June 19, 2012

State of Colorado
Department of State
Attn: Scott Gessler, Secretary of State
Suzanne Staiert, Deputy Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Notice of Proposed Rulemaking, Election Rules, 8 CCR 1505-1 (June 15, 2012)

Pursuant to the above-cited "Notice of Proposed Rulemaking" (June 15, 2012), I hereby submit the following written comments regarding the Secretary's proposed Rules.

The gist of my comments concern proposed changes to Rule 41 – some of which appear to exceed the Secretary's statutory authority as to both the composition and functions of County Canvassing Boards under C.R.S. § 1-10-101(1)(a), while none of the proposed changes would fulfill his statutory mandate under C.R.S. § 1-7-514 that "[t]he rules shall account for . . . (c) [t]he confidentiality of the ballots cast by the electors".

1. Overview:

Because we have perhaps the most firmly established "democracy" in the world, we Americans tend to take it for granted that we enjoy the best electoral processes that money can buy. As a result, we too often take it for granted that those processes are operating as they should and that free and fair democratic elections necessarily result.

Seemingly, only when major election problems arise – as in Florida in 2000 – do policymakers and the public question (albeit only temporarily) cherished assumptions underlying their shared belief in the efficacy and integrity of American elections.

However, pursuant to principles derived from our own and others' experience and international law -- as promulgated on line by the Carter Center's Democracy Program – in order to be truly free, fair and democratic, elections should preferably:

a. be conducted by impartial officials;
b. afford no opportunity for linking voted ballots to voters' identities; and
c. be maximally transparent to both the press and the public.

Of course, in Colorado, our elections are not conducted by "impartial officials", but rather by 64 individually elected (typically as a member of a political party, and thus "partisan") County Clerks and Recorders, subject to the overall supervision of an elected (typically and similarly "partisan") Secretary of State. As a result, and as historically well-demonstrated, both transparency and effective oversight by the press, by the public, and by competing political parties become even more crucial – if not truly indispensable -- when elections are being managed by partisan officials, as they are in Colorado.

2. Composition of County Canvass Boards.

To prevent and detect any inherent threat to the integrity of democratic elections posed by overzealous partisan election officials, Colorado's election mechanism calls for sworn Election Judges, "quasi-independent" County Canvass Boards, and "watchers".

County Canvass Boards are "quasi-independent" because – pursuant to C.R.S § 1-10-101(1)(a) – the members of a County Canvassing Board are to be appointed by "the county chairperson of each of the two [now three] major political parties in each county". The obvious logic of this provision is that – absent truly impartial election officials – the potential for partisan shenanigans is minimized when members of opposing political parties (whether or not competing locally in a particular election) both oversee and participate in certifying election results, thus affording a classic "check and balance".

Proposed Rule 41.2.1 would limit the number of "major party" appointees to the County Canvass Board to two (2) each, and expressly embraces the logical presumption that each major party is to be represented equally. By statute, the County Clerk and Recorder is also a member of the County Canvass Board, each of which must therefore statutorily consist of at least four members – one from each of the three "major parties" plus the County Clerk and Recorder – or, by rule, a maximum of seven (7) members – two from each of the three "major parties" plus the County Clerk and Recorder.

Pursuant to C.R.S § 1-10-101(1)(b), only when a major party's county chairman or vice-chairman is unavailable to appoint an allocated member or replacement to the County Canvass Board is the County Clerk and Recorder empowered to "make the appointment" or "fill the vacancy", and even then the County Clerk and Recorder must make such appointment "as nearly in compliance with the intention of this section as possible" – which logically must mean that the County Clerk and Recorder is to fill any vacancies on the County Canvass Board by appointing a registered member of the un- or under-represented major party or a registered elector already certified by that major party's county chairman as eligible for appointment pursuant to C.R.S § 1-10-101(1)(a).

Therefore, both the "Definition" of "Canvass Board" in proposed Rule 41.1.2 and the language of Proposed Rule 41.2.2 are contrary to statute, apparent legislative intent, and the logic of overseeing elections using counterbalancing major party representatives. More specifically, only in the limited circumstances described in C.R.S § 1-10-101(1)(b) does Colorado election law authorize a County Clerk and Recorder to appoint anyone to the County Canvass Board.

Thus, nothing in Colorado statutes or logic supports proposed Rule 41.2.2, which would unilaterally authorize County Clerks and Recorders to "accept applications from, and subsequently appoint, additional representatives from among minor party and unaffiliated electors". Rather, C.R.S § 1-10-101(1)(b) authorizes County Clerks and Recorders to prescribe procedures by which "each minor political party whose candidate is on the ballot and each unaffiliated candidate whose name is on the ballot in such election" may designate "one watcher to observe the work of the county canvass board".

Obviously, a "watcher" is not a member of the County Canvass Board whose "work" is to be observed – else the statutory language would be redundant. While in theory, the County Clerk and Recorder's appointment of representatives of minor parties and unaffiliated electors to County Canvass Boards might arguably increase transparency and oversight, the logic of C.R.S § 1-10-101(1)(a) and (b) is to the contrary.

Rather, the legislature has already impliedly recognized that the proposed Rule 41.2.2 is an injudicious "open invitation" to County Clerks and Recorders to "pack" the County Canvass Boards with minor party and/or "unaffiliated" cronies so as to insure a loyally favorable majority of the County Canvass Board when it comes to certifying even the most disputed, unreliable, or irregular election results under C.R.S § 1-10-101.5(c).

Consequently, proposed Rules 41.2.3 and 41.2.4 are both contrary to the letter and spirit of applicable statutes, violate legislative intent and common sense, and therefore constitute a threat to the integrity of elections in which – absent impartial officials – the counterweight of presumably competing major parties (only -- albeit "watched" by representatives of minor parties and/or unaffiliated electors) protects that integrity from the chicanery of partisan County Clerks and Recorders (who may also be candidates).

Therefore, proposed Rule 41.2.7 – requiring an odd number of members of any County Canvass Board -- is both unnecessary and contrary to statute. C.R.S § 1-10-101.5(c) expressly requires a majority of the County Canvass Board to certify an election and explicitly anticipates the possibility that uncertified results may be transmitted to the Secretary of State "along with a written report detailing the reason for noncertification".

3. Duties of County Canvass Boards.

C.R.S § 1-10-101.5 expressly describes the duties of County Canvass Boards and seemingly requires no elaboration. Thus, it remains unclear whether proposed Rule 41.1.1 is intended to expand, contract, or otherwise modify the duties of the County Canvass Board. Presumably, any member of the County Canvass Board may "review" any and all records necessary to "reconcile" the ballots cast pursuant to C.R.S § 1-10-101.5(a) and (b), and to "certify" the abstract thereof pursuant to C.R.S § 1-10-101.5(c).

However, to the extent that C.R.S § 1-10-101.5 requires clarification, proposed Rule 41.3.2 should be interpreted as confirming that any member of a County Canvass Board is lawfully entitled to "review" and/or "verify" any and all records – including the reconciliation proffered by an Election Judge, the Statement of Ballot Forms (proposed Rule 41.1.4), and the "Detailed Ballot Logs" (proposed Rule 41.24) – necessary to "reconcile" the "ballots cast" tally pursuant to C.R.S § 1-10-101.5 (a) and (b).

Thus, contrary proposed Rule 41.3.1, the County Canvass Board's "sole duty" is to conduct the canvass in accordance with C.R.S § 1-10-101.5(a), (b), and (c) – not "as defined in Rule 41.1.1". Moreover, because Rule 41.1.1 uses different terminology than the statute, the proposed "definition" is likely to cause more confusion than clarity.

Likewise, proposed Rule 41.3.4 is directly contrary to statute, because nothing in C.R.S § 1-10-101.5 requires a County Canvass Board to certify results "regardless of whether the Board is able to resolve errors or inaccuracies". Rather, as above, C.R.S § 1-10-101.5(c) anticipates the likelihood that uncertified results will be transmitted to the Secretary of State "along with a written report detailing the reason for noncertification".

Therefore, proposed Rule 41.3.5 is impliedly contrary to statute and inconsistent with proposed Rule 41.3.2 (if properly interpreted) because – in order to prepare and submit to the Secretary of State a meaningful "written report detailing the reason for noncertification" -- members of a County Canvass Board must be (and statutorily are) empowered to "review", "verify" and/or "reconcile" the proper performance of all duties typically reserved to Election Judges, including -- but not limited to – "determining voter intent, evaluating voter eligibility, and reviewing logs or reports that were not generated while conducting the election" (whatever those may be). Otherwise, County Canvass Boards – logically intended to serve as a "quasi-independent" check on the County Clerk and Recorder and on Election Judges – could readily become a mere "rubber stamp" for those election officials (which seems to be the unstated intent of the proposed Rules).

This statutory interpretation is further confirmed by C.R.S § 1-7-514(2)(a) and (b), which respectively establish the County Canvass Board's duty to investigate and remediate both any discrepancies detected during a post-election audit and "any written complaint from a registered elector from within the county containing credible evidence concerning a problem with a voting device". Nothing in Colorado election law requires a County Canvass Board to wait until a post-election audit to remediate an irregularity detected in the course of its review, verification, and reconciliation of "ballots cast" – whether or not a majority of the Board opts to certify the results of that election.

4. Confidentiality of Ballots Cast by Electors.

In the context of auditing the election results obtained from "electronic voting equipment", C.R.S § 1-7-514(5)(c) requires ("shall") the Secretary of State to promulgate Rules which account for "[t]he confidentiality of the ballots cast by the electors". To my knowledge, the Secretary has thus far failed to fulfill this statutory mandate imposed by the legislature in 2011. Thus, for example, the Secretary has not issued Rules prohibiting the printing of unique and thus traceable bar codes directly on ballots (as opposed to on the detachable ballot stub as in other states). Nor has the Secretary issued Rules requiring the randomization of electronic voted ballot images when they are downloaded (as some electronic equipment allows). Thus, rather than wait for a federal judge to order such measures, the Secretary should already be formulating and promulgating such Rules.

Given Colorado's constitutional mandate that all ballots be "anonymous", the Secretary's attention to "the confidentiality of the ballots cast by the electors" should not be confined to ballots obtained from "electronic voting equipment". Rather, because the Secretary has long been aware that locally discretionary procedures employed by County Clerks and Recorders both enable and facilitate the linkage of voted ballots to voters' identities, the Secretary should already have published Rules prohibiting such procedures.

However, in February 2012, my Colorado Open Records Act ("CORA") request revealed that the Secretary had not yet even issued any "best practices" guidance – much less any proposed Rules – addressing the batching and/or randomization of voted paper ballots so as prevent their linkage back to voters' identities using reports generated from the Statewide Colorado Registration and Elections ("SCORE") database.

Therefore, the Secretary's latest proposed Rules can perhaps be construed as a cynical attempt to obfuscate his ongoing dereliction of duty and disregard for a standing legislative mandate to protect "the confidentiality of the ballots cast by the electors".

5. The Colorado County Clerks Association ("CCCA").

To the extent the proposed Rule 41.2.2 would enable partisan local County Clerks and Recorders to "pack" their respective County Canvass Boards to ensure a supportively favorable majority, and to the extent that Rule 41.3.5 would enable County Clerks and Recorders to convert their County Canvass Boards from being a "quasi-independent" double-check on partisan election officials to a "rubber stamp" therefor, the Secretary of State's proposed Rules suggest that he is in league with the CCCA to render Colorado elections less transparent and Coloradans' individual ballots less anonymous.

This collusion is further suggested by the substance of and process associated with the recently enacted HB12-1036, particularly as to what was originally SB12-155.

However, because the CCCA is nominally funded by taxpayer dollars through the annual dues paid by its 64 member counties, all of its financial transactions should be a matter of public record – but the CCCA refuses to disclose its outside funding sources.

The CCCA's ongoing resistance to full financial disclosure should be of particular concern to the Secretary of State, to the public, and to the press because -- as reported by former State Representative Kathleen Curry in a letter to Governor Hickenlooper – the CCCA's lobbying efforts on behalf of HB12-1036/SB12-155 were funded by electronic voting equipment manufacturers and vendors. Because those special interests have in the past demonstrated no business incentive to promote election transparency, the CCCA's involvement with that industry – from whom its members both purchase equipment and contract for ballot printing, and upon whom they routinely rely for technical expertise – suggests an obvious potential for a conflict between the parochial interests of CCCA members seeking to preserve and/or expand their prerogatives while reducing effective oversight, and the public interest in protecting the transparency and integrity of elections.

Therefore, the Secretary of State should rely on both existing "conflict of interest" statutes and familiar ethical precepts to promulgate appropriate Rules and/or propose necessary legislation requiring the CCCA to fully disclose its expenditures and sources of funding, prohibiting any County Clerk and Recorder from expending taxpayer moneys to the CCCA until it does so, and mandating County Clerks and Recorders to fully disclose to the Secretary – as a matter of public record – all personal and/or business dealings and relationships between their offices and any vendors that financially supports the CCCA.

6. Minimizing Unique Ballot Styles.

Because the Secretary of State has been derelict in failing to promulgate effective Rules or authoritative "best practices" to protect "the confidentiality of the ballots cast by electors", some Colorado Clerks and Recorders (by their own admissions) continue to employ batching procedures and/or bar codes which enable and facilitate the linkage of voted ballots to voters' identities – even though the solutions to those problems are well-known and have been effectively implemented in other Colorado counties and/or in many jurisdictions elsewhere in the United States outside Colorado. Thus, Colorado's failure to follow suit arguably constitutes a harsh indictment of our Secretary of State's good faith.

On the other hand, such locally discretionary but arguably unconstitutional and readily correctible procedures are only part of the "secret ballot" problem. In addition, the split of oversight authority between the Secretary of State (who has responsibility for elections) and the Department of Local Affairs (which has responsibility for special districts) promotes the proliferation of unique ballot styles in combined elections.

In other words, even if local procedures were to minimize the possibility of linkage between voted ballots and voters' identities, some ballots would still be traceable due to the small number of voters associated with a particular ballot style (a product of a voter's precinct number and any special district election(s) combined on the same ballot). The possibility of linkage is further increased when a special district boundary overlaps a precinct boundary, thereby creating small enclaves of voters who therefore became more readily identifiable. At its extreme, this issue is well-known as the "univoter" problem.

Thus, the Secretary of State – in conjunction with the Department of Local Affairs – should promulgate Rules intended to minimize the number of unique ballot styles used in combined elections, to include requiring small special district elections to appear on a separate paper ballot in conjunction with a combined ballot or held entirely separately.

However, in defense of County Clerks and Recorders, the practicalities of dealing with a growing compendium of federal and state election laws and "best practices" and of tracking the boundaries of special districts relative to precinct boundaries are daunting.

Indeed, in February 2012, my CORA request to the Mesa County Clerk and Recorder revealed that – because of the Colorado legislature's delay in finalizing the redistricting of state and federal legislative districts pursuant to the 2010 Census, and because the Republican Party's caucuses were accelerated by one month – the Mesa County Board of County Commissioners ("BOCC") adopted new precinct boundaries one day before the statutory deadline without knowing how many "registered electors" were in each new precinct. As a result, Mesa County's new precincts range in size from 149 to 1941, arguably in violation of the U.S. Supreme Court's "one man, one vote rule".

While there is ample case law as to the proper size and delineation of County Commissioner districts, there is little judicial guidance and limited statutory direction in C.R.S. § 1-5-101 applicable to the proper size and delineation of precincts.

Thus, for example, as confirmed by my February CORA 2012 request thereto, the Secretary of State has not promulgated any interpretation of C.R.S. § 1-5-101(1) to more specifically define what constitutes those "natural and artificial boundaries that meet the requirements of the census", and which County Clerks and Recorders and their respective BOCCs are to "take into consideration . . . in establishing [new precinct] boundaries".

Given Colorado's increasing reliance on Early Voting, Mail-In Ballots, and Voting Centers – and to further ameliorate the "univoter" problem -- the Secretary of State should also propose Rules and/or necessary legislation requiring County Clerks and Recorders to minimize the number or precincts in each Colorado county and/or to specify that precincts are to contain roughly equal numbers of "registered electors".

In the meantime, County Clerks and Recorders are also hampered by the time constraints of C.R.S. § 1-5-103(1)(a), which requires all changes in precinct boundaries ("except in cases of precinct changes resulting from changes to county boundaries") to be "completed no later than twenty nine days prior to the precinct caucus day" preceding a partisan election – such that the boundaries blindly adopted by the Mesa County BOCC must apparently remain in effect until after the November 2012 general election.

In order to further minimize the "univoter" problem and to recognize the issues arising from overlapping special district elections, the Secretary of State should consider proposing a legislative amendment to permit – in the interim between the primary and general elections (even in 2012) -- County Clerks and Recorders to more accurately adjust and/or realign the recently redrawn precinct boundaries to fully encompasses and/or better coincide with special district boundaries, particularly when a special district election is anticipated. Such an amendment C.R.S. § 1-5-103(1)(a) would reinforce any proposed Rules properly intended by the Secretary to minimize the number of unique ballot styles in an election -- which make voters' identities more traceable than otherwise.

7. Conclusion.

While it may come as a shock to the public, Colorado's Secretary of State and several County Clerks and Recorders expressly maintain that "there is no fundamental constitutional right to a secret ballot", and that statutes intended to insure and protect the secrecy and anonymity of voted ballots do not apply to them as sworn election officials.

However, while Colorado's Secretary of State and his Republican cohorts seem obsessed with preventing unproven and arguably nonexistent "voter fraud" in the context of voter registration, the historical evidence is that actual election fraud is more often committed by and/or attributable to the skullduggery of election officials themselves.

Thus, if oaths alone were sufficient to protect the anonymity of voters' choices and the integrity of elections, every member of the public seeking access to voted ballots for the purpose of verifying election results before they were certified could be similarly sworn and subject to the same criminal penalties for violations as are election officials.

Logic, history, and common sense all insist and demand that sound procedures and "best practices" – as well as solemn oaths -- are all necessary to preserve and protect the integrity of our elections, even if by themselves none of tem is sufficient to do so.

Therefore, pursuant to ¶ V. of your "Notice of Proposed Rulemaking" (June 15, 2012), I respectfully request that my comments be included in the record regarding the above-referenced proposed Rules, and that the hearing scheduled for July 23, 2012, be conducted with substantially more openness and public participation than was permitted by the Colorado legislature in tacking SB12-155 onto HB12-1036 at the last minute.

Cordially,

William C. Hugenberg Jr., J.D.
[redacted]