

August 29, 2012

Honorable Scott E. Gessler
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Re: Draft Proposed Election Rule 52

Dear Secretary Gessler:

We, as representatives of our undersigned groups, write to express our concerns about the draft proposed Election Rule 52 your office released late last Friday, August 24, 2012 to be discussed at a public meeting (expressly not a formal rulemaking proceeding) to be held Wednesday, August 29, 2012.

The right to vote is the fundamental building block of our society. It is what unites us as Americans, achieving success by relying on the wisdom of the people to produce a government that reflects the values of the greatest possible number of people. Blood has been shed and vast treasure spent defending that sacred right. It is too important to be compromised by a shoddy procedure invented on the eve of an election, one that Coloradans may legitimately suspect is intended to provide an electoral benefit to candidates and issues you support by providing a means to reduce Americans' access to the voting booth.

Our concern is that the rules you are discussing at this meeting, and which you have suggested you will adopt on an emergency basis, like the procedures you are using to identify potential non-citizens, are not likely to impact only non-citizens. They have and will impact citizens that are registered to vote, and entitled to vote. Indeed, adoption of these rules at this time, leaving so little time for notification and correction of errors, could result in large numbers of eligible citizens being disenfranchised right before the election. Your approach is neither thoughtful nor narrow in its design or impact, and most importantly, is without any basis in Colorado law.

Indeed, during the 2011 legislative session, two bills were introduced (House Bill 11-1252 and Senate Bill 11-018) that would have given your office authority to remove ineligible voters from the rolls. Neither of those bills passed. It is surprising that over a year later, and on the eve of a presidential election in which you are a declared supporter of one candidate, you would propose to exercise all the power that the legislature denied you in 2011 and more – and do so through a rule that invents a brand-new procedure never seen before in Colorado law, one that presumes registered voters to be guilty before proven innocent and requires American citizens to present themselves to you to determine (with very limited appeal rights) whether they may exercise their right to vote.

In 2006, the legislature made it a Class 5 felony for an ineligible voter to cast a ballot – the harshest criminal penalty in the Election Code. C.R.S. § 1-13-704.5. While you may disagree, the legislature has mandated that the deterrent effect of felony criminal penalties for ineligible voters is the best way to address the perceived problem.

Colorado law has long placed responsibility for maintenance of the voter rolls in the hands of elected county clerks. Existing Colorado law, primarily C. R. S. § 1-9-101 relating to how a registered voter may challenge another registered voter provides a means for ensuring that ineligible persons do not vote, while incorporating important and needed safeguards in the process. C. R. S. § 1-9-101 requires that a specific challenge be made in writing, supported by evidence and filed no later than sixty days prior to the election with the county clerk and recorder. In addition, C. R. S. § 1-9-101 provides that all hearings on the challenge be heard by the local clerk and recorder, and provides time periods both for the hearing, filing any appeal and the resolution of any appeal. Finally, the statute places the burden of proof on the challenger to demonstrate that the registered voter is ineligible, instead of putting the burden on the citizen to prove that they have a right to vote. It is telling that the notice of meeting released last Friday did not include a citation of statutory authority for the creation of a new process as proposed in Rule 52 – there is none.

Certainly, the fact that the Department of Homeland Security (“DHS”) has agreed to make its Systematic Alien Verification for Entitlements (“SAVE”) database available to your office does not legitimize the new procedure. Indeed, Section IV.B.1.n of the Memorandum of Agreement (“MOA”) between DHS and your office requires you, as the “User Agency,” to provide potentially affected persons “with the opportunity to use the User Agency’s **existing** process to appeal the denial.” [Emphasis added.] The proposed new rule 52 was not, on August 22, 2012 when the MOA was signed, “Colorado’s existing appeal system.” Rather, it is an entirely new system. As Colo. Rev. Stat 1-9-101 sets forth an appeal system that is in effect, any new appeal system less robust than what is imposed by that provision would be non-compliant with the terms of the MOA. To release a draft of a brand-new process as soon as the ink was dry on the MOA calls into question whether your office was honest with representatives of DHS in its discussions with them, and certainly violates the spirit of that agreement.

The National Voter Registration Act requires that “any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” must be completed as of the 90th day before the general election, here August 6, 2012. 42 U.S.C. § 1973gg-6(c)(2)(a). While the statute does list some exceptions to this general rule (e.g., non-systematic removal of voters who become deceased), it does not exempt programs purporting to target non-citizens who may or may not be on the rolls. We are aware that a federal judge in Florida recently declined to block a purge of potential non-citizen voters, but that ruling does not render your actions lawful. The ruling was largely animated by Florida’s promise that it was not currently removing voters. While the court opined that in certain circumstances, states could remove non-citizens from the rolls within 90 days of an election, that ruling does not disturb the NVRA’s prohibitions against eleventh hour systematic voter purges. These prohibitions are critical given the high risk that eligible citizens will be wrongfully purged from the voter rolls with no time for corrections.

A clear example of this risk is highlighted in the letters your office recently sent to people whom you claim obtained a driver’s license using a non-citizen form of identification such as a green card. This list was likely compiled using faulty matching criteria and using information that you have acknowledged is out of date. Moreover, the letter sets no deadline for response, nor explains the consequences of not responding. Community organizations and individuals have serious concerns that these voters’ rights are in jeopardy and need clarity as to whether any consequences result if a voter declines to respond and what parts of the proposed Rules will apply to them.

For some citizens, the form is literally impossible to fill out correctly. Indeed, even Senator John McCain would have difficulty filling out the form – he is not a naturalized citizen, and he was born in Panama, so he could not provide a “city and state” for his birthplace. Many other Americans hold “derived” or “acquired” citizenship, yet this category is not recognized on the form you mailed and those citizens who cannot truthfully respond to the vague and confusing letter would be required to present themselves to you for judgment or face being removed from the voter rolls.

Finally, we must note that Wednesday’s public meeting is just that – a meeting, not a formal hearing under the State Administrative Procedure Act. The time period you have given citizens to read and respond to your draft proposed Rule is less than the period to which they would have been entitled in a formal rulemaking procedure. We would oppose a process where you issue this rule on an emergency basis and only hold a formal hearing after the election.

Our right to vote is too important and hard-won to be cast into question by a hasty, ill-conceived and unauthorized procedure to purge the voter rolls on the eve of an election. We call on you to state publicly that you will not issue a rule on the subject of removal of voters from the voter rolls before the 2012 election.

Very truly yours,

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And on behalf of the following organizations:

Colorado Latino Forum
Colorado Progressive Coalition
New Era Colorado Foundation
ACLU of Colorado
Colorado Participation Project
Harm Reduction Action Center
Colorado Immigrant Rights Coalition

Hispanic Affairs Project
Western Equality
Rights of All People
Together Colorado
9 to 5 Colorado
Citizens Project
Interfaith Alliance of Colorado
NAACP Colorado State Conference