

<b>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</b> 1437 Bannock St. Denver, CO 80203	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<b>Plaintiff:</b> SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado,  v.  <b>Defendant:</b> DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for City and County of Denver.	
Attorney for Proposed Interpleader-Defendant, Colorado Common Cause	<p style="text-align: center;"><b>PARTIALLY-UNOPPOSED MOTION TO INTERVENE</b></p>
Name: J. Lee Gray, #27306 Address: HOLLAND & HART LLP 6380 S. Fiddlers Green Cir., Suite 500 Greenwood Village, CO 80111 Telephone: (303) 290-1602 Facsimile: (303) 975-5303 E-mail: <a href="mailto:LGray@hollandhart.com">LGray@hollandhart.com</a>	

Colorado Common Cause (“CCC”), by and through its counsel, Holland & Hart LLP, pursuant to C.R.C.P. 24(a), hereby requests that the Court enter an Order allowing it to intervene in the above-captioned case. As explained below, certain of CCC’s members are eligible electors in the City and County of Denver who are considered “Inactive failed to vote” and whose interest would be affected by the outcome of the Plaintiff’s motion for preliminary injunction. As such, CCC is entitled to intervene as a matter of right.

1. **C.R.C.P. 121 § 1-15(a) Certificate:** Undersigned counsel conferred with counsel for the parties prior to filing this motion, and learned that Defendant does not oppose the relief sought here. Counsel for Plaintiff has indicated that Plaintiff opposes the relief sought here.

**GROUND FOR INTERVENTION OF RIGHT**

2. In his capacity as Colorado Secretary of State, Scott Gessler (the “Secretary”), filed this action to obtain a court order prohibiting Denver’s Clerk and recorder, Debra Johnson (the Clerk”), from mailing ballots to eligible electors who are designated as inactive by virtue of having not voted in the 2010 General election.

3. CCC is a state chapter of Common Cause, a national non-profit citizens' advocacy group that works to ensure open, honest and accountable government at the national, state and local levels. Founded in 1970, Common Cause has and has worked to protect the integrity of our voting system and to prevent voter disenfranchisement at the national, state and local levels, including in Denver, for over 40 years. CCC's members include registered voters in Denver County who will not receive ballots for the November 1, 2011 mail-only General Election if Plaintiff prevails in his request for a preliminary injunction.

4. Rule 24(a)(2) allows for intervention as a matter of right by a non-party (applicant) where:

(1) the applicant claims an interest in the subject matter of the litigation; (2) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (3) the interest is not adequately represented by existing parties.

*Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001); C.R.C.P. 24(a)(2).

5. "Rule 24 should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *Id.*

#### **I. CCC Claims an Interest in the Subject Matter of the Litigation.**

6. The subject matter of this litigation is the ability of "inactive," eligible voters to receive ballots for a mail-in only general election. Quite simply, the Secretary seeks to prohibit the Denver election official from mailing ballots to eligible voters solely because they are deemed "inactive." See Complaint at 6 (requesting, "[a]n injunction issued pursuant to § 1-1-107(2)(d) preventing the Clerk from mailing ballots to persons other than active registered electors.>").

7. CCC represents at least 35 members in Denver who are registered electors deemed "inactive failed to vote" and will not receive a ballot in this mail-only election if the Secretary is successful. As such, CCC has an interest in the subject matter of this litigation and in protecting the rights of its members to receive ballots for the general election, which is germane to the purpose of CCC. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); see also *Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984) (holding that a voluntary membership association has standing to litigate in a representative capacity to vindicate whatever rights its members may enjoy).

8. The interest requirement for intervention by right should be determined in a liberal manner and not formalistically. *Feigin*, 19 P.3d at 29. An applicant rightfully claims an interest in litigation where it has rights granted by a statute that would be affected by the action—even where no express right to participate is granted by the statute in question. *See Charnes v. DiGiacomo*, 612 P.2d 1117, 1121 (Colo. 1980).

9. C.R.S. § 1-7.5-107(3)(a)(I) provides that the designated election official “shall mail to each active registered elector” a mail ballot packet. Further, all eligible electors, including “inactive” electors, have a right to cast the mail-in ballot by mailing it to the designated election official. C.R.S. § 1-7.5-107(4)(b). The plain language of section 107(3)(a)(I) thus sets the minimum requirement for who the designated election official should mail ballots to. It does not limit ballots to only active registered electors. Indeed, had the general assembly wished to limit mailings to solely active registered electors, it would have said so by using the phrase “mail only to active registered electors.” It did not. Further, section 107(4)(b) explicitly provides that “[t]he eligible electors”—not *active* eligible electors—may vote the ballot by returning it to the election official by depositing it in the U.S. mail.

10. When interpreting a statute, courts must look at the plain language of the statute and “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 Educ. Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008). In addition, the Uniform Election Code “shall be *liberally construed* so that *all eligible electors* may be permitted to vote ....” C.R.S. §1-1-103(1) (emphasis added). Significantly, “[s]ubstantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies.” C.R.S. § 1-1-103(3). Moreover, the General Assembly’s purpose in passing the Mail Ballot Election Act is *increased* voter participation—not limiting participation by forbidding eligible, “inactive fail to vote” electors from receiving mail-in ballots by mail. C.R.S. § 1-107.5-102 (“The general assembly hereby finds, determines, and declares that self-government by election is more legitimate and better accepted as voter participation *increases*.”) (emphasis added); *see also Bruce v. City of Colorado Springs*, 971 P.2d 679, 684 (Colo. App. 1998) (holding that the compelling state interest served by the Mail Ballot Election Act is *increased* voter participation). Based on the clear intent and plain language of the election code, election officials may not be prohibited from mailing ballots to “inactive fail to vote” eligible electors.

11. To the extent that the Court considers the Secretary’s proposed interpretation as reasonable, it must necessarily find that the statute is ambiguous and look beyond the plain language for its interpretation. *Lobato v. Indus. Claim Appeals Office*, 105 P.3d 220, 223-24 (Colo. 2005) (“If the statute is reasonably susceptible to different interpretations, [courts] determine the proper interpretation by examining the legislative goals underlying the provision, the circumstances under which it was adopted, and the consequences of possible alternative constructions.”). This also requires the Court to reject the Secretary’s proposed interpretation. “In construing statutes, [the Court’s] primary duty is to give effect to the intent of the General Assembly.” *Lombard*, 187 P.3d at 570. As described above, the intent of the General Assembly

in passing the Mail Ballot Election Act was *increased* voter participation. This intent is clear in the legislative history.

12. Further, “[i]t is elementary that when a statute may be interpreted in two ways, the way which renders it constitutional must be adopted.” *Duprey v. Anderson*, 184 Colo. 70, 77 (Colo. 1974). The Secretary’s proposed interpretation of Section 1-7.5-107(3)(a)(I) would violate the First and Fourteenth Amendments to the U.S. Constitution, and Article 2, Sections 5 and 10 of the Colorado Constitution. The right to vote is a fundamental right of every citizen and there may be no discrimination between citizens with respect to that right, except for a compelling state interest that cannot be reasonably protected in any other way. *Jarmel v. Putnam*, 499 P.2d 603, 603-04 (Colo. 1972). The Secretary’s proposed disparate treatment between eligible electors based on whether they are deemed “active” or “inactive fail to vote” would violate the Equal Protection clause of the Fourteenth Amendment. In addition, the Secretary’s proposed interpretation would also violate the First Amendment and Colorado Constitution by impermissibly burdening political expression and by burdening an “inactive failed to vote” eligible elector’s right to vote. Both political expression and the right to vote are forms of protected speech. Thus, the Secretary’s proposed interpretation must be rejected as it would render the provision unconstitutional.

13. Consequently, CCC, whose membership includes “inactive fail to vote” eligible electors in Denver, has a real and immediate interest in the subject matter of this litigation.

## **II. Disposition of This Case May Impede or Impair CCC’s Ability to Protect Its Interest.**

14. C.R.C.P. 24(a)(2)next requires that the “disposition of the action may as a practical matter impair or impede his ability to protect that interest.” In applying this requirement, the Colorado Supreme Court has found impairment of the ability to protect that interest where the proposed intervenor demonstrates a negative effect from the disposition of the case. *Dillon Companies, Inc. v. City of Boulder*, 515 P.2d 627, 629 (Colo. 1973) (holding that homeowners who lived within three blocks of a property and would be impacted by increased traffic and altered drainage from a proposed supermarket met this second requirement and reversing denial of a motion to intervene in a lawsuit regarding the proposed rezoning of the property).

15. As described above, through its members in Denver who are “inactive fail to vote” eligible electors, CCC has an interest in the ability of these voters to receive mail-in ballots by mail. If the Secretary is successful in this case, then the Denver Clerk will be prohibited from mailing ballots to “inactive fail to vote” eligible electors as it currently plans to do in substantial compliance with the Uniform Election Code. Such a disposition of this action will impair and impede CCC’s ability to protect its interest, and those of its members.

### **III. CCC's Interest is Not Adequately Protected by Parties.**

16. "The third requirement for intervention as a matter of right under Rule 24(a)(2) is that the intervenor's interest be inadequately represented by the parties to the action." *Feigin*, 19 P.3d at 31. The Colorado Supreme Court has held that this requirement is met where, "the interest of the absentee is not represented at all, or if all existing parties are adverse to him." *Id.*

17. Here, the interest of CCC, through its members, is not represented at all by the parties. In conferring on this motion, counsel for the Clerk indicated that they will focus on the authority issue raised by the Secretary's request for declaratory judgments. That is, the Clerk is representing her interest in having discretion in conducting the general election—not the interest of the "inactive fail to vote" eligible electors in receiving mail-in ballots in the mail.

18. Further, the Secretary argues in his motion for preliminary injunction that the Clerk may not even question or challenge his "order" that she not mail out ballots to inactive eligible electors. *See* Sec. of State's Mot. for Prelim. Inj. at 9-10. If this argument has merit, then the Clerk could not even protect CCC's interests in challenging the Secretary's erroneous interpretation of the Election Code or his "order" if she wanted to.

19. In short, the Clerk's interest in this matter relate to the issue of her authority and not to a "inactive fail to vote" voter's interest in receiving his or her ballot in the mail for the mail-only general election.

### **IV. CCC's Proposed Counterclaim.**

20. CCC seeks to intervene as a defendant in this matter and assert counterclaims for declaratory judgments concerning the interpretation of the Uniform Election Code with respect to mail in ballots. Specifically, as briefly described above, CCC maintains that the principals of statutory construction dictate that the statutes in question provide a minimum for who clerks must send mail-in ballots to, and that election officials may, in fact, send ballots to "inactive fail to vote" eligible electors. In addition, CCC will seek a declaratory judgment that CRS § 1-7.5-107(3)(a)(I) is unconstitutional to the extent that it does not provide for "inactive fail to vote" eligible electors to receive mail-in ballots by mail.

21. CCC's proposed Answer and Counterclaims is filed herewith pursuant to C.R.C.P. 24(c).

WHEREFORE, CCC requests that the Court enter an order allowing it to intervene in the above-captioned matter, accept the proposed Answer and Counterclaim as filed, and to allow CCC to participate in the scheduled preliminary injunction hearing before the Court on October 7, 2011 at 1:00pm.

Dated October 4, 2011.

Respectfully submitted,

*s/ J. Lee Gray*

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J. Lee Gray, #27306

HOLLAND & HART LLP

**ATTORNEYS FOR PROPOSED INTERVENOR-  
DEFENDANT, COLORADO COMMON CAUSE**

**CERTIFICATE OF SERVICE**

I certify that on October 4, 2011, I served a copy of the foregoing document to the following *via* Lexis-Nexis File and Serve:

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*s/J. Lee Gray*