DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 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	**▲COURT USE ONLY▲** Case Number: 2011CV6588 Division: 203 Courtroom:
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DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendant Debra Johnson, as Clerk and Recorder, (the "Clerk" or the "Defendant"), hereby submits this Response in Opposition to Secretary of State's Motion for Preliminary Injunction (Motion)..

I. PARTIES

The Defendant is the elected Clerk and Recorder for the City and County of Denver. She is the chief election official for the City and County of Denver (Sec. 8.1.2; Denver Charter; Sec. 1-1-110(3), C.R.S.). She has exclusive authority for all matters pertaining to municipal home-rule

elections. (Sec. 8.1.2; Denver Charter). The Secretary is an elected statewide official and is responsible for the administration of the election laws of the State of Colorado.

II. STATEMENT OF FACTS

Denver will offer the Affidavit of Amber Faye McReynolds, Denver Director of Elections the Affidavit of Debra Johnson, Denver Clerk and Recorder in support of this Response in Opposition to Motion for Preliminary Injunction.

1. The 2011 Coordinated Election ("the Election") will be conducted on November 1, 2011. A "coordinated election" is defined as an election where more than one political subdivision with overlapping boundaries or the same electors hold an election on the same day and the eligible electors are all registered electors, and the county clerk and recorder is the coordinated election official for the political subdivisions. Section 1-1-104(6.5), C.R.S. (2011).

2. The Election will be conducted as a mail ballot election in the City and County of Denver.

3. The Election will not be uniformly conducted as a mail ballot election throughout Colorado. In other Colorado counties, the election will be conducted where eligible electors vote by mail-in ballot, during early voting, or on Election Day.

4. A "mail ballot election" means an election for which eligible electors may cast ballots by mail and that 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. (2011).

5. In Denver, the ballot content for the Election consists of a statewide election for Proposition 103 (a tax increase question); the Regular Biennial School Election (which has three nonpartisan (3) School Board candidate races for School District No. 1 in the City and County of

Denver and State of Colorado); and a citywide municipal election for Initiated Ordinance 300 (a citizen initiated ordinance) and Referred Question 3A (a municipal charter amendment question).

6. Since November 2009, Denver has conducted the following five (5) elections all as mail ballot elections:

a. 2011 Municipal Runoff Election;
b. 2011 Municipal General Election;
c. 2010 Municipal Special Vacancy Election;
d. 2010 Primary Election; and
e. 2009 Coordinated Election.

7. Under Section 1-2-605(2), if a registered elector who is deemed "active" fails to vote in a general election, then his or her registration record is marked as "Inactive-(insert date)". These voters are designated in the Colorado Statewide Voter Registration System (SCORE) as "Inactive-Failed to Vote" ("IFV").

8. Denver has the following registered voters, approximately:

Total Registered Active Voters:	237,838
Total Registered "Inactive Failed to Vote" Voters	54,357
Total Inactive (not Failed to Vote)	144,947
Total Registered Voters	437,142

9. Denver followed the Secretary's rules, procedures, and requirements to establish its plans to conduct the Election as a mail ballot election including the plans to mail ballots to voters identified in the Colorado Statewide Voter Registration System (SCORE) as "Inactive-Failed to Vote" ("IFV").

10. Denver's submitted its plans for the Election to the Secretary and the plans were consistent with the mail ballot plans Denver implemented in the last five elections.

11. The Secretary approved Denver's mail ballot plans for the Election on September

15, 2011.

12. Then the Secretary provided a written interpretation/order, delivered to the Clerk by email at approximately 5:58 p.m., on Friday, September 16, 2011.

13. The Secretary's interpretation/order conflicted with the approved plans.

14. There are no procedures to implement the interpretation/order.

15. By the time the Secretary's interpretation/order was delivered to the Clerk, critical and essential performance had already occurred. In particular, ballots were issued to absent uniformed services members and overseas electors (including inactive electors) of the City and County of Denver earlier that day.

16. In Colorado, absent uniformed services members and overseas electors may return ballots by U.S. Mail, facsimile, or electronically. Section 1-8.3-110, C.R.S. (2011). This means voting already began in Colorado for the 2011 Election.

III. STANDARDS FOR GRANTING INJUNCTIONS

A. Rathke standards govern.

Preliminary injunctive relief is designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits. *Bloom v. National Collegiate Athletic Assoc.*, 93 P.3d 621, 623 (Colo. Ct. App. 2004). An injunction provides relief against future harmful conduct. *City of Colorado Springs v. Blanche*, 761 P.2d 212, 217 (Colo. 1988). Although the grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court, injunctive relief should not be indiscriminately granted. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). The trial court's power to award injunctive relief "should be exercised

sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity." *Id.* If a preliminary mandatory injunction will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, it should not be issued. *Allen v. City and County of Denver,* 351 P.2d 390, 391 (Colo. 1960); *Sanger v. Dennis,* 148 P.3d. 404, 411 (Colo. Ct. App. 2006).

A party seeking a preliminary injunction must meet the standards set forth in *Rathke.* In exercising its discretion, the trial court must find that the moving party has demonstrated: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Id. at 653-654.*

B. The limited "*Kourlis*" exception does not apply to this dispute.

The Secretary asserts he "is entitled to an injunction if he can show that the Clerk refuses to obey an order." (Motion, p. 6). He cites *Kourlis v. District Court, 930 P.2d 1329, 1335 (Colo. 1997)* to suggest the standard *C.R.C.P. Rule 56/Rathke* criteria may not apply when a statute establishes special statutory procedures for obtaining injunctions. (Motion, p. 5). The Secretary is not, however, exempt from proving the *Rule 56/Rathke* criteria in this case.

In *Kourlis,* the court reviewed the authority of the Colorado Commissioner of Agriculture to obtain a temporary restraining order or preliminary injunction under the Pet Animal Care and Facilities Act ("PACFA"). The court determined the General Assembly provided the Commissioner of Agriculture with a comprehensive legislative scheme which outlined a specific

statutory procedure that governed the Commissioner's authority to obtain injunctions. This scheme included a restraining order proceeding, an administrative appeal proceeding, and a provision for court enforcement all as essential features of PACFA's enforcement design. *Id.* at 1334. Additionally, the General Assembly expressly dispensed with the evidentiary burdens of proving irreparable injury or inadequacy of a remedy at law when seeking to enforce properly issued agency enforcement orders. *Id.* As a result of this essential feature, the court concluded the statute's express language conflicted with the requirements of C.R.C.P. 65. *Id.* Upon review of PACFA's enforcement terms, the court determined that the more specific enforcement provisions of PACFA prevailed over the six factor standards of C.R.C.P. 65 and *Rathke.*

Unlike the statute reviewed in *Kourlis,* Section 1-1-107, C.R.S., does not contain a comprehensive scheme for obtaining injunctions. It does not expressly dispense with the requirement to show irreparable injury or any other Rule 65/*Rathke* requirement. Thus, there is no conflict between the terms of Section 1-1-107 and the standard Rule 65/*Rathke* criteria. Moreover, Section 1-1-107 lacks specific procedures for obtaining a preliminary injunction. The only language in Section 1-1-107 that is similar to the statute reviewed in *Kourlis* is the general authority of Section 1-1-107(2)(d) that allows the Secretary to seek and obtain relief from the court for alleged violations of the statute. This language fails to supply the essential elements of a comprehensive special statutory scheme sufficient to properly invoke the *Kourlis* exception.

The Secretary's reliance on *Lamm v. Barber,* 565 P.2d 538 (1977) does not support any argument that the standard Rule 65/*Rathke* do not apply in this case. *Lamm* was decided before *Rathke* and *Kourlis,* and did not present the issue of the requirements that must be met by a state official to obtain injunctive relief against a county official. Moreover, the legal claims and

arguments advanced in *Lamm* to obtain mandamus rely on inapposite legal principles and procedural considerations. Thus, *Kourlis* does not apply and the Secretary must meet all six *Rathke* criteria to obtain injunctive relief in order to obtain injunctive relief.

IV. THE SECRETARY IS NOT ENTITLED TO INJUNCTIVE RELIEF.

A. The Secretary cannot show a reasonable probability of success on the merits/Implementation of Secretary's Email.

1. Denver followed the Secretary's rules, procedures, and requirements.

In his Motion for Preliminary Injunction ("Motion"), the Secretary asks the court to decide "whether the Election Code gives the Clerk the discretion to refuse to comply with the Secretary's interpretation." (Motion, p. 10). Yet, the Secretary misstates both the nature of this dispute (which did not arise out of an act of perceived disobedience) and the authority to issue orders and interpretations given to him under the Election Code.

This dispute arose when:

1) the Clerk followed existing election statutes, rules, and procedures in developing and submitting Denver's mail ballot plans for the Election;

2) the Secretary approved her mail ballot election plans which included plans to mail ballots to IFV electors;

3) Denver has followed the Secretary's rules, procedures and requirements in conducting the last five elections which were all conducted similarly as mail ballot elections.

4) the Secretary emailed a new interpretation/order overnight that conflicted with Denver's approved plans and created disparate voting opportunities in Denver; and

5) the interpretation/order could not be implemented since critical performance had already occurred and no procedures existed to effectively "start over".

2. The Secretary's power is not unlimited.

Even though the Secretary has a fair amount of duties and responsibilities under the Election Code, there are limitations on the scope and reach of his power to issue rules, orders, and interpretations. He cannot invent procedures that are not authorized by law. *De Koevend v. Board of Ed.*, 688 P.2d 219, 229 (Colo. 1984). He cannot add, modify, or conflict with the authority granted to him by the Colorado Constitution or by statute. *Sanger v. Dennis*, 148 P.3d. 404, 413 (Colo. Ct. App. 2006). And, he cannot obtain an injunction to enforce an email containing an interpretation/order when he did not comply with the Administrative Procedures Act (APA), Section 24-4-101, *et. seq.*, C.R.S., (2011). The question that must be resolved is whether the Secretary's email can even be enforced, much less obeyed. In this regard, the Secretary cannot show that he has a reasonable probability of success on the merits.

3. Section 1-1-110, C.R.s., does not create authority to issue orders by email.

The Secretary points out that he has "broad" duties and powers under the Election Code, citing the duties in Section 1-1-107(1)(a)-(c) and the powers in Section 1-1-107(1)(2)(b)-(c), C.R.S. (Motion, p. 9). Yet, the Secretary fails to discuss his delegated authority for rulemaking authority in Section 1-1-107(2)(a). Instead, he relies on Section 1-1-110(1), C.R.S., to characterize this dispute as a matter of obedience owed to him from subordinate officers. (Motion, pp. 6-11). Section 1-1-110(1) states as follows:

> **1-1-110. Powers of the county clerk and recorder and deputy.** (1) The county clerk and recorder, 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.

In order to require any clerk and recorder to follow the "rules and orders promulgated by the Secretary", the Secretary must first promulgate them according to the powers given to him by

the legislature. Section 1-1-110(1) does not give the Secretary independent power to randomly issue orders or interpretations. Instead, the provision merely requires the clerks and recorders to follow the rules and orders issued by the Secretary according to authority given to him by the legislature. Here, the Secretary's rulemaking power is contained in Section 1-1-107(2)(a). As for the authority to issue "orders", the Secretary's Motion is silent. There is no provision in the Election Code under which the Secretary can issue "orders" to resolve this dispute. What's more, the Election Code provides few instances where the Secretary is authorized to issue "orders". Where such authority exists, they are not applicable to this dispute. See, Section 1-1.5-104(1)(d)(concerning the authority to issue appropriate orders in connection with the administration of the Help America Vote Act of 2002 (HAVA) and Section 1-5-618 (concerning the written order of approval or disapproval of changes to electronic voting systems).[1] Therefore, the Secretary does not have separate authority to issue an "order" to the Clerk obey his interpretation. Instead, the Secretary should have exercised the powers given to him under Section 1-1-107(2)(a).

4. The Secretary's cannot create rules by email.

The Secretary's Motion uses the words "order" and "interpretation" interchangeably. (Motion, *passim*). He omits the word "rule" where he quotes Section 1-1-110(1) to highlight the mandatory connotation affecting the discretion of clerks and recorders. (Motion, p. 10, "Section

[1] Section 1-1-110(1) was amended in 2003 when the General Assembly enacted House Bill 03-1356. Among the major provisions of H.B. 03-1356, was the addition of Section 1-1.5-101, *et. seq.*, to the Election Code which established provisions to allow the State to comply with the requirements of the federal Help America Vote Act of 2002 (HAVA). In particular, House Bill 03-1356 created an administrative complaint procedure and the authority for the Secretary to issue appropriate orders in connection with the proper administration, implementation, and enforcement of HAVA. Section 1-1-110(1) was amended to add the word "order" as a companion amendment and to avoid a construction that county and local election officials did not have to follow orders issued under Section 1-1.5-101. To the extent that the Secretary has separate authority to issue orders, such authority under the Election Code is contained in Section 1-1.5-105(1)(d) which is not applicable in this dispute.

1-1-110(1) states that the clerk 'shall...follow... the orders promulgated by the secretary of state pursuant to this code.'...)". Nonetheless, there can be no doubt that the Secretary's September 16, 2011, correspondence (whether it is characterized as an "interpretation" or an "order"), is an attempt to create a "rule" as such term is defined by Section 24-4-102(15) of the Administrative Procedure Act (APA), Section 24-4-101, *et. seq.*, C.R.S., (2011).

The term "Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. Section 24-4-102(15). When an agency uses an interpretation to command a particular result in all applicable situations, then it is a "legislative rule". *Hammond v. Public Employees' Retirement Ass'n of Colo.*, 219 P.3d 426, 428 (Colo. App. 2009). When an agency uses an interpretation to merely establish non-binding guidelines, then it is an "interpretive rule". *Id.*

The result of the Secretary's interpretation/order in this case is evident. The Secretary cites statewide uniformity as the reason for his interpretation to limit the initial mailing of ballots to only active registered voters. Further, the Secretary has added the word "only" to create prohibitive connotation to Section 1-7.5-107(3)(a)(I). Therefore, his correspondence creates, rather than interprets, a new rule that precludes a particular course of action. In so doing, he has commanded a particular result applicable to all counties conducting the Election as a mail ballot election. For these reasons, the Secretary's interpretation/order is a guise for an improperly issued rule and it cannot be enforced.

The Secretary did not properly promulgate his interpretation of Section 1-7.5-107(3)(a) by following the notice, comment, and publication requirements of the APA. His interpretation

was not made as part of an open proceeding with notice and opportunity for public comment. Instead, he sent an overnight email **after** the Secretary had received, reviewed, and approved the Clerk's mail ballot plans which included the plan to mail to IFV electors. See, e.g., Section 1-7.5-105 (2)(a) (The secretary shall approve or disapprove the written plan for conducting a mail ballot election, in accordance with section 1-7.5-106, within fifteen days after receiving the plan and shall provide a written notice to the affected political subdivision.). Moreover, it was emailed **after** critical performance by the Elections Division already occurred. The Secretary does not have procedures in place to change or replace the approved plans. Since the Secretary did not properly promulgate an enforceable rule (or order), he is not entitled to injunctive relief. The arguments advanced in the Motion promoting obedience from subordinate officials are inapposite. In order for any clerk and recorder to be required to follow the rules and orders of the Secretary under Section 1-1-110, they must first be properly promulgated. The "interpretation"/"order" is, therefore, not enforceable. *Jefferson Sch. Dist. R-1 v. Div. of Labor*, 791 P.2d 1217, 1219 (Colo. App. 1990).

B. The Secretary cannot show a reasonable probability of success on the merits/Section 1-7.5-107(3)(a)(I), C.R.S., does not preclude mailing to IFV electors.

1. Standards for de novo review. Election laws are to be construed liberally because of the importance of the public's right to participate and vote in elections. The Colorado General Assembly adopted this objective when it stated the Uniform Election Code shall be liberally construed so all eligible electors may be permitted to vote. Section 1-1-103(1), C.R.S.

Statutory interpretation is a question of law that the courts review de novo. *Robles v. People*, 811 P.2d 804, 806 (Colo. 1991); *Wycon Construction Co. v. Wheat Ridge Sanitation District*, 870 P.2d 496, 497 (Colo.App. 1993). When construing a statute, the goal is to give

effect to the intent of the legislature and adopt the construction that best effectuates the purposes of the legislative scheme. *People v. Yascavage,* 101 P.3d 1090 (Colo.2004). The courts first look to the plain and ordinary meaning of the statutory language to determine the legislative intent. *Holcomb v. Jan–Pro Cleaning Sys.,* 172 P.3d 888, 890 (Colo.2007), citing *People v. Cross,* 127 P.3d 71, 73 (Colo.2006). If the statutory language is clear, we apply the plain and ordinary meaning of the provision. *Turbyne v. People,* 151 P.3d 563, 568 (Colo.2007). We do not add words to the statute or subtract words from it. *Holcomb,* 172 P.3d at 894; *Turbyne,* 151 P.3d at 568. If the statute is susceptible of more than one reasonable interpretation, and is therefore ambiguous, a body of accepted intrinsic and extrinsic aids to construction may be applied to determine the particular reasonable interpretation embodying the legislative intent. *Holcomb,* 172 P.3d at 890.

2. Colo. Rev. Stat. Sec. 1-7.5-107(3)(a)(I).

The Secretary's interpretation is inconsistent with the meaning of Section 1-7.5-107(3)(a)(I) which states as follows:

> (3) (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."
> [Emphasis added].

It is evident that the emphasized language, by its plain terms, directs election officials to mail ballots to each active registered elector. Denver will comply with this language. The

Secretary instead focuses on the adjective "active" and has added the word "only" as a restrictive modifier. He has literally added a prohibitive term to Section 1-7.5.103(3)(a)(I) where such term does not exist. Yet, on its face, Section 107(3)(a)(I) does not contain the word "only" and it doesn't prohibit ballots from being mailed to IFV electors in addition to active voters. Inactive Failed to Vote electors are still registered voters. When viewed in context, the Secretary's improper addition of the word "only" removes registered (and otherwise eligible) voters from the mailing list and therefore limits their participation in the Election because they do not receive ballots at the same time as active voters. Therefore, the Secretary's interpretation exceeds the plain letter of Section 1-7.5-107(3)(a)(I) and operates to defeat, not further, the stated intent of the general assembly to increase voter participation. See, Section 1-7.5-102 and Section 1-1-103(1), C.R.S.

2. The Secretary's Legislative History does not support his interpretation.

Although he does not say Section 1-7.5-107(3)a)(II) is ambiguous, the Secretary nonetheless focuses on legislative intent to support his restrictive interpretation. The Secretary looks to H.B. 08-1329 as the applicable legislative history. H.B. 08-1329, added Section 1-7.5-108.5 to the Mail Ballot Act. In particular, Section 1-7.5-108.5(b)(I) provided specific authority to mail ballots for the November 2009 election to both active **and** IFV electors. Section 1-7.5-108.5(b)(II) repealed Section 1-7.5-108.5(b) ("This paragraph (b) is repealed, effective July 1, 2011). By its terms, Section 1-7.5-108.5(b)(II) 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) in any way. The Secretary speculates about the things the General Assembly could have done other than repeal Section -7.5-108.5(b) as evidence of legislative

intent. Yet these arguments do not justify the Secretary's own rewrite of Section 1-7.5-107(3)(a)(II). Sections 1-7.5-108.5(b)(I) and (II) cannot be construed to add the prohibitive term "only" in Section 1-7.5-107(3)(a)(I). To do so would defeat, not further, the legislative intent of increasing voter participation in elections.

Similarly, the language quoted by the Secretary in the case of *Lunsford v. Western States Life Ins.*, 908 P.2d 79 (Colo. 1995) is inconsequential to the review of Section 1-7.5-107(3)(a)(II). The statutory scheme in that case contained several specific contexts to prevent killers from reaping profits as a result of the perpetration of homicides (the "slayer" statute). *Lunsford*, 908 P.2d at 83. There it was necessary to review the terms of the statute to determine if the notice provisions in the slayer statute precluded insurer liability in a separate case brought by Plaintiff Lunsford against the insurer for negligence and breach of contract for paying policy benefits. The court determined that the statutory provisions were clear as written. *Lunsford*, 908 P.2d at 84. The Secretary's quoted language simply illustrates that where the language of the statute is clear on its face, it must be applied as written. *Id.* Yet, the case provides guidance for the principle that words should not be added to statutory provisions to determine their meaning particularly where the addition provides a restrictive connotation. The Court in *Lunsford* refused to superimpose any exceptions to the literal language of the statute. It therefore provides guidance that prohibitive terms should not be added through statutory interpretation.

For the reasons discussed above, the legislative history cited by the Secretary does not support his interpretation and he is not entitled to injunctive relief.

3. Colo. Rev. Stat. Sec. 1-8.3-101, et. seq., provides guidance for legislative intent.

The Secretary's interpretation is also inconsistent with the requirements of Section 1-8.3-101, et. seq., (the Uniform Military and Overseas Voter Act) which requires ballots to be mailed to "covered voters". A covered voter is defined at Section 1-8.3-102(2)(a)-(d) and includes both overseas voters and uniformed service members who are absent by reason of active duty. The general assembly did not set apart "covered voters" as either active or inactive electors. Section 1-8.3-110(1) requires all clerks and recorders to transmit ballots to "covered voters". Thus, all uniformed and overseas voters who come within the definition of "covered voter" are entitled to receive a ballot regardless of active or IFV status in SCORE. Under the Secretary's interpretation of Section 1-7.5-107(3)(a)(II), IFV covered voters will be singled out and prevented from receiving a ballot. This too defeats the requirement that Colorado's election laws be given a liberal interpretation so that all eligible electors may be permitted to participate and vote. Section 1-1-103(1), C.R.S; Section 1-7.5-102.

4. The Secretary's interpretation should be rejected. The Secretary's interpretation should be rejected in favor of a broader construction that comports with the requirement that Colorado's election laws be given a liberal interpretation. Section 1-1-103(1), C.R.S; Section 1-7.5-102. For the reasons discussed above, the Secretary will not be able to show a reasonable probability of success on the merits that he has properly interpreted Section 1-7.5-107(3)(a)(I).

C. The Secretary has not shown a danger of real, immediate and irreparable injury which may be prevented by injunctive relief.

The Secretary asserts the concerns of irreparable injury:

1. **Uniformity.** The Secretary asserts that there will be irreparable injury to the election process because mailing to IFV electors undermines the mandate of uniformity and affects the state's interest in the integrity of the voter registration list. (Motion, p. 14-15). First, the interest of maintaining uniformity throughout the State is disingenuous because the Election itself is not being conducted in a uniform manner across the State. Some counties are conducting a polling place election which does not treat active and IFV electors differently. Instead, under a polling place election, active and inactive voters have access to the ballot at the same time thereby promoting an equal opportunity to participate in the election. Because Denver's plan to include IFV voters provides the same result for electors as in a polling place election, there is no danger of real, immediate, and irreparable injury to the Secretary. Moreover, an injunction will create disparate voting opportunities because ballots to absent uniformed service members and overseas electors (active and inactive) were already issued before the Secretary emailed his interpretation/order.

2. **Integrity of the voter registration list.** The mailing to IFV electors will protect the integrity of the voter registration list. If an elector votes, his or her registration status will be revised to active status. If the ballot is returned as "undeliverable", then the voter's registration status will be revised to "inactive-undeliverable". Contrary to the Secretary's assertions, the mailing to IFV electors will help maintain the SCORE voter registration list.

3. **Potential for fraud/unreturned ballots.** The Secretary also raises the specter of fraud due to unreturned ballots, but fails to provide factual support for this claim. The Secretary ignores that the General Assembly, has already concluded that mail ballot elections are an appropriate method of conducting elections and that self-government by election is more

legitimate and better accepted as voter participation increase. Section 1-7.5-102, C.R.S. In addition, the Secretary cites no authority for the statement that he must "account for all ballots." He doesn't even count them. Instead, county officials count ballots that are deposited or returned under Section 1-7.5-107(6). The claim that there is a greater potential for fraud because ballots cannot necessarily be tracked is specious. Generally, the concern about fraud in mail ballot elections arises when there are allegations of attempts to vote more than once in the same election or attempts to vote a ballot that belongs to someone else (which concerns the Secretary does not allege). Unreturned mail ballots sent to IFV pose no greater potential for fraud than unreturned mail ballots sent to active voters. Moreover, the Secretary fails to inform the Court that Denver can track and report the status of mail ballots. The Elections Division, with voluntary disclosure to the Secretary of State's Office, has since November 2009, used an award winning ballot tracking system known as Ballot TRACE. Under the Ballot TRACE system, Denver tracks mail ballots from the time they are printed, through the time they move through the U.S. Postal System to and from voters, and until the time they are returned or deposited with the Denver Elections Division to be processed for counting. Thus, the Secretary's concerns for tracking ballots are unwarranted.

For the reasons set forth above, the Secretary's arguments of irreparable injury are unsupported. As a result, there can be no danger of real, immediate, and irreparable injury to the Secretary or the public for these concerns. To the contrary, real immediate, irreparable harm will occur to registered voters whose participation will be limited if the Secretary is allowed to create new rules by email.

D. An injunction will disserve the public interest and the balance of equities disfavors an injunction.

1. **Denver followed the Secretary's rules and procedures.** The Secretary has jeopardized uniformity by issuing his interpretation/order at this late date. By the time the Secretary had issued his interpretation/order, critical and essential election procedures had already been performed using the Secretary's established rules, procedures, and requirements. Injunctive relief cannot be awarded when performance has already occurred. *City of Colorado Springs v. Blanche,* 761 P.2d at 217. There are no procedures in place to remove IFV electors. In addition, the SCORE system will continue to reflect that IFV electors are scheduled to receive a mail ballot. Thus, an injunction will disserve the public's confidence in the election process and place the burden all on Denver and its voters.

2. **Denver's home rule concern should not be overlooked.** The Secretary virtually concedes in his Motion, that, as a home rule city, Denver controls its own elections. (Motion, p. 11). This dispute would not even exist if the ballot content for the Election did not include the statewide ballot question. Denver indeed has plenary authority over its own elections under Art. XX, Sec. 6 of the Colorado Constitution. It cannot be denied that important local questions and school board candidate races are on the ballot too. Yet, the Secretary's interpretation/order directly impairs an important constitutional power vested in Denver as a home rule city and county. Only by happenstance, and at the very last minute through the certification of one statewide initiative, did this become an election that the Secretary of State even noticed. In contrast, the 2007 and 2009 November elections did not include any statewide ballot questions. If it were not for mere happenstance, the Denver Clerk would not be ordered to desist from exercising her discretion to promote increased voter participation on these local ballot questions and races.

For all these reasons, the Secretary cannot show the balance of equities favors the injunction or that the public interest will be served.

E. An injunction will disrupt the status quo.

If the Court grants the relief requested by the Secretary, the injunction will in fact change the status quo and dictate the outcome of this case. Ballots were already on their way to some electors before the Secretary emailed his interpretation/order at 6:00 p.m, on Friday Saturday 16, 2011. At present, voting has already begun. Thus, the issuance of a preliminary injunction which prohibits the Clerk from mailing ballots to IFV electors will change the status quo. The Secretary's Motion, therefore, must be denied.

F. Special Remedy of Section 1-1-107(2)(d) is adequate. The Secretary has invoked the special remedy available to him under Section 1-1-107(2)(d) (although it is questionable whether he can obtain both declaratory relief and injunctive relief under this provision). There is no right to an expedited hearing on the merits and if the injunction is granted, it will give the Secretary all the relief he could obtain at a trial in the merits.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Clerk respectfully request that Plaintiff's Motion for a Preliminary Injunction be denied.

Respectfully submitted this 6th day of October, 2011

By: /s/ Victoria Ortega

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In accordance with C.R.C.P. 121§1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that today, October 6, 2011, the foregoing **RESPONSE IN OPPOSITION OF PRELIMINARY INJUNCTION** was served via LexisNexis File & Serve on:

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