DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St Denver, Colorado 80203	
SCOTT GESSLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO, Plaintiff, v. DEBRA JOHNSON, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER FOR CITY AND COUNTY OF DENVER, Defendants.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th 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	Case No. 11CV6588 Courtroom:203
SECRETARY OF STATE'S MOTION FOR PRELIMINARY INJUNCTION	

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

CERTIFICATION

Undersigned counsel certifies that he has conferred in good faith with counsel for Defendant Debra Johnson. Defendant opposes this motion.

PARTIES

The Secretary is a duly elected statewide elected official. Among other duties, the Secretary supervises the conduct of primary, general, congressional and statewide ballot issue elections. Section 1-1-107(1)(a), C.R.S. (2011). The Secretary enforces the Election Code, § 1-1-107(1)(b), C.R.S. (2011), and may do so by seeking injunctive relief from state courts. Section 1-1-107(2)(d), C.R.S. (2011).

Debra Johnson is the duly elected Clerk and Recorder for the City and County of Denver (hereinafter "the Clerk"). Among other duties, she conducts elections within City and County of Denver. When conducting statewide elections, including statewide ballot issue elections, she is required to consult with the Secretary and follow applicable election statutes, election rules and orders from the Secretary. Section 1-1-110(1), C.R.S. (2011)

STATEMENT OF FACTS

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).

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 supervision of the secretary of state" and "subject to rules which shall be promulgated 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).

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

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).

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

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

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

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

d. Denver's "inactive failed to vote" electors would receive a mail ballot from the City and County of Denver in the upcoming statewide election if they had responded to even one of the notices sent them or voted in any of the aforementioned elections. They have fallen into inactive status because these they failed to heed repeated notifications of inactive status and failed to vote in each of the four elections noted above. Thus, under 1-7.5-107(3)(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.

A statewide ballot issue election will be held on November 1, 2011. At the election the voters will decide whether to approve Proposition 103, a proposal to raise state taxes to fund education.

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). The Secretary issued an order requiring the Defendant to mail ballots only to active registered electors. 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.

STANDARDS FOR GRANTING INJUNCTION

In most instances, a party seeking a preliminary injunction must meet the six criteria set forth in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982). *Joseph v. Equity Edge, LLC,* 192 P.3d 573, 576 (Colo. App. 2008). The criteria for obtaining a permanent injunction are the same "except that the applicant must show actual success on the merits rather than merely a reasonable probability of success, and preservation of the status quo pending trial would no longer be relevant." *Id.* (quoting *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508, 518 (Colo. App. 2004)).

The standard criteria for issuing preliminary and permanent injunctions may not apply when a statute establishes special procedures for obtaining injunctions. *Kourlis v. District Court,* 930 P.2d 1329, 1335 (Colo. 1997). "[D]ifferent statutory provisions for enforcement through injunctive relief may form an integral part of the legislative design of a particular enactment." *Id.* at 1333. Such relief is necessary "to effectuate properly issued agency enforcement orders." *Id.*

That statutory construct in *Kourlis* offers guidance. The Pet Animal Car and Facilities provided, "In the event that any person fails to comply with a cease-and-desist and order within twenty-four hours, the commissioner may bring a suit for a temporary restraining order and for injunctive relief to prevent any further or continued violation of this article." Section 35-80-111(2)(b). The Court concluded that the agency had to show only that (1) a cease and desist order was properly issued, (2) the facility required a license to operate and (3) the facility did not have a license. *Id.* at 1137. The agency was entitled to an injunction if it could show that the three factors were met. *Id.*

In the context of an action brought by a state official to enjoin a subordinate county officer from taking an action contrary to statute, the state official must prove only that the county officer failed to comply with the statute. "It is well established 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." *Lamm v. Barber*, 192 Colo. 511, 519 565 P.2d 538, 544 (1977). When a statute imposes upon a subordinate county officer a legal obligation to comply with an order of a state official, the subordinate official must comply with the order, even if the county officer believes that the order is unconstitutional or inconsistent with the applicable statutes. *Id.* 192 Colo. at 520-21, 565 P.2d at 545.

For these reasons, the Court must grant a preliminary injunction on behalf of the Secretary upon a showing by the Secretary of a reasonable probability of success on the merits. *Rathke v. MacFarlane*, 648 P.2d at 654. The Secretary is entitled to an injunction if he can show that the Clerk refuses to obey an order.

THE SECRETARY WILL PREVAIL ON THE MERITS.

The Clerk Must Implement and Abide By the Secretary's Interpretation of State Law.

The issues in this case address the respective roles and responsibilities of the county and state officials in the implementation and enforcement of election laws.

The City and County of Denver is a home rule entity. Colo. Const. art. XX, § 1. As a home rule entity, it has:

> Powers necessary, requisite or proper for the government and administration of its local and municipal matters, including the power to legislate upon, provide, regulate, conduct and control:

> …
>
> d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character.

Colo. Const. art. XX, § 6(d).

Denver's officers are appointed or elected as provided in its charter. Colo. Const. art. XX, § 2. Although Denver may establish its own offices, it may not abandon its duties with regard to state responsibilities:

> There is no warrant or authority in article 20 to the people of the city and county of Denver to alter, change or dispense with such acts or duties. They remain, as before, subject to the Constitution and general laws, and are exclusively under the control of the Legislature. The people of the city and county of Denver have not been given, and do not have, the power by charter to in any way change the duties of governmental officers, so far as they relate to state and county affairs, and there can be no ground for such contention if article 20 be properly read and understood.

People v. Curtice, 50 Colo. 503, 117 P. 357, 359 (1911).

The power of home rule entities and their officers in election matters is limited to municipal elections. Elections involving state matters, including concerning statewide ballot issues and state candidates, fall outside the authority of home rule entities. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000).

For purposes of elections on statewide ballots or candidates for offices other Denver offices, the Clerk is an officer subordinate to the Secretary.

In 2007, Denver established the elected position of Clerk and Recorder, Denv. Mun. Code, § 8.1.1, and designated the Clerk and Recorder as the official responsible for implementing state elections within Denver. Denv. Mun. Code, § 8.1.2(A). To the extent that the Clerk implements and enforces state laws, the Clerk is subject to those laws.

Prior to 1967, almost all responsibility for the day-to-day operation of elections rested with county officials. Under Colorado's territorial laws, primary responsibility for elections rested with county officials. When Colorado was a territory, the county sheriff and the county commissioners assumed primary roles in implementing and conducting elections. R.S. 1868, chap. XXVIII, §§ 10, 11, 12 (secretary of the territory must give notice of elections to county sheriff); § 13 (Sheriff shall order special elections for county officials, and the order shall be countersigned by board of county commissioners); § 15 (county commissioners establish precincts); § 16 (county commissioners appoint election judges); § 29 (local constables responsible for ensuring order at polling places); § 30 (county clerks register electors); § 32 (county clerk opens returns); § 33 (county clerks make abstracts of votes).

In 1967, the General Assembly gave the Secretary supervisory responsibility. The Secretary was empowered to "supervise the conduct of primary, general and special elections," to enforce the provisions of the Election Code, to inspect and review the practices of local election officials and to bring injunctive action to enforce the provisions of the Election Code. Section 49-1-11, C.R.S. (1967 Supp.) As an adjunct to these new powers, county clerks were

required to consult with the Secretary when implementing the provisions of the Election Code. Section 49-1-7, C.R.S. (1967 Supp.). These provisions presently are codified at § § 1-1-107 and -110, C.R.S. (2009).

The Secretary has broad duties and powers under the Election Code. His duties include (1) supervision of the conduct of primary, general, congressional vacancy and statewide ballot issue elections; (2) enforcement of the Election Code; and (3) rendering uniform interpretations of the Election Code. Section 1-1-107(1)(a)-(c), C.R.S. (2011). His powers include (1) review of the practices and procedures of the county clerks and recorders; and (2) enforcement of the Election Code by seeking injunctive relief. Section 1-1-107(1)(2)(b)-(c).

County clerks and recorders have a subordinate role to that of the Secretary. The county clerks and recorders, "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(1).

As a subordinate officer, the Clerk cannot disobey an order of the Secretary. The Colorado Supreme Court's decision in *Lamm v. Barber* provides guidance. The State Board of Equalization (SBOE) sued three county assessors who refused to comply with an SBOE order. The orders were authorized by state statutes. One statute provided that the assessor "shall forthwith make the necessary changes in the abstract of assessment required to carry out such order" requiring a correction of assessment. Section 39-5-127, C.R.S. (1973). A second statute provided that assessors, upon receipt of an order from SBOE "shall forthwith make the proper

adjustment in each individual scheduled affected by such order so that the assessment roll of his county." Section 39-9-107, C.R.S. (1973).

The Court concluded that the assessors did not have standing to challenge the SBOE orders. The assessors argued that they had the right to challenge the validity of the SBOE orders. The Court unequivocally rejected the assessors' argument:

> The respondents are incorrect. Their argument is a house of cards resting on the assumption that they have discretion to follow or disregard the State Board's order. While it is true that they have discretion to determine the details of how they will implement the State Board ordered increases, they have no discretion to determine whether or not to implement them. Each respondent has a clear legal duty to carry out the State Board's order by increasing the aggregate valuation of certain subclasses of property within his county. Absent evidence of State Board interference with how discretion is exercised, case law and sound public policy require issuance of a mandamus to compel the defendants to perform their statutory duties. We hold that the respondents have no standing to question the constitutionality of the statute or the State Board's action in response to it.

Id. 192 Colo. at 520-21, 565 P.2d at 545. Otherwise stated, a subordinate public official must comply with the orders of the superior public official.

The question, then, is whether the Election Code gives to the Clerk the discretion to refuse to comply with the Secretary's interpretation. The Election Code does not give the Clerk such discretion. Section 1-1-110(1) states that the clerk "shall…follow…the orders promulgated by the secretary of state pursuant to this code." The word "shall" has a mandatory connotation and "is the antithesis of discretion or choice." *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987).

To rule otherwise would effectively turn counties into independent entities and allow for disparate voting opportunities in each of Colorado's sixty-four counties. Denver could send ballots to voters who are inactive because they failed to vote while other counties would not. This disparity could lead to equal protection violations. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (The right to vote encompasses "more than the initial allocation of franchise. Equal protection applies as well to the manner of exercise.")

As the elections official for a home rule county, the Clerk retains the option to conduct purely municipal elections in a manner consistent with charter or ordinance provisions. However, the Clerk must comply with the Secretary's orders when the election includes statewide ballot issues or state candidates. Because this election includes a statewide ballot issue, the Clerk has no option but to comply with the Secretary's order.

The Secretary will prevail even if the court reaches the substantive issue. Colorado law does not authorize clerks to mail ballots to inactive voters who failed to vote.

The Clerk contends that Colorado law gives her the discretion to mail ballots to voters who are deemed inactive failed to vote. The statute does not give her such discretion.

When construing a statute, the courts "afford the words of the statute their ordinary and common meaning and construe the statutory provisions as a whole, giving effect to the entirety of the statute." *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008). If the language is ambiguous or unclear, the courts will "consider the statute's legislative history, the state of the law prior to the enactment, the problem addressed and the statutory remedy. *Id.* "When the legislature speaks with exactitude, [the court] must construe the statute to

mean that the inclusion or specification of a particular set of conditions necessarily excludes others." *Lunsford v. Western States Life Insurance,* 908 P. 2d 79, 84 (Colo. 1995).

Section 1-7.5-107(3)(a)(I) discusses the process by which mail ballots will be sent to registered electors. It provides:

> 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…

(Emphasis added.) An active voter is a person who voted in the last general election, § 1-2-605(2). Conversely, a person is deemed "inactive", failed to vote, if the person has not voted in a general election. *Id.*

The adjective "active" is crucial. If the General Assembly intended to allow election officials to send packets to all registered electors, it would not have used the word "active." Instead, it would have required election officials to mail packets to "each registered elector."

Legislative history confirms this view. 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.

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.

The General Assembly could have achieved the result advocated by Denver 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, 2001." Instead, it chose to repeal the requirement that mail ballot packets be sent to inactive voters who failed to vote.

The Clerk's interpretation has significant long-term implications for all of the Election Code. The Clerk apparently interprets the law to give her discretion unless words like "only" or "solely" are used. If the court adopts the Clerk's interpretation, then all provisions within the Code which specify certain conditions for the right to vote could be open modification by the clerks. For example, § 1-5-410, C.R.S. (2011) states that election judges receiving sealed ballot packages provide receipts, and such "receipts shall be filed with the designated election official." The receiving election judges must deliver the packages "and, in the presence of all election judges, shall open the packages." *Id.* Under the Clerk's interpretation, clerks would be permitted to specify that the receipts may be filed with a person other than the designated election official. Clerks could also have the discretion to permit the packages to be opened in the presence of persons other than election judges.

Thus, the argument that election officials retain the discretion to send mail ballot packets to voters who are inactive because they failed to vote is without merit. The Court must conclude that the Secretary is likely to succeed on the merits of the dispute.

THE SECRETARY CAN ALSO MEET THE OTHER *RATHKE* FACTORS.

The Secretary can also meet the other *Rathke* factors, if necessary.

Irreparable injury. The limitation that mail ballot packets be sent only to active voters is necessary to preserve the integrity of the election process. In *Duprey v. Anderson*, 184 Colo. 70, 518 P.2d 807 (1974), voters challenged the constitutionality of a statutory provision requiring election officials to purge the names of persons who failed to vote at the preceding biennial election from voter registration books. The Colorado Supreme Court held that the purging provisions were consistent with the state's obligation to secure the purity of elections. *Id.* 184 Colo. at 75, 518 P.2d at 810. "[T]he election list becomes more authentic and is not susceptible to fraudulent voting practices or other abuses of the franchise. This is the legitimate state interest involved in the purging procedure and in our view, it far outweighs the light burden of re-registering." *Id.* 184 Colo. at 76, 518 P.2d at 810.

Similar to the State's interest in the integrity of voter registration list, the State has a strong interest in refusing to send ballots to persons who failed to vote in previous elections. The State must account for all ballots. As will be shown at a hearing, only a small percentage of ballots mailed to inactive voters are returned. Because they are not returned, they are not accounted for. Because the ballots cannot necessarily be tracked, there is a greater potential for fraud.

Election protocols must be implemented uniformly throughout the state. The Secretary "is the chief state election official and, in that capacity, is charged by HAVA and existing state statutory provisions with responsibility for supervising the conduct of elections and for enforcing and implementing the provisions of [the Help America Vote Act] and of this code." Section 1-1.5-101(1)(g), C.R.S. (2011). The Secretary is responsible for "overseeing and coordinating elections" and for "implementing *uniform* standards in elections." (Emphasis added.) Section 1-1.5-101(1)(h), C.R.S. (2011).

The Clerk's interpretation undermines the mandate of uniformity. Under the Clerk's theory, each county clerk may employ practices which are unique to voters in the clerk's county. In this instance, inactive voters in one county may receive ballots while inactive voters in another county will not. The differential treatment is inconsistent with the mandate that voting procedures in statewide elections must be uniform.

Public interest and balance of equities. The public interest and the balance of equities favor granting the injunction. Statewide elections should be conducted with uniformity throughout the State. By statute, the responsibility for supervision of statewide elections rests with the Secretary. In order to ensure uniformity, the Secretary must have the authority to ensure that his interpretations and orders are followed by all counties.

Status quo. The status quo in the context of a request for preliminary injunction is "the last existing state of peaceable, noncontested conditions which preceded the pending controversy." *Mantle Ranches, Inc. v. United States Park Service,* 945 F. Supp. 1449, 1452 (D. Colo. 1996). In this case, the status quo is the obligation to obey the orders of the Secretary.

Plain, speedy and adequate remedy at law. A preliminary injunction is necessary because there is no plain, speedy and adequate remedy at law. Mail ballot packets may be sent as early as October 11, 2011. Section 1-7.5-107(3)(a)(I). The Secretary will be unable to obtain relief if the ordinary procedures are followed

CONCLUSION

For the above-stated reasons, the court must grant the Secretary's motion for a preliminary injunction enjoining the Clerk from mailing mail ballot packets to persons other than active registered electors.

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