DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301 **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** ▲
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AMICI CURIAE MI FAMILIA VOTA EDUCATION FUND AND URBAN LEAGUE OF METROPOLITAN DENVER'S BRIEF IN OPPOSITION TO THE SECRETARY OF STATE'S MOTION FOR PRELIMINARY INJUNCTION	

Amici Curiae Mi Familia Vota Education Fund ("MFVEF") and the Urban League of Metropolitan Denver ("ULMD"), by and through their undersigned counsel, hereby submit their Brief in Opposition to the Secretary of State's Motion for Preliminary Injunction. In support of their Brief, MFVEF and ULMD state as follows:

ISSUE PRESENTED

Whether the Secretary of State's Motion for Preliminary Injunction should be granted enjoining the Denver County Clerk and Recorder from providing mail ballot packets to inactive registered electors.

STATEMENT OF IDENTITY OF AMICI CURIAE

MFVEF is a nonpartisan, 501(c)(3) organization working to ensure social and economic justice through increased civic engagement and to unite and build power in Latino, immigrant and, allied communities. ULMD is a nonpartisan, non-profit organization founded in 1946 for the purpose of promoting the attainment of economic and social self-reliance among poor and disadvantaged African-Americans. Since its founding, ULMD has worked aggressively to create equality for African-Americans and others of disadvantaged ethnic and cultural backgrounds. MFVEF and ULMD have historically considered the protection of the poor, the elderly, and people of color from political, social, and economic disenfranchisement as a key component to their stated organizational mission statements. Both organizations conduct significant nonpartisan voter education and Get-Out-The-Vote efforts during each election cycle.

This litigation raises important issues under Colorado's Uniform Election Code of 1992 and Mail Ballot Election Act and will have wide-ranging implications for future Colorado elections. MFVEF and ULMD's participation is important because of their collective experience in working with groups that have historically suffered political disenfranchisement. Additionally, the outcome of this litigation will directly affect the ability of MFVEF and ULMD, along with other similarly situated groups, to foster active civic engagement among historically disenfranchised persons. MFVEF and ULMD's particular expertise is necessary to the Court's understanding of why the Secretary of State's interpretation of Colo. Rev. Stat. § 1-7.5-

107(3)(a)(I) is facially inaccurate and, therefore, his order to the Denver Clerk and Recorder is *void ab initio*. Further, MFVEF and ULMD can illustrate the harmful and disproportionate effect of the Secretary of State's order prohibiting the Denver Clerk and Recorder from sending mail ballots to inactive voters will have on the ability of certain eligible electors to exercise their right to vote.

ARGUMENT

I. Introduction

On September 16, 2011, Secretary of State Scott Gessler (the "Secretary") ordered the Denver Clerk and Recorder (the "Clerk") to desist from sending Inactive, Failed-to-Vote ("IFV") voters mail ballot packets for the November 1, 2011 election (the "Secretary's Order"). The Clerk indicated that she would not follow the Secretary's Order. The Secretary now seeks a preliminary injunction to prohibit the Clerk from sending IFV voters their mail ballots. IFV voters are registered electors who did not vote in the last general election. Colo. Rev. Stat. § 1-2-605(2). MFVEF and ULMD's brief does not address each of the *Rathke* elements individually but, instead, addresses whether the Secretary can establish a reasonable probability of success on the merits. This brief will establish that the Secretary's actions are contrary to Colorado law because they unnecessarily and improperly restrict voter participation and potentially disenfranchise eligible electors. Further, because the Secretary's Order to the Clerk has a disproportionate impact on eligible Hispanic and African-American electors and denies them the opportunity "to be permitted to vote" under Colo. Rev. Stat. § 1-1-103(1), it should be found *void ab initio*.

II. Colorado law does not prohibit mailing ballots to IFV voters

A. Voting Rights are Fundamental and Colorado Law Encourages Increased Voter Participation

The Secretary's Order is inconsistent with Colorado's broad conception of the right to vote, which is grounded in a constitutional, statutory, and judicial recognition of voting rights as the cornerstone of our democracy. *See Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003). The Colorado Supreme Court has recognized the right to vote as a fundamental right of the first order, preserving all other rights. *See Bickel v. City of Boulder*, 985 P.2d 215, 225 (Colo. 1994). The Colorado Constitution and statutes also require the free exercise of voting rights. The Colorado Constitution states that "[a]ll elections shall be free and open; and no power, civil or military, shall at any time interefere to prevent the free exercise of the right to suffrage." Colo. Const. art. II, § 5. In addition, when the Colorado General Assembly enacted the Uniform Election Code of 1992 (the "Code"), it stated that the "code shall be liberally construed so that all eligible voters may be permitted to vote . . ." Colo. Rev. Stat. § 1-1-103(1).

Colorado law encourages maximizing access to voting and increased voter participation. A "compelling state interest exists in having voters fully participate in the election process" and "legislative efforts to achieve this goal of increased voter participate should be encouraged." *Bruce v. City of Colorado Springs*, 971 P.2d 679, 684 (Colo. App. 1998). In enacting the Mail Ballot Election Act (the "Act"), which is the law at issue here, the General Assembly determined that "self-government by election is more legitimate and better accepted as voter participation increases" and that such elections are cost effective and have not resulted in increased fraud. Colo. Rev. Stat. § 1-7.5-102; *see also*, *Bruce*, 971 P.2d at 684. The Colorado Court of Appeals held that mail ballot elections serve to meet the compelling state interest in encouraging increased voter participation. *Bruce*, 971 P.2d at 684. Here, the Secretary's Order prohibiting

the sending of mail ballot to IFV voters, and the subsequent lawsuit, does not achieve the constitutional and legislative goals of increased voter participation.

B. The Secretary will not prevail on merits of case because Colorado statutes do not prohibit mailing ballots to IFV voters

The Secretary's Order to restrict disbursement of mail ballots to IFV voters not only runs afoul of Colorado's broad protection of voters' rights, it also misconstrues the intent of Colorado statutes. In the Motion for Preliminary Injunction, the Secretary makes two arguments in support of his claim that he will prevail on the merits of the case. First, the Secretary claims that the Clerk is required to abide by the Secretary's interpretation of state law regarding the implementation and enforcement of election law. Even if the Secretary is correct regarding his statutory authority, the scope of the Secretary's authority is limited to the plain language and clear intent of Colorado's laws and the Secretary's Order to prohibit the sending of mail ballots to IFV voters is contrary to the constitutional and statutory goals of increased voter participation. Second, the Secretary claims that Colorado law prohibits the mailing of ballots to IFV voters. This argument is wrong and contrary to the plain language of the Code and the Act.

1. *Neither the plain language of the Code nor the Act prohibits mailing ballots to IFV voters*

The Secretary's Order incorrectly interprets Colorado statutes regarding mail ballot elections and the distribution of mail ballots to IFV voters. When construing a statute, a court's "primary duty is to give full effect to the intent of the General Assembly." *Colorado Water Conversation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005). This inquiry starts with the plain language of the statute and the context of the statute as a whole. *Id.* If the statutory language is clear, courts will apply the discernable legislative intent of the language. *South Fork Water and Sanitation Dist. v. Town of South Fork*, 252 P.3d 465,

468 (Colo. 2011). If the statutory language is ambiguous, courts may use other tools of statutory interpretation to determine the General Assembly's intent. *Id.*

Here, the Secretary argues that specific sections in the Act prohibit the Clerk from mailing IFV voters a ballot for the November 1, 2011 election. *See* Colo. Rev. Stat. § 1-7.5-107(3)(a)(I), 1-7.5-108.5(2)(b). This is incorrect. Nothing in the plain language of the Act or the Code prohibits the Clerk from sending IFV voters a mail ballot. *See generally,* Colo. Rev. Stat. § 1-1-101, *et seq.*; Colo. Rev. Stat. § 1-7.5-101, *et seq.* Further, the legislative intent of the Act and the Code was to promote and encourage elector participation.

2. *Section 1-7.5-107(3)(a)(I) does not prohibit sending IFV voters ballots*

The Secretary points to statutory language stating that the "designated election official shall mail to each active registered elector" a mail ballot packet as proof that the General Assembly did not intend for IFV voters to receive mail ballots. *See* Colo. Rev. Stat. § 1-7.5-107(3)(a)(I). This argument ignores that the plain language of the statute, which simply requires that all active registered electors receive a mail ballot. The plain language does not prohibit the Clerk from sending IFV voters a ballot. By failing to specifically prohibit the sending of mail ballots to IFV voters, the Act permits sending IFV voters a ballot while also requiring the Clerk to send mail ballots to active registered electors. *Id.* Had the General Assembly intended to create such a prohibition, it could have easily added the word "only" or a similar word to specifically limit the sending of mail ballots to active registered electors. However, the General Assembly chose not to limit sending mail ballots only to active registered electors. This type of prohibition would be contrary to the purpose of Colorado election law, in general, and, to the specific goal of increasing voter participation through mail ballot elections. In addition, such a prohibition would potentially make the law unconstitutional.

3. *H.B. 08-1329 and Section 1-7.5-108.5(2)(b) do not prohibit sending IFV voters mail ballots*

The Secretary also claims that the General Assembly's enactment of H.B. 08-1329, which added Section 1-7.5-108.5(2)(b) to the Act, shows that the General Assembly "chose to repeal the requirement that mail ballots be sent to inactive voters who failed to vote." *See* Motion for Preliminary Injunction at 13. H.B. 08-1329 expressly required clerks to send mail ballots to IFV voters, but included a sunset provision repealing this requirement as of July 1, 2011. *See* Colo. Rev. Stat. § 1-7.5-108.5(2)(b). The Secretary admits that the intent of H.B. 08-1329 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." *See* Motion for Preliminary Injunction at 13. However, the Secretary cannot claim, nor does the statutory language support, any intent of the General Assembly to strictly prohibit the mailing of ballots to IFV voters after July 1, 2011.

The language of the bill and statute are clear. The General Assembly creating a mandate for clerks to send all IFV voters a ballot for a specified time period because problems in the 2006 election led to many voters becoming inactive. This law was a mandate, not a grant of authority. As discussed above, nothing prohibited the clerks from sending mail ballots to IFV voters before H.B. 08-1329 added Section 1-7.5-108.5(2)(b) to the Act. Therefore, the automatic repeal of Section 1-7.5-108.5(2)(b) only abolished the mandatory requirement that clerks send all IFV voters a mail ballot. The repeal did nothing to change the existing discretion and authority under the Act to send IFV voters a ballot. The legislative history confirms that the General Assembly passed H.B. 08-1329 to prevent the disenfranchisement of voters due to problems in the 2006 election. The General Assembly did not intend for this obligation to continue in perpetuity and

attached a sunset provision to the bill. The General Assembly never intended or limited the ability to send IFV voters a mail ballot.

4. *The Secretary has no policy justification for prohibiting sending IFV voters a mail ballot*

Colorado law does not prohibit the mailing of ballots to IFV voters. Further, the Secretary lacks any policy justification to construe the Act narrowly to decrease the number of registered electors receiving mail ballots. First, as the Fiscal Note attached to H.B. 08-1329 indicates, the State of Colorado and the Secretary do not incur any additional cost when county clerk and recorders send mail ballots. *See* H.B. 08-1329 Local Fiscal Impact, attached as **Exhibit A.** The financial burden of sending mail ballots to registered electors, both active and inactive, is on the individual counties, not the State. Second, an unproven risk of fraud is not sufficient justification for the Secretary's Order. The Secretary argues that there is greater potential for fraud by sending IFV voters a mail ballot. *See* Motion for Preliminary Injunction at 14. However, the Secretary fails to cite any proof to support this claim and does not produce any evidence that voter fraud increased during the time period when the General Assembly mandated that IFV voters receive mail ballots.

Nothing in the plain language of the Act prohibits sending IFV voters a mail ballot and the Secretary does not have a policy justification for prohibiting the Clerk from sending IFV voters a mail ballot for the November 1, 2011 election. The General Assembly's intent in enacting the Code and the Act was to encourage voter participation. Therefore, even if the Secretary has the statutory authority to limit the Clerk's actions, the Secretary does not have the constitutional or statutory authority to limit or restrict the participation of eligible voters by denying IFV voters access to mail ballots.

III. The Secretary's Order directing the Clerk not to provide mail ballots to IFV voters is *void ab initio*

As the arguments above demonstrate, the Secretary's interpretation of Colo. Rev. Stat. § 1-7.5-107(3)(a)(I) is facially invalid because it does not comport with the plain language of the statute. As such, the Secretary's Order directed to the Clerk is *void ab initio*. The doctrine of *void ab initio* is traditionally used to void an unconstitutional statute in its entirety and deem it inoperative, as if it never existed. *See, e.g.*, *Norton v. Shelby Co*., 118 U.S. 425, 442 (1886) (stating the classic definition of the doctrine of *void ab initio*); *People v. District Court*, 834 P.2d 181, 210-236 (Colo. 1992) (the majority and concurring opinions both recognizing the continued validity of the doctrine of *void ab initio*). However, this same principle also applies to orders issued by public officials that are either unconstitutional or are in direct contravention to the law.

The Secretary's Order is in direct contravention to Colo. Rev. Stat. §§ 1-1-103 and 1-7.5-107(3)(a)(I). Section 1-1-103(1) states the Code "shall be liberally construed so that all eligible electors may be permitted to vote . . ." The Secretary's Order construes the Code in a manner that disenfranchises approximately 54,000 eligible electors in the City and County of Denver. Section 1-1-103 unambiguously states that the intent of the Code is to ensure that all eligible electors have the opportunity to vote.

In Colorado, trial courts are required to "give significant deference to the legislature's fiscal and policy judgments." *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009); *accord Mesa County Bd. of County Comm'rs v. State*, 230 P.3d 519, 527 (Colo. 2009) (courts must show the legislature deference "in its law making functions."). The Secretary does not have the authority to summarily issue an order in direct contravention of policy enacted by the General Assembly. Any action taken by the Secretary that does not adhere to the General Assembly's express intent to liberally construe the Code is *void ab initio*. Therefore, MFVEF and ULMD request this

Court declare the Secretary's Order *void ab initio* because it violates the General Assembly's express declaration to liberally construe the Code in a manner which permits eligible electors to vote.

IV. The Secretary's Order is void as a matter of public policy because it disproportionately impacts eligible electors who are predominately Hispanic and African-American

The Colorado Constitution states that "[a]ll elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Colo. Const. art. II, § 5. The Colorado Supreme Court has interpreted this provision to mean that "every qualified elector shall have an equal right to cast a ballot . . . and it thereby vests in the elector a constitutional right of which he cannot lawfully be deprived by any governmental power." *Littlejohn v. People ex rel. Desch*, 121 P. 159, 162 (Colo. 1912). In *Littlejohn*, the Colorado Supreme Court acknowledged that the General Assembly has the power to place reasonable restrictions on how the right to vote is exercised, but cautioned that those restrictions "cannot extend to the denial of the franchise itself . . . [and] the test is whether the effect of the legislation is to deny the franchise, or render its exercise so difficult and inconvenient as to amount to a denial." *Id*. In Colorado, the right to vote is a fundamental right which is to be exercised without discrimination. *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993); *accord Jarmel v. Putnam*, 499 P.2d 603, 604 (Colo. 1972).

Although MFVEF and ULMD do not allege the Secretary's Order violates Section 2 of the Voting Rights Act of 1965 ("VRA § 2"), VRA § 2 does provide useful insights to this Court as it considers the Secretary's Motion in light of Article II, Section 5 of the Colorado Constitution. VRA § 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" imposed or applied "in a manner which results in a denial or abridgement

of the right of any citizen of the United States to vote on account of race or color . . ." 42 U.S.C.A. § 1973(a). A violation of VRA § 2 is established when under "the totality of circumstances, it is shown that the political processes . . . in the State . . . are not equally open to participation" based on race or color and that those persons "have less opportunity than other members of the electorate to participate in the political process." *Id*. at § 1973(b).

If the Secretary's Order is enforced, there is a plausible argument that the Secretary's Order constitutes an impermissible episodic practice under VRA § 2. Episodic practices include any practice that, while not a permanent structure constituting a barrier to the electoral system, nonetheless results in an abridgement or denial of the right to vote based on race or color. *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) (internal citations omitted); *accord United States v. Jones*, 57 F.3d 1020, 1023 (11th Cir. 1995) (internal citations omitted). In other words, episodic practices are "isolated and singular incidences of misconduct and improper administration." *Welch v. McKenzie*, 592 F. Supp. 1549, 1558 (S.D. Miss. 1984). In *Welch II*, the court used the misapplication of a Louisiana absentee ballot statute which resulted in the purging of many more blacks than whites from the voter lists as an example of an impermissible episodic practice. *Welch* v. *McKenzie*, 765 F.2d 1311, 1315 (5th Cir. 1985). The court did not require that discriminatory intent be demonstrated to establish that a VRA § 2 violation had occurred. *Id*. A successful VRA § 2 claim only has to demonstrate the practice in question be "undertaken with an intent to discriminate or must produce discriminatory results." *Brown*, 561 F.3d at 432 (internal citations omitted). The enforcement of the Secretary's Order would produce discriminatory results for eligible electors in Denver because of their race or color.

In her response to the Secretary's Order, the Clerk provided two maps prepared by the Denver Elections Division. The first map shows the distribution of IFV voters across Denver.

Attached as **Exhibit B**. The second map shows the distribution of residents by ethnicity across Denver. Attached as **Exhibit C**. If these two maps are overlaid, it is clear that the IFV voters affected by the Secretary's Order are predominantly Hispanics and African-Americans. There is a near direct correlation between those Denver neighborhoods with a Hispanic or African-American population greater than fifty (50) percent and those Denver neighborhoods with IFV voters of thirty (30) percent or greater. In contrast, in Denver neighborhoods with a white population greater than fifty (50) percent, the number of IFV voters is generally twenty (20) percent or less. Accordingly, eligible electors in predominantly Hispanic or African-American neighborhoods have a significantly higher likelihood of being impacted and potentially disenfranchised by the Secretary's Order than eligible electors in predominantly white neighborhoods. Undeniably, a discriminatory result would occur from the Secretary's Order. Therefore, as a matter of public policy and fundamental fairness, this Court cannot allow the Secretary's Order to be enforced. This Court only needs to find that the Secretary's Order has a discriminatory result to deny the Motion for Preliminary Injunction.

CONCLUSION

WHEREFORE, Amici Curiae Mi Familia Vota Education Fund and Urban League of Metropolitan Denver respectfully request that this Court deny the Secretary of State's Motion for Preliminary Injunction.

Respectfully submitted this 6th day of October, 2011.

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(Original signature on file at the offices of Greenberg Traurig, LLP, pursuant to C.R.C.P. 121, § 1-26)

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify on October 6, 2011, a true and correct copy of the foregoing **AMICI CURIAE MI FAMILIA VOTA EDUCATION FUND AND URBAN LEAGUE OF METROPOLITAN DENVER'S BRIEF IN OPPOSITION TO THE SECRETARY OF STATE'S MOTION FOR PRELIMINARY INJUNCTION** was filed with the Court and served via LexisNexis File and Serve on the following:

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