

The Honorable Scott Gessler  
1700 Broadway, Suite 200  
Denver, CO. 80290

Dear Secretary Gessler:

I am writing to you in connection with your suggested changes to Rule 41 of the Election Rules of your office. These rule changes deal with the area of canvass boards.

The independence of the canvass board is central to the election system. It is a check on the county clerk and a step removed from the Secretary's office. It ensures that there is a check on the clerk's review of ballots by allowing a bipartisan group to count the numbers of voters and the number of ballots cast.

You have rule making authority, of course. The rules you make must be a function of specific legislative direction. And in the instance of the canvass boards, the legislature has not given you the rule making authority seem to want in this area.

The legislature anticipated a need for the Secretary to become involved in certain post-election processes. In this regard, the Secretary can be the arbiter of the recount process when, as set forth in a very clear statutorily defined process, there is a complaint lodged in the appropriate district court and a judge orders that your office supervise the recount process to ensure a fair, impartial, and uniform result. C.R.S. §1-45-10.5-109. That is a critically important role to play.

Your rule changes would allow a majority of a canvass board or a county clerk acting unilaterally to bring you into the canvassing of votes. You cannot give the canvass board any powers that the legislature has not anticipated and provided. The changes made in this area are in excess of your office's constitutional and statutory authority.

Further, the rules as proposed would allow you to come into the process for the purpose of making an "investigation" in close races in order to root out any "error or abnormality." That broad power is not one that the General Assembly has granted to your office. It cannot simply be granted through the rule making process.

Finally, you propose to take the results of your investigation in one county and use it for purposes of policy setting – during this election cycle – in other counties. You have a process for developing such system wide policies; it is the rule making process in which we are now engaged. I understand that elections are fluid events. Within the statutory and the regulatory framework that exists before a single ballot is cast, however, you have the tools necessary to address situations that could arise while votes are being cast or while they are being counted. You may not institute new processes that the General Assembly has not given you authority to implement.

Whatever the reason you had for proposing Rules 41.14.1, 41.14.2, and 41.14.3, I urge you not to adopt them. They are legally flawed and in my opinion are not likely to be upheld by our courts.

Sincerely,

State Representative, Mark Ferrandino