

July 25, 2016

Dear Secretary of State Williams,

We do not accept CDOS's Orwellian double-speak proposed as the new Rule 1.1.8 "Ballots Cast" definition. We begin by identifying four problems with the proposed terminology. After discussion, we offer a temporary, albeit imperfect, work-around for the November 2016 election. The following discussion relates also to proposed Rules 1.1.44, 10.5.2(b), 10.11.2(a), and 21.4.15(d)(5).

1. Attempting to redefine the commonly understood word "cast" is a horrible suggestion. If adopted, we would have to accommodate to mind-bending acrobatics to distinguish between "cast" and "received."

2. There is a vital distinction between BALLOTS CAST and BALLOTS RECEIVED, and this distinction must be retained. "Ballots Cast" relates to something that electors are allowed to do; "ballots received" relates to something that election judges are allowed to do. The difference is as stark as the difference between a baseball pitcher and catcher. To speak of the catcher pitching and catching the ball is nonsensical. Exhibit 1 illustrates a few of the many nonsensical consequences.

3. The CDOS's proposed change disguises a major flaw¹ in Colorado's election system. Such deception would directly violate CDOS's explicit statutory **duty** to enforce the provisions of the code and would misuse CDOS's statutory **power** to adopt rules necessary for the proper administration and enforcement of election laws. The law does not say that CDOS has the power to rewrite the code; see Exhibit 2: 1-1-107. Powers and duties of secretary of state, and Hanlen v. Gessler, 2014 CO 24, 333 P.3d 41.

4. Colorado's mail ballot system currently provides no chain-of-custody of ballots, has made no attempt to comply with the law requiring that it report the number of ballots cast by voters, and has made no provision for assessing the number of cast ballots that have been lost or stolen. In addition to potentially disenfranchising eligible electors, Colorado's election contest results are not trustworthy. In the recent Boulder County Primary election, 65% of the issued ballots were not returned. Lost or stolen cast ballots may have overturned an election contest. For example, the House District 10 contest for the Democratic Party Primary was won by 212 votes, but there

were about 16,000 ballots not returned, and it is UNKNOWN how many of the unreturned ballots were actually cast ballots that were lost or stolen.

Colorado's non-compliance with the requirement to report the number of ballots cast is not a new problem to CDOS. Boulder County Canvass Boards have reported this issue for years, and nothing has been done to address this violation of the law. The problem is not just the missing report of ballots cast. Without knowing the number of ballots cast, Colorado's election system cannot be verified as secure and accurate.

To remedy this problem, it is likely that CDOS must develop procedures to document and publicly certify that the entire election system complies with the laws of the State of Colorado. CDOS must then recommend legislative and election system changes needed to achieve trustworthy elections. These steps will take time and talent, so in the meantime, a temporary fix is needed for the November 2016 General Election.

Any fabricated number reported as "ballots cast" would be an affront to the people of Colorado and potentially illegal. We assume it is true that Colorado election officials do not know how many ballots are cast by voters, as opposed to received by officials. Therefore, we ask CDOS to adopt a temporary rule for the November 2016 General Election. (1) The term "ballots cast" should remain unchanged. (2) The new rule should require that wherever the number of "ballots cast" is reported by the office of the Designated Election Official, that number must be labeled, in some manner, as "UNKNOWN."² (3) Numbers identified as UNKNOWN may not be used in Canvass Board decision-making. (4) A temporary method for certification will need to be devised and adopted.

Footnotes and two exhibits follow this letter. Our membership includes members with substantial Canvass Board experience, and we are available to discuss our request with you and your staff.

Al Kolwicz, Trustee
Colorado Voter Group

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Notes:

¹ Statutory changes have undone the historical chain-of-custody mechanisms required to protect the purity of elections. Prior to these changes, a precinct judge handed each eligible elector a paper ballot that must be returned before the elector was permitted to exit the precinct. The elector marked and verified their votes in a private voting booth, then personally cast the anonymous ballot into the sealed precinct ballot box. This chain-of-custody was verifiably documented by a precinct ballot inventory, a pollbook, a certified judges' report, and the physical unused, spoiled, and cast ballots.

² "UNKNOWN" is used to alert Canvass Board members and the public that Colorado's election system erroneously uses the term "Ballots Cast" to misidentify certain information in the official election records (including data files, forms, and reports). The Canvass Board must not use any numbers identified as "UNKNOWN." Colorado's Designated Election Officials (DEOs) do not collect data to know "whether the mail ballot cast by the elector was received by the county clerk and recorder" (C.R.S. 1-7.5-207). Colorado's DEOs only know about the ballots that their offices receive into their custody. Any cast ballot not received has possibly been lost or stolen.

EXHIBIT 1

1-7.5-207. Voter verification - mail ballot information

Each county clerk and recorder shall provide electors, upon request, with information on whether the mail ballot cast by the elector was received by the county clerk and recorder, including an online mail ballot tracking system or response by other electronic or telephonic means.

1-5-615. Electronic and electromechanical voting systems – requirements

1(e)(III) Gives the elector the opportunity to correct the ballot before the ballot is cast;

1-7-514. Random audit

(5) ... The rules shall account for: ... (c) The confidentiality of the ballots cast by the electors; and

1-13.5-605. Preparing to vote

(1) Any eligible elector desiring to vote shall write his or her name and address on a form ... The form made available must contain in substance the following:

I state under penalty of perjury that I am an elector who is eligible to vote each of the ballots that I have cast in this election; that my signature and name are as shown on this document; that I have not and will not cast more than one ballot.

EXHIBIT 2

1-1-107. Powers and duties of secretary of state - penalty

(1) In addition to any other duties prescribed by law, the secretary of state has the following duties: ... (b) To enforce the provisions of this code;

(2) In addition to any other powers prescribed by law, the secretary of state has the following powers: (a) To promulgate, publish, and distribute, either in conjunction with copies of the election laws pursuant to section 1-1-108 or separately, such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws,

Hanlen v. Gessler, 2014 CO 24, 333 P.3d 41.

“[T]he secretary lacks authority to promulgate rules that conflict with statutory provisions.”