of the four elections noted above. Thus, under

1-7.5-107(30(a)(1), C.R.S. (2011), these electors will not receive a mail ballot in the November 2011 coordinated election. This does not mean that these electors cannot vote, however. It just means that the county is prohibited from sending them a mail ballot.

13. After July 1, 2011, clerks may send mail ballots only to active registered electors. They have no authority or discretion to send mail ballots to inactive voters who failed to vote.

14. A statewide election will be held on November 1, 2011.

15. The Clerk has stated that she intends to mail ballots to both active voters and voters designated as inactive-failed to vote. Section 1-7.5-107(3)(a)(I), C.R.S. (2011).

16. The Clerk's proposal to send mail ballots to inactive failed to vote electors directly contravenes the statute.

17. The Secretary issued an order requiring the Defendant to mail ballots only to active registered electors. (Exhibit B, attached hereto)

18. The Clerk has informed the Secretary and the Elections Director that she will refuse to comply with the Secretary's order. Specifically the Clerk intends to send mail ballots to inactive voters in the statewide ballot issue election to be held on November 1, 2011.

19. In 2009, Denver sent mail ballots to 38,611 electors who were designated as inactive-failed to vote. Of those, 1121 electors, or 2.9 percent, returned their ballots.

20. In 2009, all counties sent mail ballots to 200,654 electors who were designated as inactive-failed to vote. Of those, 8,182, or 4.1 percent, returned their ballots.

21. Voters who are inactive-failed to vote may vote at Denver's main election office during the period October 11, 2011 through November 1, 2011 (Election Day). They may also cast ballots at seven election service centers during the period October 24, 2011 through November 1, 2011.

22. The Clerk "in rendering decisions and interpretations under this code, *shall* consult with the secretary of state and follow the rules and orders promulgated by the secretary of state pursuant to this code." (Emphasis added) Section 1-1-110(2), C.R.S. (2011).

23. The Secretary makes *uniform* interpretations of the Election Code, § 1-1-107(1)(c), C.R.S. (2011) and supervises the conduct of statewide ballot issue elections. Section 1-1-107(1)(a).

24. A statewide ballot issue is on the ballot at the election on November 1, 2011.

25. The same rules in statewide ballot elections must be applied in all counties.

26. Out of sixty counties conducting mail ballot elections, only Denver County has expressly stated that it will not follow the Secretary's interpretation. Upon information and belief, one other county is awaiting the decision in this case.

FIRST CLAIM FOR RELIEF

(Declaration That Clerk Has No Discretion to Disobey Secretary's Order)

27. Paragraphs 1-26 of the Complaint are incorporated herein by reference.

28. The Clerk "shall...follow the rules and orders promulgated by the secretary of state." Section 1-1-110(1), C.R.S. (2011)

29. The Clerk cannot disobey an order of the Secretary, even if the Clerk believes the Secretary erred. For purposes of a statewide ballot issue election, the Clerk is a subordinate officer who has a ministerial duty to obey the order of the Secretary even when the Clerk disagrees with the interpretation.

30. The Secretary is entitled to a declaration that the Clerk must follow the Secretary's order.

SECOND CLAIM FOR RELIEF

(Declaration the Secretary's Orders in a Statewide Ballot Issue Election Must Be Applied Uniformly)

31. Paragraphs 1-26 of the Complaint are incorporated herein by reference.

32. Under Colorado law, the Secretary must ensure that laws in statewide ballot issue elections are applied uniformly. Section 1-1-107(1)(c), C.R.S. (2011).

33. Under the legislative declaration in 1-1.5-101(g), the Secretary is required to "effectively and uniformly implement[]" election standards. Section 1-1.5-101(g), C.R.S. (2011).

34. The Secretary is entitled to a declaration that the election laws must be applied uniformly in each county in the State.

THIRD CLAIM FOR RELIEF
(Injunction against the Defendant pursuant to § 1-1-107(2)(d))

35. Paragraphs 1-26 of the Complaint are incorporated herein by reference.

36. As of July 1, 2011, clerks may mail ballots only to active registered voters. Section 1-7.5-107(3)(a)(I), C.R.S. (2011).

37. The Clerk has stated that she will not obey the order of the Secretary to mail ballots only to active registered electors.

38. The Secretary is entitled to an injunction requiring the Clerk to mail ballots only to active registered electors.

REQUEST FOR RELIEF

WHEREFORE, the Secretary requests the following relief:

(a) A declaration that the Clerk must follow the Secretary's order even if the Clerk believes that the Secretary erred;

(b) A declaration that the election laws must be applied uniformly in each county throughout the state;

(c) An injunction issued pursuant to § 1-1-107(2)(d) preventing the Clerk from mailing ballots to persons other than active registered electors; and

(d) Other relief that the court may deem just and proper.

JOHN W. SUTHERS
Attorney General

/s/Maurice G. Knaizer

MAURICE G. KNAIZER, 05264*
Deputy Attorney General
Public Officials
State Services Section
Attorneys for Plaintiff
*Counsel of Record

CHAPTER 374

ELECTIONS

HOUSE BILL 08-1329

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

AN ACT

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

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

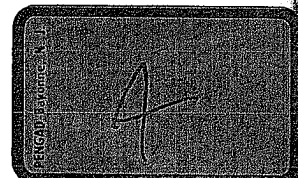
SECTION 1. 1-2-605 (2), Colorado Revised Statutes, is amended to read:

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

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

1-7.5-108.5. Voter information card - verification of active status - designation of inactive status - mailing of mail ballots - repeal. (1) NOT LESS THAN NINETY DAYS BEFORE A MAIL BALLOT ELECTION CONDUCTED PURSUANT TO THIS ARTICLE, THE COUNTY CLERK AND RECORDER SHALL MAIL A VOTER INFORMATION CARD TO ANY REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED INACTIVE - FAILED TO VOTE." FOR PURPOSES OF THIS SECTION, "INACTIVE - FAILED TO VOTE" SHALL MEAN A REGISTERED ELECTOR WHO IS DEEMED

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



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

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

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

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

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

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

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

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

1-5-101. Establishing precincts and polling places for partisan elections. (5) NOTWITHSTANDING SECTION 1-5-103, AND EXCEPT AS OTHERWISE REQUIRED BY FEDERAL LAW, in order to facilitate the preparation of a computerized database for use in the **reapportionment** REDISTRICTING process that will take place after the decennial census in ~~the year 2000~~ YEARS ENDING IN THE NUMBER ZERO, THE

PRECINCT BOUNDARIES ESTABLISHED BY the county clerk and recorder of each county, subject to approval by the board of county commissioners, ~~shall establish precinct boundaries which~~ THAT ARE USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT shall remain in effect until after the general election in ~~2000~~ YEARS ENDING IN THE NUMBER ZERO; except that the precincts so established may be subdivided within the boundaries of the original precinct. ~~Such precincts shall be established no later than twenty-nine days prior to the precinct caucus day in 1998; except that, in counties affected by the reapportionment plan required by Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996), such precincts shall be established within two weeks after the federal district court approves of such reapportionment plan~~ AND ADJACENT PRECINCTS MAY BE AGGREGATED FOR PURPOSES OF DATA COLLECTION. In establishing precinct boundaries pursuant to the provisions of this subsection (5), county clerk and recorders and boards of county commissioners shall, to the extent reasonably possible, utilize natural and man-made boundaries that meet the requirements for visible features adopted by the United States bureau of the census. IF THE PRECINCT BOUNDARIES USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT ARE CHANGED PRIOR TO THE NEXT GENERAL ELECTION IN YEARS ENDING IN THE NUMBER ZERO PURSUANT TO FEDERAL LAW, THE COUNTY CLERK AND RECORDERS SHALL TIMELY SUBMIT IN WRITING TO THE DIRECTOR OF RESEARCH OF THE LEGISLATIVE COUNCIL A LIST SHOWING THE PRECINCTS FOR WHICH THE BOUNDARIES HAVE CHANGED.

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

SECTION 6. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 2, 2008

STATE OF COLORADO
Department of State
1700 Broadway
Suite 200
Denver, CO 80290



Scott Gessler
Secretary of State

Judd Choate
Director, Elections Division

September 16, 2011

The Honorable Debra Johnson
County Clerk and Recorder
City and County of Denver
201 W. Colfax Avenue, Dept. 101
Denver, CO 80202

Via email delivery

RE: Order regarding mailing of ballots for the 2011 Coordinated Election

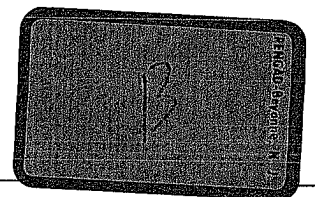
Dear Clerk Johnson:

The Secretary of State's office, with the assistance and advice of the Attorney General under § 1-1-107(1)(c), C.R.S., interprets § 1-7.5-107(3)(a)(I), C.R.S., to limit the initial mailing of ballots in a coordinated mail ballot election to only active registered voters. Given this interpretation and in order to preserve statewide uniformity for the November coordinated election, the Secretary of State's office concludes that voters whose registration status is no longer active may not receive a mail ballot without first activating their registration status. To encourage voters to activate their registration, the Secretary of State's office suggests that the City and County of Denver send an additional postcard to inactive voters. Such an approach will be more economical than sending mail ballots to all inactive voters.

Under §§ 1-1-107 and 1-1-110(1), C.R.S. the Secretary of State orders the City and County of Denver to desist from sending mail ballots to registered voters who are inactive for failure to vote. Should the City and County of Denver disobey this order, a complaint challenging Denver's authority to send the disputed ballots will be filed in Denver District Court, Tuesday, September 20, 2011.

Sincerely,

Judd Choate
Director, Division of Elections
Colorado Department of State



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