DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 **Plaintiff:** SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado v. **Defendant:** DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for the City and County of Denver v. **Intervenors-Defendants:** COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo, Colorado	DATE FILED: January 21, 2013 ◆ **COURT USE ONLY** ◆ Case Number: **11CV6588** Ctrm: **203**

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. Background

Plaintiff, Scott Gessler, the Secretary of State of Colorado (Secretary), filed this action seeking declaratory and injunctive relief against Debra Johnson, the Clerk and Recorder for the City and County of Denver (Denver Clerk), relating to mailing election ballots to a particular class of electors in the November 1, 2011 statewide election. The Intervenor-Defendants, Gilbert Ortiz, the Clerk and Recorder for Pueblo County, Colorado (Pueblo Clerk), and Colorado Common Cause (CCC), were permitted to intervene, and a hearing on Secretary's Motion for Injunctive Relief was heard by Judge Whitney on October 7, 2011 and denied.

The case is currently set for trial on the merits on January 28, 2013.

The following Motions are currently pending and ripe:

a. The Secretary's Renewed Motion for a Ruling of Law under C.R.C.P. 56(h);

b. The Denver Clerk's Motion for Judgment on the Pleadings under C.R.C.P. 12(c) and 12(h)(2);

c. The Denver Clerk's Motion for Summary Judgment under C.R.C.P. 56(b);

d. The Secretary's Cross-Motion for Summary Judgment under C.R.C.P. 56(b) against the Denver Clerk;

e. The Secretary's Motion for Summary Judgment under C.R.C.P. 56(b) against the Pueblo Clerk; and

f. The Secretary's Motion for Summary Judgment under C.R.C.P. 56(b) against CCC.

The parties made oral argument at a hearing held on December 27, 2012.

The Court has considered the parties' Motions, Responses and Replies and the oral argument, and enters the following findings and orders.

II. Nature of Claims and Relief Sought

A. Specific Issue about Sending Mail Ballots to IFTV Electors

The Secretary seeks declaratory relief regarding the interpretation of § 1-7.5-107(3), C.R.S. 2012 (Section 1-7.5-107(3) or Section 107(3)), a section of the Colorado Uniform Election Code of 1992, §§ 1-1-101, *et seq.*, C.R.S. 2012 (Uniform Election Code), the Uniform Military and Overseas Voters Act), §§ 1-8.3-101, *et seq.*, C.R.S. 2012 (UMOVA), and the Help America Vote Act, §§ 1-1.5-101, *et seq.,* C.R.S. 2012 (HAVA), and the application of Section 107(3) to both UMOVA and HAVA in sending mail ballots to "inactive - fail to vote" (IFTV) electors.

First, the Secretary seeks declaratory relief determining that county clerk and recorders or other county election officials do not have discretion to send mail ballots to IFTV electors. The Secretary "interprets § 1-7.5-107(3)(a)(I), C.R.S. (2012) to preclude sending mail ballots to voters who are deemed

inactive because they failed to vote at the prior general election. Clerk Johnson contends that county clerks retain the discretion to send mail ballots to such electors. [The Secretary contends] Clerk Johnson will continue to send mail ballots to voters who are designated as 'inactive-failed to vote.'" (Secretary's Cross-Motion for Summary Judgment, at 7) *See also* Complaint, Third Claim for Relief.[1]

A second issue relates to sending mail ballots to electors under UMOVA. The Pueblo Clerk intervened in this case and counterclaimed, seeking declaratory relief that the Secretary's order precluding the Pueblo Clerk from sending mail ballots to qualified voters under UMOVA who were also IFTV electors was of no effect, and that seventy-six Pueblo County UMOVA qualified/IFTV electors were entitled to receive mail ballots.

A third issue, raised by CCC, asserts that the "Secretary's interpretation of [Section 107(3)] 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." (CCC's Response in Opposition to Secretary's Motion for Summary Judgment, at 2). In seeking summary judgment on this claim, the Secretary claims that CCC does not have associational standing to assert the constitutional claims of its members, that the Secretary's interpretation of Section 107(3) is correct as a matter of law, and that there is no denial of the equal protection or First Amendment constitutional rights of IFTV electors who are members of racial or ethnic minorities who do not receive mail ballots because those electors may cast ballots by other means. CCC responds that the issues are not appropriate for resolution on summary judgment.

B. Broader Issues

In addition, the Secretary seeks much broader, general declaratory relief as well.

Citing provisions in the Uniform Election Code[2], the Secretary claims

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[1] The Secretary's Third Claim for Relief claims that under Section 107(3)(a), "clerks may mail ballots only to active registered voters." Complaint, ¶¶ 36 – 38.

[2] Under the Uniform Election Code, the Secretary's duties include the "supervis[ion]" of statewide elections and "enforce[ment]" of the Uniform Election Code, § 1-1-107(1)(a)&(b), C.R.S. 2012. It provides that county clerks and recorders "shall consult with . . . and follow the rules and orders promulgated by the secretary of state." Section 1-1-110(1), C.R.S. 2012.

that a county clerk or recorder "cannot disobey an order of the Secretary, even if the Clerk believes the Secretary erred." (Complaint ¶ 29) The Secretary contends that, 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," *id.*, and seeks declaratory relief that the Denver and Pueblo Clerks "must follow the Secretary's order" as applied to the Uniform Election Code in order to assure uniformity in the application of election laws in Colorado. (*Id.*, ¶ ¶ 30, 34)

C. Secretary's 2012 Rules

In a separate case currently pending in the Denver District Court, *Johnson v. Gessler,* Denver District Court, Civil Action No. 2012CV5841, Div. 259, the Denver Clerk seeks declaratory relief that Rules adopted by the Secretary, effective September 30, 2012 (2012 Rules), which relate to sending mail ballots to IFTV electors allegedly violate Denver's constitutional home-rule powers and Section 107(3), and were allegedly adopted in an arbitrary and capricious manner. On November 4, 2012, Judge Martinez denied the Denver Clerk's Motion to consolidate that case with this case.

Thus, the validity, meaning, and effect of the 2012 Rules are not at issue here or now.

III. Facts

A. Statutory Definitions and Procedures

1. 'SCORE' is an acronym used to refer to the Colorado Statewide Voter Registration System maintained by the Secretary's office.

2. Colorado counties may conduct "mail ballot elections" "under specified circumstances." Section 1-7.5-102, C.R.S. (2012).

3. A "mail ballot election" is an "election for which eligible electors may cast ballots by mail" conducted in accordance with the Mail Ballot Election Act (MBEA), §§ 1-7.5-101, *et seq.*, C.R.S. 2012, and is "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. 2012.

C.R.S. 2012. It provides that county clerks and recorders "shall consult with . . . and follow the rules and orders promulgated by the secretary of state." Section 1-1-110(1), C.R.S. 2012.

4. An "elector" is "a person who is legally qualified to vote" in Colorado. Section 1-1-104(12), C.R.S. 2012.

5. A "registered elector" is "an elector . . . who has complied with the registration provisions of [the Uniform Election Code] and who resides within or is eligible to vote in the jurisdiction of the political subdivision calling the election. . . .", § 1-1-104(35), C.R.S. 2012.

6. An "eligible elector" is a "person who meets the specific requirements for voting at a specific election or for a specific candidate, ballot question, or ballot issue." Section 1-1-104(16), C.R.S. 2012. "If no specific provisions are given, an eligible elector shall be a registered elector, as defined in subsection (35) [*see* ¶ 5, supra] of this section." *Id.*

7. "Unaffiliated" means "a person is registered but not affiliated with a political party . . . ." Section 1-1-104(49.5), C.R.S. 2012.

8. Under the MBEA, "election" means "any election under the" Uniform Code or Colorado Municipal Election Code. Section 1-7.5-103(2), C.R.S. 2012.

9. "General election" means "the election held on the Tuesday succeeding the first Monday of November in each even-numbered year." Section 1-1-104(17), C.R.S. 2012.

10. "Primary election" means "the election held on the last Tuesday in June of each even-numbered year." Section 1-1-104(32), C.R.S. 2012.

11. "Partisan election" means "an election in which the names of the candidates are printed on the ballot along with their affiliations." Section 1-1-104(23.6), C.R.S. 2012.

12. The Uniform Election Code and MBEA differentiate between an "active" and "inactive" elector.

13. An "inactive failed to vote" (IFTV) elector under the MBEA is a "registered elector who is deemed 'Active' but who fails to vote in a general election. . . ." Section 1-7.5-108.5(1), C.R.S. 2012. *See* § 1-2-605(2), C.R.S. 2012. Such an elector's registration record shall be marked "'Inactive (insert date)' by the county clerk and recorder following the general election." Section 1-2-605(2), C.R.S. 2012.

14. An IFTV 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. 2012.

15. An IFTV elector may become an "active" elector by updating his/her registration information with the county clerk and recorder, or by voting in any election conducted by the county clerk and recorder, or any election for which the information has been provided to the clerk and recorder, or by applying for a mail-in ballot, or by completing, signing and returning a confirmation card. Section 1-2-605(4), C.R.S. 2012.

16. Not later than ninety days after a general election, the county clerk and recorder must mail a confirmation card to all electors whose registration records are marked IFTV because the elector did not vote in the last general election and who has not previously been mailed a confirmation card. Section 1-2-605(6)(a), C.R.S. 2012. A confirmation card is a forwardable, postage paid mailing that is preaddressed to the sending county and that includes a voter registration form so the elector may update his or her voter registration record. Section 1-2-605(6)(b), C.R.S. 2012.

B. General Statutory Procedures for Mail Ballot Elections

17. Mail ballot elections are optional, as determined by the governing board of any political subdivision. Section 1- 7.5-104(1), C.R.S. 2012[3].

18. If a mail ballot election is to be conducted, the county election official responsible for conducting a mail ballot election must notify the Secretary of that fact no later than fifty-five days before election. Section 1-7.5-105(1), C.R.S. 2012. For primary elections conducted as mail ballot elections, the official must notify the Secretary of that fact no later than ninety days before the election. Section 1-7.5-105(1.5), C.R.S. 2012. The notification must include a proposed plan for conducting the mail ballot election. Sections 1-7.5-105(1), (1.5), C.R.S. 2012. The plan may be based on the standard plan adopted by the Secretary. *Id.* Political subdivisions that opt to conduct a mail ballot election must do so "under the supervision of the secretary of state" and "shall be subject to rules which shall be promulgated by the secretary of state." Section 1-7.5-104(1) and -106(1)(c) C.R.S. (2012).

[3] Mail ballot elections may not be held for elections, or recall elections, that involve partisan candidates, except for primary elections, § 1-7.5-104(2)(a), C.R.S. 2012, or elections held in conjunction with or on the same day as a primary or congressional vacancy election unless the primary election is conducted as a mail ballot election, § 1-7.5-104(2)(b), C.R.S. 2012.

19. "[W]ith advice from election officials of the several political subdivisions," the Secretary "shall" (a) "[p]rescribe the form of materials to be used in the conduct of mail ballot elections" and (b) "[e]stablish procedures for conducting mail ballot elections," provided that the procedures "shall be consistent with section 1-7.5-107." Section 1-7.5-106(1)(a), (b), C.R.S. 2012.

20. Mail ballot elections are constitutional and serve the compelling state interest of increasing voter participation.

> The right to vote is the essence of a democratic society. This right is fundamental because its exercise preserves all other rights. Therefore, a compelling state interest exists in having voters fully participate in the election process. Thus, legislative efforts to achieve this goal of increased voter participation should be encouraged. . . .
>
> Mail ballot elections serve two purposes in encouraging participation in the election process. First, the convenience of voting by mail may increase voter participation. Second, the administration of mail ballot elections may provide economic savings and permit governmental entities to call special elections at relatively little cost.

Bruce v. City of Colorado Springs, 971 P.2d 679, 684 (Colo. App. 1998)(internal citations omitted).

C. Statutory Procedures Before Mail Ballot Elections

21. At least ninety days before a mail ballot election, election officials "shall mail a nonforwardable voter information card to any registered elector whose registration record has been marked [IFTV]." Section 1-7.5-108.5(1), C.R.S. 2012.[4] *See* § 1-2-605(11), C.R.S. 2012. A voter information card is "a card or letter that is mailed to the elector's address. . . and shall contain the eligible elector's name and address, precinct number, polling location for the election, a returnable portion that allows the elector to request designation as a permanent mail-in voter pursuant. . . ." as well as "any other information the designated election official deems applicable." Section 1-5-206(1)(b), C.R.S. 2012.

22. If a primary election is conducted as a mail ballot election, the

[4] The General Assembly provided that for 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 [IFTV]," § 1-7.5-108.5(2)(b)(I), but repealed this provision effective July 1, 2011, § 1-7.5-108.5(2)(b)(II), C.R.S. 2012.

county clerk and recorder "shall mail a notice by forwardable mail to [a] each unaffiliated active registered eligible elector and [b] each unaffiliated registered eligible elector whose registration record has been marked [IFTV]." Section 1-7.5-107(2.3)(a), C.R.S. 2012. That notice shall advise the unaffiliated elector – either active or IFTV – that he/she must affiliate with a political party in order to vote in the primary election and shall contain a returnable portion to allow the elector to request political party affiliation. Section 1-7.5-107(2.3)(b)&(c), C.R.S. 2012.

D. Statutory Procedures for Conducting Mail Ballot Elections

23. Because it is the primary issue in this case, the precise language of § 1-7.5-107(3), C.R.S. 2012 is set forth:

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

(Emphasis and underlining added).

24. Thus, in a mail ballot election, the election official "shall mail to each active registered elector . . . a mail ballot packet" Section 1-7.5-107(3)(a)(I), C.R.S. (2012).

25. For a primary election that is conducted as a mail ballot election, ballots shall be mailed *both* to "active registered electors who are affiliated with

a political party" and "to each registered elector who is affiliated with a political party and whose registration is marked as [IFTV]." Section 1-7.5-107(3)(a)(II)(A), C.R.S. (2012).

26. Even if an IFTV elector does not update his/her registration before any mail ballot election, the IFTV elector may vote in person in a mail ballot election. Election officials must make ballots available for electors who are designated as IFTV at the county elections office and at designated service centers or walk-in voting locations beginning twenty-two days before a mail ballot election. Section 1-7.5-107(3)(c), C.R.S. 2012.

E. Facts re Prior Denver Elections

27. The following facts have been alleged by the Denver Clerk. At oral argument on December 14, 2012, the Secretary, through the Attorney General's office, stipulated to all of the facts set forth in the Affidavits of the Denver Clerk and Ms. McReynolds. Thus, the Court deems these facts to be undisputed for purposes of the pending motions.

28. Since 2008, Denver has conducted five elections as mail ballot elections:

a. 2009 Coordinated Election (November 3, 2009);

b. 2010 Municipal Special Vacancy Election (May 4, 2010);

c. 2010 Primary Election (August 10, 2010);

d. 2011 Municipal General Election (May 3, 2011); and

e. 2011 Municipal Runoff Election (June 7, 2011).

29. In each of those five elections, ballots were mailed to both active and IFTV electors.

30. In the May 3, 2011 Municipal General Election, 4,517 IFTV electors voted and returned mail ballots. In the June 7, 2011 Municipal Runoff Election, 6,138 IFTV electors voted and returned mail ballots.

31. There is no evidence that the Secretary or his office objected to this procedure by the Denver Clerk in the 2009 – 2011 mail ballot elections.

F. Facts re November 2011 Election

32. The Denver Clerk was sworn into office in July 2011. She made the decision to conduct the November 1, 2011 election as a mail ballot election.

33. When a county conducts an election as a mail ballot election, it must use a software program on the Secretary's website to provide information about the election to the Secretary's Office. This software program included a section in which the county would indicate whether or not ballots would be mailed to IFTV electors.

34. A Mail Ballot Election Setup Checklist provided by the Secretary's Office, dated June 10, 2010, and which contained instructions for completing the software program, stated: "Be sure to select the "Inactive-Failed to Vote Eligible for Mail Ballot" checkbox." This checklist was in place for the 2011 primary election. The parties disagree whether that checklist was updated after the primary and before the general election. The determination of that dispute is not material to the resolution of the case.

35. During the summer of 2011, there were multiple communications between the Denver elections officials and the Secretary's office about the November 2011 election. In those communications, Denver indicated that it planned to mail ballots to IFTV electors. For the November 2011 general election, the Denver Clerk's Office completed inputting information into the Secretary's software program by August 24, 2011 and checked the section of the software program to indicate that it *would* be mailing ballots to IFTV electors.

36. On September 7, 2011, Denver submitted its written mail ballot plan for the November 2011 election using the form on the Secretary's website.

37. Denver's written mail ballot plan was completed using the most current form provided by the Secretary's Office. It asked for an estimate of the number of voters eligible to vote in Denver's 2011 Coordinated Election. Denver reported 288,204 estimated eligible electors. Both active and IFTV electors were included in this estimate.

38. The first indication of any controversy about Denver's decision to mail ballots to IFTV electors for the November 2011 election occurred during a phone conversation between Ms. McReynolds of the Denver Clerk's Office and Ms. Rudy of the Secretary's Office, on either September 12 or September 14, 2011. To the extent there is a dispute about that date, it is not material to the issues presented.

39. On September 15, 2011, the Denver Clerk was notified by mail by the Secretary that Denver's November 1, 2011 Coordinated Mail Ballot Election Plan was in compliance with Article 7.5 of Title 1, C.R.S. and therefore had been approved:

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

Scott Gessler
Secretary of State

Judd Choate
Director, Elections Division

September 15, 2011

Hon. Debra Johnson, Clerk and Recorder
City and County of Denver
200 W. 14th Ave., Ste. 100
Denver, CO 80204

Re: 2011 Mail Ballot Plan Approval

Dear Clerk Johnson:

The Secretary of State's Office has reviewed the mail ballot plan that was submitted on September 7, 2011, for the City and County of Denver's November 1, 2011 coordinated mail ballot election. Our office has determined that the mail ballot plan is in compliance with Article 7.5 of Title 1, C.R.S., and is therefore approved.

If you have any questions or require further assistance, please contact me at 303-894-2200, ext. 6342.

Sincerely,

Ben Schler
Legal Specialist
Elections Division

cc: Amber McReynolds, Director of Elections

40. The Secretary concedes that his Office approved Denver's plan for the November 2011 election. However, the Secretary maintains "the approval only means that the plan complies with the statute" and contends his Office "does not ensure that the election will be conducted in a manner consistent with statutes and rules." (Secretary's Cross-Motion for Summary Judgment, at 5, ¶ 19).

41. As of September 16, 2011, Denver had already mailed ballots to both active and IFTV electors who were absent uniformed services and overseas (UMOVA) electors. Because the UMOVA mailing deadline fell on a Saturday, Denver scheduled the mailing to occur on Friday, September 16, 2011.

42. On the morning of Friday, September 16, 2011, the Denver Clerk received a voice mail message from Judd Choate (Mr. Choate), Director of Elections for the Secretary's Office, about Denver's plan to mail ballots to IFTV electors for the November 1, 2011 election.

43. Later that day, the Denver Clerk spoke with Mr. Choate. Mr. Choate advised the Denver Clerk that the Secretary's Office construed § 1-7.5-107(3)(a)(I) to mean that ballots could not be mailed to IFTV electors for the November 2011 election.

44. Later that same day, Mr. Choate sent an email to the Denver Clerk, which is time-stamped at 5:59 PM. The email stated:

McReynolds, Amber Faye - Elections Division

From: Judd Choate [Judd.Choate@SOS.STATE.CO.US]
Sent: Friday, September 16, 2011 5:59 PM
To: Johnson, Debra - Clerk and Recorder; McReynolds, Amber Faye - Elections Division
Cc: Scott Gessler; Bill Hobbs
Subject: Letter re: Mailing to IFTV Voters
Attachments: Denver re IFTV Ballots 9-16-11.pdf

Dear Debra.

Please find the attached letter concerning Denver proposal that it send mail ballots to IFTV voters. We welcome any opportunity to discuss this further. My direct line is 303-869-4927 and my cell is [redacted]

Judd

Judd Choate, Ph.D., J.D.
Director, Division of Elections
Colorado Department of State
1700 Broadway - Suite 200
Denver, CO 80290
303-894-2200 - Office
303-869-4861 - Fax
judd.choate@sos.state.co.us

45. The email contained an electronic copy of the following letter:

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

46. The Secretary's Office did not provide any method by which Denver could remove IFTV electors to whom ballots had already been mailed.

47. This lawsuit was filed by the Secretary on September 21, 2011.

48. On September 29, 2011, the Secretary, by letter, ordered Mr. Ortiz, the Clerk of Pueblo County, not to mail ballots to seventy-six (76) IFTV Pueblo County electors who were also qualified voters under UMOVA:

"Hence, as you requested, please consider this letter as an order from the Secretary of State not to send mail ballots to inactive-failed to vote UOCAVA electors." (Emphasis added).

49. Denver's ballots were printed, as required by law, as of September 30, 2011.

50. As of October 7, 2011, there were 54,831 affiliated and unaffiliated IFTV electors on the SCORE system.

51. Denver was required to mail ballots between October 10 and October 14, 2011.

52. Judge Whitney denied the Secretary's Motion for Injunctive Relief on October 7, 2011.

53. Denver proceeded to mail ballots to IFTV electors for the November 1, 2011 election.

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

IV. Analysis of Section 107(3) Claims

A. Parties' Arguments re Section 107(3)

Both sides concede that despite having been designated as "inactive," an IFTV elector nevertheless "shall be eligible to vote in any election where registration is required and the elector meets all other requirements." Section 1-2-605(3), C.R.S. 2012. The dispute is whether, in non-primary mail ballot elections, a clerk and recorder or designated local election official may mail ballots to IFTV electors.

The Secretary maintains the answer is 'no,' a conclusion he argues is mandated by the clear language of Section 107(3). Because the General Assembly used the term "active registered elector" – instead of "registered

elector" -- in subsection 107(3)(a)(I) to enumerate those electors to whom ballots shall be mailed, the Secretary argues that county clerks and local election officials have no discretion under the statute to mail ballots to IFTV electors in a non-primary election. As set forth in the Secretary's letter of September 16, 2011, the Secretary asserts: "The Secretary of State's office, with the assistance and advice of the Attorney General . . . interprets § 1-7.5-107(3)(a)(1), C.R.S., to limit the initial mailing of ballots in a coordinated mail ballot election to only active registered voters."

Additionally, the Secretary argues that as the state official designated by statute who shall establish procedures for mail ballot elections and who has overall supervisory authority of elections, including promulgation of rules and regulations as may be necessary for the proper administration and enforcement of election laws, and in consideration of the need for statewide uniformity in election laws, the Secretary may enter an enforceable order to a local county clerk or designated election official not to mail ballots to IFTV electors in a non-primary election.

The Denver and Pueblo Clerks argue that the General Assembly did not intend to exclude eligible electors from non-primary mail ballot elections by use of the word "active" in Section 107(3)(a)(1). Rather, the Clerks argue that the Legislature's declaration in § 1-1-103(1), C.R.S. 2012, that the election code be "construed liberally so that all eligible electors may be permitted to vote" mandates a construction of Section 107(3)(a)(I) which is a minimum requirement: in a non-primary mail ballot election, the Clerks contend, ballots must be mailed to *at least* each "active eligible electors," but local election officials may also, in their discretion, mail ballots to IFTV electors. The Clerks contend that local election officials in each county have the statutory right to determine whether or not to mail ballots to IFTV electors in non-primary elections. The Denver Clerk interprets Section 107(3)(a)(1) to mean:

> . . .we are required to send ballots to active electors and that is the minimum requirement within the statute. Yet, the Secretary's order to Denver, emailed on September 16, 2011, that Section 1-7.5-703(a)(1) limited the initial mailing of ballots to <u>only active registered voters.</u> In his order, the Secretary added the word 'only' to [Section 1-7.5-703(a)(1)] even though the statute itself does not contain that restriction.

(Affidavit of Clerk Johnson; emphasis in original) The Denver Clerk argues that the Secretary's order of September 16, 2011 "created a new limitation affecting

IFTV electors (who are still eligible electors) that does not exist in statute." (Affidavit of Ms. Johnson, at ¶¶ 94-95)

As with a number of other issues pertaining to elections[5] cited by the Clerk, the Clerk contends that Section 703(a)(1) sets the minimum statutory threshold (ballots must be mailed to all "active" registered electors) but does not prevent the local election official from doing more than is prescribed by the statute. Thus, the Clerk argues that the Secretary may not lawfully order a local election official not to mail ballots to IFTV electors in a non-primary election.

The controversy may be illustrated for a hypothetical voter in the City and County of Denver, Voter A, as follows:

-**2008 general election** (including presidential election):

Voter A votes in election = active registered voter

-**2010 general election** (mid-term, non-presidential election):

Voter A does not vote in election

Voter A = IFTV elector but still registered elector who is entitled to vote

-**2011 primary mail election**:

-Assume Voter A does not re-register, therefore remains registered IFTV elector instead of "active" elector, but is still entitled to vote:

-Voter information card ➡ Sent to all IFTV electors § 1-7.5-108.5(1) at least 90 days before election

-If Voter A **unaffiliated** ➡ will receive forwardable notice re need to affiliate in order to vote in primary § 1-7.5-107(2.3)(a)

[5] For example, § 1-8.3-110(1), C.R.S. 2012 requires that UMOVA ballots be mailed "not later than forty-five days before the election" but does not prevent ballots being mailed earlier; § 1-5-106, C.R.S. 2012 requires posting of polling place signs "at least twelve days before each election" but does not prevent earlier posting.

-If Voter A **affiliated** ➡ will receive ballot to vote in primary § 1-7.5-107(3)(II)(a)

-**2011 general mail election:**

-Assume Voter A does not re-register, therefore remains registered IFTV elector instead of "active" elector, but is still entitled to vote:

-Voter information card ➡ Sent to all IFTV electors § 1-7.5-108.5(1) at least 90 days before election

THEN:

-Secretary's position ➡ May not receive mail ballot from county election official

-Clerk's position ➡ May receive mail ballot from county election official

Thus, a necessary consequence of the Secretary's interpretation is that Voter A, a registered IFTV elector who is eligible to vote in both the 2011 primary and general elections, *will* and *shall* receive a voter identification card in the mail and either a mail ballot (if Voter A is affiliated) or a notice regarding the need to affiliate (if Voter A is unaffiliated and wishes to vote in the primary) for the primary election; Voter A *will* and *shall* receive a voter identification card for the general election; but, Voter A, the very same registered IFTV elector, *will not* receive a ballot by mail for and will not vote in the general election unless he/she physically leaves home and goes to a voting center or polling place or has completed paperwork to become "active."

B. Applicable Rules of Statutory Construction

The primary goal of statutory interpretation "is to ascertain and give effect to legislative intent. *Golden Animal Hosp. v. Horton*, 897 P.2d 833, 836 (Colo.1995). *See* §§ 2–4–203 and 2–4–212, C.R.S. 2012. "To reasonably effectuate the legislative intent, a statute must be read and considered as a whole. Where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts." *People v. Dist. Ct., Second Jud. Dist.*, 713 P.2d 918, 921 (Colo. 1986)(internal citations omitted).

When interpreting a statute, the court must "look first at the plain meaning of the words and apply them as written if they are clear and unambiguous." *Griff v. City of Grand Junction*, 262 P.3d 906, 909 (Colo. App.

2010). Where the statutory language is clear and unambiguous, there is no need to resort to other rules of statutory construction. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000). "Words and phrases should be given effect according to their plain and ordinary meaning, and '[the court] must choose a construction that serves the purpose of the legislative scheme, and must not strain to give language other than its plain meaning, unless the result is absurd.'" *City of Westminster v. Dogan Const. Co., Inc.*, 930 P.2d 585, 590 (Colo. 1997)(internal citation omitted).

If the statutory language is ambiguous, the Court may consider legislative history and the potential consequences of a particular interpretation. *Buckley v. Chilcutt,* 968 P.2d 112, 117 (Colo.1998). The court "may consider indicia of legislative intent such as '[t]he object sought to be attained,' '[t]he legislative history,' and '[t]he consequences of a particular construction.'" *Dogan, supra* (internal citations omitted).

The Court must presume that a "just and reasonable result is intended." Section 2-4-201(1)(c), C.R.S. 2012. "[A] statutory construction that defeats the legislative intent or leads to an absurd result will not be followed." *Ingram v. Cooper,* 698 P.2d 1314, 1315 (Colo. 1985).

Here, the Court finds that Section 107(3)(a)(1) is ambiguous. There is a question about what the General Assembly intended by the use of the term "active registered elector" and whether that applies to mandatorily exclude, or permissively include, the mailing of mail ballots to IFTV electors in non-primary elections. The Court must attempt to ascertain why, according to the Secretary's interpretation, there is a legislative preference toward and desire to facilitate the ability of IFTV electors to vote in primary mail ballot elections but not in general mail ballot elections. Accordingly, considerations of the legislative history, goals of the legislation, and consequences of the various interpretations are appropriate to consider.

C. Legislative History

The Mail Ballot Election Act (MBEA), §§ 1-7.5-101, *et seq.,* C.R.S. 2012, was originally enacted in 1990.

The legislative declaration regarding the MBEA states:

> The general assembly hereby finds, determines, and declares that self-government by election is more legitimate and better accepted as voter participation increases. The general assembly further

> finds, determines, and declares that mail ballot elections are cost-efficient and have not resulted in increased fraud. By enacting this article, the general assembly hereby concludes that it is appropriate to provide for mail ballot elections under specified circumstances.

1990 Colo. Sess. Laws, p. 314, adopted as § 1-7.5-102, C.R.S. 1980 (Repl.Vol.) This legislative declaration remained in effect and unchanged through 2010.[6]

As originally enacted, 1990 version of the statute, § 1-7.5-703(3)(a), C.R.S. 1980 (Repl.Vol.) provided:

> . . . the designated election official shall mail to ***each registered elector***, entitled to vote in the mail ballot election, at the last address appearing in the registration records, a mail ballot packet. . .

(Emphasis added).

The MBEA was revised and reenacted in 1992. 1992 Colo. Sess. Laws, Ch. 118, p. 755 (H.B. 92-1333). The 1992 version of the statute, § 1-7.5-703(3)(a), changed the group of electors to whom mail ballots shall be provided to:

> . . . the designated election official shall mail to ***each eligible elector***, entitled to vote in the mail ballot election, at the last address appearing in the registration records, a mail ballot packet. . .

(Emphasis added). The 1992 revision thus broadened the category of electors to whom ballots were mailed in mail ballot elections from "registered" to "eligible."

In 1997, the MBEA was amended, as follows, with "eligible" elector being deleted and "active registered" elector being inserted:

> **1-7.5-107. Procedures for conducting mail ballot election.** (3) (a) Not sooner than twenty-five days before an election, and no later than fifteen days before an election, the designated election official shall mail to each ***~~eligible~~ ACTIVE REGISTERED*** elector, at the last mailing address appearing in the registration records and in accordance with United States postal service regulations, a mail ballot packet, which shall be marked "DO NOT FORWARD. ADDRESS CORRECTION REQUESTED", or any other similar statement that is in accordance with United States postal service regulations; except that with prior approval from the secretary of state, the packets shall be sent no later than ten days before election day.

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[6] In 2010, the General Assembly deleted the sentence, "The general assembly further finds, determines, and declares that mail ballot elections are cost-efficient and have not resulted in increased fraud." 2010 Colo. Sess. Laws Ch. 194, § 18, H.B. 1116.

1997 Colo. Sess. Laws, Ch. 69, § 6, H.B. 97-1235. The same bill also amended section (3)(c) to provide:

> (c) No sooner than twenty-five days prior to election day, nor later than 7 p.m. on election day, mail ballots shall be made available at the designated election official's office, or the office designated in the mail ballot plan filed with the secretary of state, for eligible electors who are not listed OR WHO ARE LISTED AS "INACTIVE" on the county voter registration records or, for special district mail ballot elections, on the list of property owners or the registration list but who are authorized to vote pursuant to section 32-1-806, C.R.S., or other applicable law.

Id.

The definitions of "active" and "inactive" electors were also revised and recodified at the same time. *See* 1997 Colo. Sess. Laws, Ch. 130, § 1, H.B. 97-1234. New § 1-2-605 [formerly § 1-2-224], C.R.S. 1980 (Repl.Vol.) defined an "inactive" elector as one whose elector registration card was returned by the postal service as undeliverable, § 1-2-605(1)(b)[7], or who "fails to vote in any general election, § 1-2-605(2),[8] C.R.S. 1980 (Repl.Vol.). The revision provided that "[a]ny registered elector whose registration record has been marked "Inactive" shall be eligible to vote in any election where registration is required and the elector meets all other requirements." Section 1-2-605(3), C.R.S. 1980 (Repl. Vol.).[9]

Counsel did not provide any legislative history regarding the reasons for the 1997 amendments. Specifically, there was no evidence that the General Assembly expressed any concern about electors who failed to vote in a general election or any increased risk of fraud associated with those electors. The 1997 amendments directed that mail ballots "shall" be mailed to "active" electors, but simply did not preclude the mailing of ballots to "inactive" electors, whether inactive by reason of having an elector registration card returned as undeliverable, or by reason of not voting in a general election. Rather, revised

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[7] The statute provided that, in this situation, the clerk and recorder "may" mark the elector as "inactive."

[8] The statute provided that, in this situation, the clerk and recorder "shall" mark the elector as "Inactive (insert date)" after the general election.

[9] This section of the statute was amended, as follows: "(3) Any registered elector whose registration record has been marked "Inactive" shall be eligible to vote in any ~~municipal, school district, or special district election, but voting in these elections shall not cause the county clerk and recorder to delete the word "Inactive" from the elector's registration record, except as provided for in subsection (2) of this section~~ election where registration is required and the elector meets all other requirements."

§ 1-2-605(3) clarifies that an elector who is "inactive" for any reason *shall* be eligible to vote any election where registration is required and who otherwise meets all other requirements.

The 1997 amendments thus appear to streamline the groups of electors to whom mail ballots shall be mailed but, because § 1-2-605(3) was broadened, do not appear to evince any legislative intent to preclude the mailing of ballots to electors deemed inactive.

In 2007, the Legislature directed that a procedure be created for electors to become designated as permanent mail-in voters. 2007 Colo. Sess. Laws, Ch. 398, § 9, S.B. 07-234, codified as § 1-2-501(e). The same Bill provided, under what was codified as § 1-8-108(2)(b) that "[a]n eligible elector shall be deleted from the permanent mail-in voter list if: (I) The eligible elector notifies the designated election official that he or she no longer wishes to vote by mail-in ballot; (II) The mail-in ballot sent to the eligible elector is returned to the designated election official as undeliverable; or (III) The eligible elector has been deemed 'Inactive' pursuant to section 1-2-605." 2007 Colo. Sess. Laws, Ch. 398, § 27, S.B. 07-234.

In 2008, the General Assembly made three changes to the Uniform Election Code: (a) amended § 1-2-605 of the Uniform Election Code, (b) added § 108.5 to the MBEA, and (c) added a new subsection (11) to the cancellation of registration statute, § 1-2-605. 2008 Colo. Sess. Laws, Ch. 374, §§ 1-3, H.B. 08-1329.

(a) Distinction between IFTV and Inactive-Undeliverable Electors. The 2008 amendment to § 1-2-605 established two classes of inactive electors: (a) those electors who were deemed inactive because of the elector's failure to vote in the last prior general election (IFTV's), and (b) those electors, called "Inactive-Undeliverable" electors, who were deemed inactive because a confirmation card, *see* § 1-2-606(a), had been returned to the local clerk or election official as 'undeliverable' by the United States Postal Service. This new section provided:

> **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".

(b) Mail Ballots to IFTV and Inactive-Electors in Mail Ballot Elections. As part of the same bill in 2008, the General Assembly added § 1-7.5-108.5, which again distinguished between the same two classes of inactive electors -- those who are IFTV, and those who are "Inactive-Undeliverable":

> **1-7.5-108.5. Voter information card - verification of active status - designation of inactive status - mailing of mail ballots - repeal.** (1) NOT LESS THAN NINETY DAYS BEFORE A MAIL BALLOT ELECTION CONDUCTED PURSUANT TO THIS ARTICLE, THE COUNTY CLERK AND RECORDER SHALL MAIL A VOTER INFORMATION CARD TO ANY REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED INACTIVE - FAILED TO VOTE." FOR PURPOSES OF THIS SECTION, "INACTIVE - FAILED TO VOTE" SHALL MEAN A REGISTERED ELECTOR WHO IS DEEMED "ACTIVE" BUT WHO FAILED TO VOTE IN A GENERAL ELECTION IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1-2-605 (2); EXCEPT THAT THE TERM "INACTIVE - FAILED TO VOTE" SHALL NOT INCLUDE AN ELECTOR WHOSE PREVIOUS COMMUNICATION FROM THE COUNTY CLERK AND RECORDER WAS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE AND IS, ACCORDINGLY, REFERRED TO IN THE REGISTRATION RECORDS OF THE COUNTY AS "INACTIVE - UNDELIVERABLE" PURSUANT TO SECTION 1-2-605 (2). THE VOTER INFORMATION CARD REQUIRED BY THIS SECTION MAY BE SENT AS PART OF THE VOTER INFORMATION CARD REQUIRED TO BE MAILED PURSUANT TO SECTION 1-5-206 (1). THE VOTER INFORMATION CARD SHALL BE SENT TO THE ELECTOR'S ADDRESS OF RECORD UNLESS THE ELECTOR HAS REQUESTED THAT SUCH COMMUNICATION BE SENT TO HIS OR HER DELIVERABLE MAILING ADDRESS PURSUANT TO SECTION 1-2-204 (2) (k) AND SHALL BE MARKED "DO NOT FORWARD".
>
> (2) (a) IF THE VOTER INFORMATION CARD REQUIRED TO BE SENT TO A REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE" PURSUANT TO SUBSECTION (1) OF THIS SECTION IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".
>
> (b) (I) IN CONNECTION WITH ANY MAIL BALLOT ELECTION TO BE CONDUCTED IN NOVEMBER 2009, A MAIL BALLOT SHALL BE MAILED TO ALL REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE". SUCH MAIL BALLOT SHALL NOT BE SENT TO REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - UNDELIVERABLE".
>
> (II) THIS PARAGRAPH (b) IS REPEALED, EFFECTIVE JULY 1, 2011.
>
> (c) IN ANY MAIL BALLOT ELECTION CONDUCTED ON OR AFTER JULY 1, 2008, IF A MAIL BALLOT SENT TO A REGISTERED ELECTOR IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

Under the new § 1-7.5-108.5(1), a voter information card was required to be sent to *all* IFTV electors not less than ninety days before any mail ballot election. Those voter information cards returned to the clerk or voting official as "undeliverable" then result in a change in the elector's inactive status, causing the elector to go from IFTV to "Inactive – Undeliverable," such that a mail ballot would not be sent to that elector in the future without re-registration.

(c) Determination of Inactive Status under Mail Ballot Election Act. The 2008 legislation also added § 1-2-605(11), which clarifies:

> **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

Thus, for purposes of the MBEA, the legislature intended that cancellation of voter registration due to inactivity be determined under the more specific provisions of the MBEA rather than the general statute.

Summarizing, then, under the 2008 legislation, those IFTV electors whose voter information cards were not returned to the clerk or voting official as undeliverable (and who, presumably, received the card) still were to continue to receive mail ballots. As required by § 1-7.5-108.5(2)(c), for any mail ballot elections conducted after July 2008, if a mail ballot sent to a registered elector was returned by the United States Postal Service as undeliverable, the county clerk and recorder shall marked the registration record of that elector with the words "Inactive-Undeliverable." New § 1-7.5-108.5(2)(c) neither prohibits the continued sending of mail ballots to IFTV electors, nor mandates that such process cease after the November 2009 election.[10] Instead, § 1-7.5-108.5(2)(c) refers to a broader classification of voters: "registered electors," which includes both active registered as well as IFTV electors. *See* § 1-2-605(3), C.R.S. 2008.

In 2009, the Legislature amended the cancellation statute, § 1-2-605(5) 2009 Colo. Sess. Laws, Ch. 165, § 2, HB 09-1216, as follows.

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[10] The Secretary argues that the repeal section in new § 1-7.5-108.5(2)(b)(II) is indicative of the Legislature's intent to exclude IFTV electors from future elections after 2009 because the Legislature "chose to include the repeal in the bill and subsequently did not take any action to reinstate the requirement that mail ballot packets be sent to inactive voters who failed to vote after July 1, 2011." (Motion, p. 15). The Secretary argues 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 to unique election problems in Denver and Douglas County in 2006. The authority to send mail ballots to electors who were inactive and failed to vote expired on July 1, 2011. The General Assembly could have achieved the result advocated by the clerks and Common Cause merely by not including, or repealing, the sunset provision. Alternatively, it could have amended § 1-7.5-108.5(2)(b) to state that 'a mail ballot may be mailed to all registered electors whose registration record has been marked as 'inactive-failed to vote' effective July 1, 2011.' Instead, it chose to include the repeal in the bill and subsequently did not take any action to reinstate the requirement that mail ballot packets be sent to inactive electors who failed to vote after July 1, 2011." *Id.* The Clerk asserts that the repeal "repealed nothing more than the specific mandate to mail ballots **for the November 2009 Election.** It did not repeal or change the terms of Section 1-7.5-107(3)(a)(I)." (Clerk's Motion, at 21; emphasis in original). Nor did it repeal § 1-7.5-108.5(2)(c) which, in the Court's view, implies that mail ballots at least *may* be sent to "registered electors," as will be discussed further above.

> **1-2-605. Canceling registration - voter information card.** (5) If a mail OR MAIL-IN ballot that was mailed pursuant to the requirements of this article to an elector who has been deemed "Active" is returned to the county clerk and recorder by the United States postal service as undeliverable, the county clerk and recorder shall send 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), a notice pursuant to section 1-2-509 by forwardable mail and a postage prepaid, preaddressed form by which the elector may verify or correct the address information. If the elector verifies that he or she resides in a county other than the county mailing the mail OR MAIL-IN ballot, the county clerk and recorder shall ~~mark the registration record of the elector "Canceled (insert date)", and the record shall be removed from the registration file of the county~~ FORWARD THE ADDRESS INFORMATION TO THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH THE VOTER RESIDES. If the elector fails to respond, the county clerk and recorder shall mark the registration record of that elector with the word "Inactive".

This was followed in 2010, 2010 Colo. Sess. Laws, Ch. 194, § 8, H.B. 10-1116, with another amendment to § 1-2-605(7), which provided:

> **1-2-605. Canceling registration - voter information card.** (7) If the county clerk and recorder receives no response to the confirmation card and the elector has been designated "Inactive" for two general elections since the confirmation card was mailed pursuant to the requirements of this article, the county clerk and recorder shall cancel the registration record of the elector; EXCEPT THAT, NOTWITHSTANDING ANY OTHER PROVISION OF LAW, NO ELECTOR'S REGISTRATION RECORD SHALL BE CANCELED SOLELY FOR FAILURE TO VOTE.

From this review of the legislative history, the Court draws the following conclusions:

1. From the outset of the adoption of the MBEA in 1990, the General Assembly intended to increase rather than limit or decrease voter participation in elections, including mail ballot elections.

2. There is nothing to suggest that the General Assembly intended to preclude IFTV electors from receiving mail ballots when it amended the MBEA statute in 1997 from “eligible” to “active registered” electors. Rather, the language used by the General Assembly in 1997 suggests an intent to streamline the process, but not to preclude election officials from mailing ballots for mail ballot elections to “inactive” voters.

3. Along with the adoption of the IFTV and Inactive-Undeliverable categories in 2008, changes to the MBEA and the Election Code in 2008-2010 make clear that the General Assembly intended, by adopting § 1-7.5-108.5(2)(c), that IFTV electors should continue to receive mail ballots until such a mail ballot is returned as undeliverable.

4. The General Assembly intended that registered and eligible electors continue to be able to vote, notwithstanding a failure to vote or decision not to vote by that elector in a previous general election.

D. Purpose of the MBEA and Election Code

The Colorado Constitution provides that the "general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Colo. Const. Art. VII, Section 11. Securing the purity of elections "consists chiefly in affording qualified electors an opportunity to vote and have their votes counted, and in preventing those not qualified from voting. It means protection, in the exercise of this right, to those entitled to have it. The right of the elector to be thus safeguarded carries with it the corresponding duty on the part of the state to furnish all needed protection." *Mauff v. People*, 52 Colo. 562, 123 P. 101, 103 (Colo. 1912).

In its introduction to the Uniform Election Code, the General Assembly directed that the code "shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." Section 1-1-103(1), C.R.S. 2012. Section 1-1-103(3), C.R.S. 2012 provides that "[s]ubstantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies."

These constitutional and statutory principles dictate that the Court must interpret § 1-7.5-107(3) liberally rather than restrictively, and in a manner which promotes rather than restricts the ability of eligible electors to vote. Hypertechnical interpretations are to be eschewed in favor of interpretations which promote the further enfranchisement of eligible electors.

E. § 1-7.5-107(3) Must be Interpreted to Give Clerks and Other Election Officials the Authority to Send Mail Ballots to IFTV electors in General Elections

With these principles in mind, the Court concludes that § 1-7.5-107(3) must be interpreted to give clerk and recorders, and other local election officials responsible for conducting mail ballot elections, the authority to send mail ballots to IFTV electors in general elections. The Court reaches this conclusion for the following reasons:

1. Section 1-7.5-107(3)(II)(A) explicitly mandates sending mail ballots to affiliated IFTV registered electors to vote by mail in a *primary* election. *See* ¶ 25, *supra.* It would make no sense for the Legislature to have focused on the rights of an affiliated IFTV elector in a *primary* election but, as the Secretary

contends, mandate that the clerk or responsible election official could not mail a ballot to the *very same affiliated IFTV elector* for the general election, unless the elector undertook further action (*see* ¶¶15 and 26, *supra*). Applying the interpretation urged by the Secretary would create an illogical preference for affiliated IFTV electors in primary elections but against those very same voters in general elections. No legislative rationale has been shown or argued by the Secretary that would support such a conclusion. Because the statute is clear and unambiguous as to the *primary*, it would, in the Court's view, lead to an absurd result to extend a right (mailing ballots to affiliated IFTV electors in primary elections) but withdraw that same right as to the *very same affiliated IFTV elector* for the (arguably more, and certainly no less, important) general election.

2. All parties concede that IFTV electors are eligible electors. Adoption of the Secretary's 'plain-wording' position would restrict rather than enhance the ability of eligible electors to participate in mail ballot elections.

3. The arguments advanced by the Secretary at oral argument – prevention of fraud and decreasing costs to the State – would apply equally to primary as well as to general elections. If either or both had been the objective(s) of the Legislative, the Court cannot discern how either of these objectives could be facilitated by requiring county clerks *to mail* ballots to affiliated IFTV electors in primary elections but (without further action by the IFTV elector) require county clerks *not to mail* such ballots to affiliated IFTV electors in general elections.

4. Section 1-7.5-107(2.3)(a) requires that unaffiliated electors – including IFTV electors – receive notice about the need to affiliate to vote in the election. Again, if the Court adopted the Secretary's argument, this would reflect a misplaced preference for enhancing the ability of IFTV electors to vote in primary rather than in general elections.

5. The Secretary argues that the specification of "active" registered electors in § 1-7.5-107(3) evinces a legislative intent to exclude IFTV electors during general elections and that when the Legislature speaks with exactitude, no exceptions are admitted. That principle[11] is inapplicable here, where the

[11] "[W]hen the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others." *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo.1995). "[W]e must presume that the General Assembly, having chosen to speak with such exactitude, did not intend any implied exceptions. Straining the statute to read otherwise would ignore its plain language, and read in

Legislature's intent as to IFTV voters in general coordinated elections under § 1-7.5-107(3) is, as discussed above, unclear. Far from carving a judicially created exception into § 1-7.5-107(3), the incongruity of stating that ballots *shall* be mailed to affiliated IFTV electors in primary elections but *shall not* be mailed to those identical electors (absent further activity by the elector) for the general election is not, in the Court's view, a matter which can be resolved meaningfully or rationally under the 'exactitude doctrine.'

6. Adoption of the Secretary's reading of § 1-7.5-107(3) necessarily would require the Court to rewrite § 1-7.5-107(3)(a)(I), including a new word not used by the General Assembly in that section. If the Secretary's position was upheld, the Court would be countenancing a reading of 1-7.5-107(3)(a)(I) to say: "the designated election official shall mail ***only*** to each active registered elector. . . ." the mail ballot. Had the Legislature intended this result, they could have said so. They did not.

7. The Secretary's interpretation is at odds with and irreconcilable with § 1-7.5-108.5(2)(c), in which the Legislature speaks to mail ballots "sent to a registered elector." If the Legislature had intended to exclude the mailing of mail ballots to IFTV electors, it is hard to understand why the later-adopted subsection 108.5(2)(c) refers to "registered" (and not only "active") electors. The use of the broader term "registered elector" implies that mail ballots *may* be sent to other than "active" registered electors, *i.e.,* IFTV electors.

8. The MBEA must be construed in manner which increases rather than limit or decreases voter participation in elections.

9. There is nothing in the 1997 amendments to suggest that the General Assembly intended to preclude IFTV electors from receiving mail ballots. Instead the language suggests intent to streamline the mailing process for county clerks or other election officials, but not to preclude those clerks or election officials from mailing ballots for mail ballot elections to "inactive" voters.

10. Along with the adoption of the IFTV and Inactive-Undeliverable categories in 2008, changes to the MBEA and the Election Code in 2008-2010 make clear that the General Assembly intended, by adopting § 1-7.5-

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a judicially created exception that the General Assembly did not include." *In re Marriage of Chalat,* 112 P.3d 47, 57 (Colo. 2005)(internal citations omitted).

108.5(2)(c), that IFTV electors should continue to receive mail ballots until such a mail ballot is returned as undeliverable.

11. The General Assembly intended that registered and eligible electors continue to be able to vote, notwithstanding a failure or decision not to vote by that elector in a prior general election.

12. One of the objectives of the 2008 – 2010 changes in the MBEA and Election Code is to preclude any elector's registration record from being canceled solely for failure to vote. Yet the Secretary's construction substantially achieves this statutorily proscribed outcome: if a clerk may not mail a ballot to an IFTV in a general election and that elector must, in order to vote in the general election, either re-register or go to a polling place or voting center, that penalizes the IFTV elector for not voting in a previous general election. Given the statutorily declared objective that "no elector's registration record shall be canceled solely for failure to vote" along with the provisions of § 1-7.5-107(3) extending mail voting privileges to affiliated IFTV electors in primary elections, application of the Secretary's construction would effectively impair the registration of a permanent mail-in voter in a general election.

13. The Secretary's construction is contrary to the express and stated goals of the Uniform Election Code that it be construed in a way which will enhance the principle that all eligible electors may be permitted to vote. Application of the Secretary's interpretation would, for example, have impeded the voting of some 4,000 – 6,000 IFTV electors in Denver in November 2011, (*see* ¶ 30, *supra*), and tens-of-thousands of citizens statewide (*see* ¶ 50, *supra*), who did receive mail ballots in May and June 2011.

14. At oral argument, the Secretary conceded that the Uniform Election Code dictates areas which are minimum requirements but which can be increased by local election officials. For one example, § 1-7-101(a), C.R.S. 2012, requires that all polls "shall be opened continuously from 7 a.m. until 7 p.m. of each election day." The Secretary admitted that a local county clerk and recorder or election official could, in her or his discretion, open the polls earlier or keep them open later. The Secretary was unable to provide any principled basis for distinguishing why this would represent an appropriate exercise of discretion by a local election official, but the mailing of ballots to IFTV electors would not.

For these reasons and the discussion set forth in this Order, the Court concludes that § 1-7.5-107(3)(a)(I) permits a clerk and recorder or local election

official to send a ballot by mail to IFTV electors for a general coordinated election.

The Court, accordingly, **denies** the Secretary's Motion for Summary Judgment against the Denver Clerk and the Pueblo Clerk, and **grants** the Denver Clerk's Motion for Summary Judgment on this issue and the Third Claim for Relief.

Because of this conclusion, the Court need not consider claims of CCC that the Secretary's interpretation of § 1-7.5-107(3)(a)(I) is unconstitutional, nor the Secretary's claim that CCC lacks associational standing to pursue the constitutional claims. Because the Uniform Election Code permits clerks and recorders and local election officials to mail ballots to IFTV electors in a general coordinated mail ballot election, no issue arises regarding disparate impact or discriminatory effect.

V. Pueblo Clerk's UMOVA Counterclaim

At oral argument, the Secretary conceded that the Pueblo Clerk could mail ballots to voters who are deemed "covered voters" under the Uniform Military and Overseas Voters Act (UMOVA), §§ 1-8.3-101, *et seq.*, C.R.S. 2012 and that UMOVA is not superseded by § 1-7.5-107(3)(a)(I). Given these concessions, the Court concludes that the Pueblo Clerk may send mail ballots to IFTV electors in a general coordinated election who are otherwise deemed "covered voters" under UMOVA.

Pueblo's Motion for Summary Judgment is therefore **granted** and the Secretary's Motion for Summary Judgment is **denied.**

VI. Secretary's Additional Requests for Declaratory Relief (First and Second Claims for Relief) and Denver Clerk's Motion for Judgment on the Pleadings

Because of the controversy which arose in connection with the November 2011 election, the Secretary seeks broad declaratory relief, including judicial declarations that the Denver Clerk "must obey the rules, orders and directives of the Secretary, even if she believes them to be illegal or unconstitutional" and to declare "that the Election Laws must be applied uniformly throughout the State." (Secretary's Cross-Motion for Summary Judgment, at 35)

The Denver Clerk seeks judgment on the pleadings on these claims, arguing that the Secretary is limited under § 1-1-107(2)(d), C.R.S. 2012, to

"enforc[ing] the provisions of this [Uniform Election] code by injunctive action brought by the attorney general in the district court for the judicial district in which any violation occurs." The Secretary responds, citing *Lamm v. Barber,* 565 P.2d 538, 544 (Colo. 1977) that "as a general rule, neither a county officer nor a subordinate county agency has any standing or legal authority to question or obtain judicial review of an action taken by a superior state agency," that the Secretary is a superior official *vis a vis* the Uniform Election Code, and that an action seeking declaratory rather than injunctive relief is proper.

The Court declines to rule on these claims because there is no additional, remaining case or controversy which has not been resolved in this case.

A court's jurisdiction exists in a declaratory action "only if the case contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim." *Bd. of County Commrs. v. Park County Sportsmen's Ranch, LLP,* 45 P.3d 693, 698 (Colo.2002). A declaratory judgment action "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Farmers Ins. Exch. v. Dist. Court,* 862 P.2d 944, 947 (Colo.1993). A court may not appropriately adjudicate a case seeking declaratory relief "in the absence of a showing that a judgment, if entered, would afford the plaintiff present relief." *Id.* Above all, there must be a present and actual legal controversy and "not a mere possibility of a future legal dispute over some issue." *Cacioppo v. Eagle County Sch. Dist. Re-50J*, 92 P.3d 453, 467 (Colo. 2004)(internal citation omitted). Although claims for declaratory relief under C.R.C.P. 57 are to be construed liberally[12], the "legal controversy presented must be a current one rather than one that may arise at some future time." *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 168 (Colo. 1988).

This Order resolves the dispute and controversy regarding the interpretation § 1-7.5-107(3)(a)(I). The controversy regarding the 2012 Rules adopted by the Secretary concerning mailing ballots to IFTV electors is

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[12] *See* C.R.C.P. 57(k). "The primary purpose of the declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument or law." *Tidwell v. Bevan Properties, Ltd.,* 262 P.3d 964, 968 (Colo. App. 2011)(internal citation omitted).

currently pending in a separate action, 12CV5841, before Judge Martinez and is not appropriate for consideration here. Thus, apart from the Secretary's contention that future disagreements may arise between the Secretary and the Denver Clerk, or the Secretary's request for a generalized judicial declaration that the Denver Clerk is a "subordinate to the Secretary under the [Uniform] Election Code" or that the Secretary "is the superior officer," (Secretary's Reply, at 5-6), or that the Denver Clerk "cannot disobey an order of the Secretary, even if the Clerk believes the Secretary erred." (Complaint ¶ 29), there are no remaining actual disputes to be resolved by this Court without improperly venturing into the realm of rendering advisory opinions. Resolution of any further disputes between the Secretary and the Denver Clerk must first await their nascence.

The remaining claims in the case are dismissed without prejudice.

Please set the case for a status conference to occur this week. The Court believes that this Order resolves all outstanding issues in the case and obviates the need for the bench trial beginning January 28, 2013. However, the Court would like to receive counsel's input on this question.

Dated this 21st day of January, 2013.

BY THE COURT:

_____
Edward D. Bronfin
District Court Judge

cc: All counsel