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(sent by e-mail to scott.gessler@sos.state.co.us)

Scott Gessler
Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Comments to Proposed Rulemaking

Dear Secretary Gessler:

This letter represents comments from The ACLU of Colorado to the Secretary of State's proposed amendments to the Colorado Secretary of State Election Rules. The hearing on the proposed amendments is July 23, 2012. The following ACLU comments are limited to proposed changes to Rule 12.11 and new Rules 12.4.1(d) and 13.19.

The Secretary Lacks the Power to Promulgate the Proposed Changes

The Secretary's rule making authority is created by statute. Here, the statute relied upon by the Secretary of State does not provide the office with the rulemaking authority the Secretary attempts to exercise in this instance.

Election laws are to be construed liberally because high voter participation is of heightened importance. *See* Section 1-1-103(1), C.R.S. In reviewing statutes and interpreting them, the courts instruct us to first look at the statute's language and only if it is unclear, we look to legislative intent. *Turbine v. People*, 151 P. 3d 563, 568 (Colo. 2007). Also, in reviewing a statute's meaning, we do not add or subtract words from it. *Holcomb v. Jan-Pro Cleaning Systems*, 172 P. 3d 888, 894 (Colo. 2007).

With these rules in mind, we review the relevant statutory language to which the Secretary's proposed amendments relate. Section 1-7.5-107(3)(a)(I) reads as follows:

Not sooner than twenty-two days before an election, and no later than eighteen days before an election, except as provided in paragraph (II) of this paragraph (a), the designated election official **shall mail to each active registered voter**, at the last address appearing in the registration records and in accordance with United States postal service regulations, a mail ballot packet, which shall be marked "DO

NOT FORWARD. ADDRESS CORRECTION REQUESTED.", or any other similar statement that is in accordance with United States postal service regulations.

(emphasis added). The key language is "shall mail to each active registered voter." The language by its plain terms directs election officials to mail ballots to all active and registered voters. The statute provides a bare minimum for election officials. That is, the statute directs them to at the very least, mail ballots to active voters. The statute does not prohibit any election official from doing more, nor does it compel them to do more.

The Secretary proposes to add Rule 12.4.1(b)(2), which specifically directs election officials to "not mail a ballot to an elector whose registration record is marked inactive-failed to vote until the elector submits a request for a ballot . . ." ¹ Proposing rules or amendments that limit or define what election officials can and cannot do with respect to inactive/failed to vote electors is beyond the statutory scheme. Indeed, the Secretary must alter the statute to add the term "only" to the phrase "the election official shall mail to each active registered electors". Because the statute as written does not include the term "only" or other language prohibiting election officials from mailing ballots to inactive/failed to vote voters, election officials may mail ballots to such registered electors. Simply stated, the Secretary lacks the authority to promulgate the proposed rules or to amend existing Rule 12.11 as proposed.

The Proposed Rules and Amendments Are Contrary to a Stated Public Purpose

The power to choose who governs is one of the most essential rights Americans share. The right to vote is protected by more constitutional amendments than any other right we enjoy as American citizens. Further and as previously noted, our legislators have expressed the importance of high voter participation.

The Secretary's proposed rules and amendments limit voter participation and, therefore hinder the fundamental right to vote. By adding the term "only", the Secretary proposes to remove registered and otherwise eligible voters from the mailing list and, therefore, limits their participation in the election process. These eligible voters will not receive ballots at the same time as active voters and not until they specifically request a ballot. The Secretary's rules and amendments operate to defeat, not further, the stated intent of our election laws and the Constitution. *See* Section 1-7.5-102 and Section 1-1-103(1); *see also* U.S. Constitution Amendments 1, 14, 15, 19, 24 and 26.

The proposed rules and amendments create a separate class of registered voters and for seemingly no reason. Simply because an eligible voter does not vote in the previous election, suddenly they have to jump additional hurdles in order to cast a ballot. This limits voter access by rendering it more difficult for these eligible voters to participate in an election.

In conclusion, ACLU respectfully requests that the Secretary not move forward on the proposed amendment to Rule 12.11 and on promulgating new Rules 12.4.1(d) and 13.19. The Secretary

¹ Proposed Rule 13.19 similarly provides that in elections that are not primary elections, the election official "may not issue a mail-in ballot to an elector whose record is marked inactive-failed to vote until the elector submits a timely application for a mail-in ballot.

lacks the authority to make these proposed changes to Colorado's Election Rules, they run contrary to a stated legislative purpose, and they impede on the fundamental right to vote.

Sincerely,

Denise S. Maes
Public Policy Director