

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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 City and County of Denver.	
Attorney for Proposed Interpleader-Defendant, Colorado Common Cause	<p style="text-align: center;">COLORADO COMMON CAUSE’S ANSWER AND COUNTERCLAIMS</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: LGray@hollandhart.com	

Intervenor-Defendant Colorado Common Cause (“CCC”), by and through its counsel, Holland & Hart LLP, responds to the Complaint of Plaintiff Scott Gessler (the “Secretary”) as follows.

INTRODUCTION

1. Paragraph 1 of the Complaint generally describes the action, but contains no factual allegations to which a response is necessary.

JURISDICTION

2. Admit.

VENUE

3. CCC admits that venue is proper. CCC denies the remaining allegations contained in paragraph 3 of the Complaint to the extent they are inconsistent with the statute.

PARTIES

4. CCC admits that the Secretary has duties that include the supervision the conduct of certain elections and that the Secretary may seek injunctive relief as provided by statute. CCC denies the propriety of the injunction sought by the Secretary here.

5. CCC admits the first two sentences of paragraph 5 of the Complaint. CCC denies that the Clerk must follow the “order” at issue in this case.

FACTUAL BACKGROUND

6. Admit.

7. CCC admits that the allegations set forth in paragraph 7 of the Complaint generally set forth the provisions of the cited statutes, but denies that the Secretary has issued either a valid or enforceable rule or order relating to this issue as provided for by Colorado law.

8. Admit.

9. CCC admits that paragraph 9 of the Complaint accurately sets forth a portion of the provision of C.R.S. § 1-7.5-107(3)(a)(I). CCC denies that this provision requires the Clerk to mail ballots only to active registered electors.

10. The provisions of Exhibit A to the Complaint speak for themselves, and thus CCC denies so much of the allegations set forth in paragraph 10 of the Complaint to the extent that they fail to accurately quote or describe the language of Exhibit A to the Complaint. CCC denies the remaining allegations and characterizations contained in paragraph 10 of the Complaint.

11. Admit.

12. CCC is without knowledge of the allegations contained in paragraphs 12, and 12(a) – (d) of the Complaint and therefore denies same.

13. Deny.

14. Admit.

15. Upon information and belief, CCC admits the allegations contained in paragraph 15 of the Complaint.

16. Deny.

17. CCC admits that Judd Choate of the Colorado Department of State sent a letter to the Clerk on or about September 16, 2011, but denies that this constituted a valid, enforceable order as provided for by Colorado law.

18. Upon information and belief, CCC admits the allegations contained in paragraph 18 of the Complaint.

19. Upon information and belief, CCC admits the allegations contained in paragraph 19 of the Complaint.

20. Upon information and belief, CCC admits the allegations contained in paragraph 20 of the Complaint.

21. Admit.

22. CCC admits that paragraph 22 of the Complaint accurately sets forth a portion of the provision of C.R.S. § 1-1-110(2).

23. The provisions of C.R.S. § 1-1-107(1)(a) and (c) speak for themselves, and thus CCC denies so much of the allegations or characterizations set forth in paragraph 23 of the Complaint to the extent that they fail to accurately quote or describe the language of that statute.

24. Admit.

25. Admit.

26. CCC is without knowledge of the allegations contained in paragraph 26 of the Complaint and therefore denies same.

**FIRST CLAIM FOR RELIEF
(Declaration That Clerk Has No Discretion to Disobey Secretary's Order)**

27. CCC incorporates the responses in the above paragraphs as though fully set forth herein.

28. The provisions of C.R.S. § 1-1-110(1) speak for themselves, and thus CCC denies so much of the allegations or characterizations set forth in paragraph 28 of the Complaint to the extent that they fail to accurately quote or describe the language of that statute.

29. Upon information and belief, CCC denies that the Clerk cannot disobey an erroneous order of the Secretary, but admits that the Clerk is a subordinate officer to the Secretary.

30. Deny.

SECOND CLAIM FOR RELIEF
(Declaration That Secretary's Orders in a Statewide Ballot Issue Election
Must Be Applied Uniformly)

31. CCC incorporates the responses in the above paragraphs as though fully set forth herein.

32. The provisions of C.R.S. § 1-1-107(1)(c) speak for themselves, and thus CCC denies so much of the allegations or characterizations set forth in paragraph 32 of the Complaint to the extent that they fail to accurately quote or describe the language of that statute.

33. Admit.

34. CCC denies the allegations contained in paragraph 34 of the Complaint as they relate to the facts of this case.

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

35. CCC incorporates the responses in the above paragraphs as though fully set forth herein.

36. Deny.

37. Upon information and belief, CCC admits the allegations contained in paragraph 37 of the Complaint.

38. Deny.

GENERAL DENIAL

39. CCC denies all allegations not specifically or expressly admitted herein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a cause of action for which relief may be granted.

Second Affirmative Defense

Plaintiff's claims must fail because prohibiting the mailing of ballots to "inactive fail to vote" registered electors would violate the First and Fourteenth Amendments to the U.S. Constitution, and Article 2, Sections 5 and 10 of the Colorado Constitution.

Third Affirmative Defense

“Inactive fail to vote” registered electors have a right to receive ballots by mail for mail-ballot elections pursuant to the First and Fourteenth Amendments to the U.S. Constitution, and Article 2, Sections 5 and 10 of the Colorado Constitution.

WHEREFORE, Intervenor-Defendant CCC requests that the Secretary’s Complaint be dismissed with prejudice in its entirety, that the Secretary’s request for a preliminary injunction be denied, and CCC be granted all further and additional relief to which it is entitled.

COUNTERCLAIMS

For its Counterclaim against the Secretary, CCC states as follows:

PARTIES, JURISDICTION, AND VENUE

40. 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. Common Cause 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 at least 35 registered voters in Denver County who are deemed “inactive failed to vote.”

41. Plaintiff- Scott Gessler, in his official capacity (“the Secretary” or “Respondent”), is the duly elected Secretary of State of the State of Colorado with responsibility for supervising elections and enforcing the Uniform Election Code in a constitutional manner.

42. This Court has jurisdiction of this matter under article VI, §9(1) of the Colorado Constitution, C.R.S. §13-51-105, and C.R.C.P. 57(a).

43. Venue is proper in this Court under C.R.C.P. 98(c)(1).

FACTUAL ALLEGATIONS

44. Since 1992, Colorado law has provided for mail ballot elections in certain circumstances under the Mail Ballot Election Act, C.R.S. § 1-7.5-101, et seq.

45. Since 2007, Colorado law has allowed registered voters to request to be put on the “permanent mail ballot” status and receive all ballots by U.S. Mail. *See* C.R.S. § 1-8-104.5. Under this law, such voters receive their ballot by U.S. Mail and may not vote a different ballot in person or otherwise without verifying under oath that they have lost or misplaced their ballots. C.R.S. § 1-8.4.101(3).

46. Today, nearly 43 % of Colorado’s registered voters are on the permanent vote by mail list.

47. The November 1, 2011 statewide election will be a mail-only election for the majority of Colorado counties, including the City and County of Denver.

48. In conducting this election, C.R.S. § 1-7.5-107(3)(a)(I) states that, “the designated election official shall mail to each active registered elector.”

49. C.R.S. § 1-2-605(2) provides that, “[a] registered elector who is deemed ‘Active’ but who fails to vote in a general election shall have the elector’s registration record marked ‘Inactive (insert date)’ by the county clerk and recorder following the general election.” These registered electors are referred to as “inactive failed to vote” (referred to herein as “Inactive Voters”).

50. The inactive status does not affect the ability of Inactive Voters to vote as they remain eligible to vote in any election. C.R.S. § 1-2-605(3) (“Any registered elector whose registration record has been marked ‘Inactive’ shall be eligible to vote in any election where registration is required and the elector meets all other requirements.”).

51. The Secretary has interpreted C.R.S. § 1-7.5-107(3)(a)(I) to prohibit election officials from mailing ballots to Inactive Voters and brought suit to permanently enjoin the Denver County Clerk from doing so.

52. Of the approximately 5,000 members of CCC, at least 35 are Inactive Voters who reside in Denver and would not receive ballots for the November 1, 2011 mail-only statewide election under the Secretary’s proposed interpretation of C.R.S. § 1-7.5-107(3)(a)(I).

53. The interests CCC seeks to protect in this suit are germane to its purpose of protecting the integrity of our voting system and preventing voter disenfranchisement in Denver and throughout Colorado.

54. Neither the declaratory judgment claims asserted nor the relief requested here requires the participation of CCC’s individual members in the lawsuit.

55. A dispute exists between CCC and the Secretary as to whether election officials may mail ballots to Inactive Voters.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment That Clerks May Not Be Prohibited From
Mailing Ballots to Inactive Voters)

56. CCC incorporates the allegations above as though fully set forth herein.

57. Plaintiff is entitled to a declaratory judgment under C.R.S. §13-51-105, and C.R.C.P. 57(a), that the provision of C.R.S. § 1-7.5-107(3)(a)(I) sets the minimum for which registered electors should be mailed a ballot and that the Secretary may not prohibit election officials from mailing ballots to all registered electors, including Inactive Voters.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment That Use of the Term “Active”
In CRS § 1-7.5-107(3)(a)(I) Is Unconstitutional)

58. CCC incorporates the allegations above as though fully set forth herein.

59. 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.

60. The disparate treatment between eligible electors based on whether they are deemed “active” or “inactive fail to vote” as provided for by C.R.S. § 1-7.5-107(3)(a)(I) in requiring that ballots only be sent to “each active registered elector” violates the Equal Protection clause of the Fourteenth Amendment.

61. C.R.S. § 1-7.5-107(3)(a)(I) also violates the First Amendment and Colorado Constitution by impermissibly burdening political expression and by burdening Inactive Voter’s right to vote. Both political expression and the right to vote are forms of protected speech.

62. Plaintiff is entitled to a declaratory judgment under C.R.S. §13-51-105, and C.R.C.P. 57(a), that the provision of C.R.S. § 1-7.5-107(3)(a)(I) requiring that ballots only be mailed to “each active registered elector” is unconstitutional in that it does not require mailing to “inactive fail to vote” registered electors.

PRAYER FOR RELIEF

Based on the foregoing, Intervenor-Defendant CCC respectfully requests the following relief:

A. A declaration that the provision of C.R.S. § 1-7.5-107(3)(a)(I) sets the minimum for which registered electors should be mailed a ballot and that the Secretary may not prohibit election officials from mailing ballots to “inactive fail to vote” registered electors.

B. A declaration that any interpretation of the provision of C.R.S. § 1-7.5-107(3)(a)(I) forbidding ballots to be mailed to “inactive fail to vote” registered electors is unconstitutional.

C. Such other relief as the Court may deem appropriate.

Dated October 4, 2011.

Respectfully submitted,

s/ J. Lee Gray

J. Lee Gray, #27306

HOLLAND & HART LLP

**ATTORNEYS FOR 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 and/or by e-mail to:

Maurice G. Knaizer, Esq.
Deputy Attorney General
Public Officials
1525 Sherman Street, 7th Floor
Denver, CO 80203
Maurie.knaizer@state.co.us
Attorneys for Plaintiff

Victoria Ortega, Esq.
David Cooke, Esq.
Denver City Attorney's Office
Municipal Operations Section
201 W. Colfax Ave., Dept. 1207
Denver, CO 80202
(720) 913-3275
Fax: (720) 913 -3180
Victoria.ortega@denvergov.org
David.cooke@denvergov.org
Attorneys for Defendant

s/J. Lee Gray

5248063_1.DOCX