

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

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

### INTRODUCTION

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

### JURISDICTION

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

## **VENUE**

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

## **PARTIES**

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

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

## **FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

12a. In 2010, Denver’s inactive voters received a mailing from the county prior to the August primary, a ballot in the August primary if they were affiliated with a political party, and a notice from the county alerting them of their inactive status prior to the November general election. They then failed to vote in that general election.

12b. In 2011, these electors received a mailing that again notified them of their inactive status prior to the mayoral election. They then received a ballot in the mayoral election and another ballot in the mayoral run-off election. Each “inactive failed to vote” elector chose not to cast a ballot in these elections.

12c. In addition, these electors were sent yet another notice of their inactive status last month (August), which they failed to heed.

12d. Denver’s “inactive failed to vote” electors would receive a mail ballot from the City and County of Denver in the upcoming statewide election if they had responded to even one of the notices sent them or voted in any of the aforementioned elections. They have fallen into inactive status because these they failed to heed repeated notifications of inactive status and failed to vote in each of the four elections noted above. Thus, under 1-7.5-107(30(a)(1), C.R.S.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **FIRST CLAIM FOR RELIEF**

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

27. Paragraphs 1-25 of the Complaint are incorporated herein by reference.

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

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

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

### **SECOND CLAIM FOR RELIEF**

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

31. Paragraphs 1-25 of the Complaint are incorporated herein by reference.

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

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

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

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

35. Paragraphs 1-25 of the Complaint are incorporated herein by reference.

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

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

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

**REQUEST FOR RELIEF**

WHEREFORE, the Secretary requests the following relief:

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

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

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

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

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