IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-2321-JLK-KMT

COMMON CAUSE OF COLORADO,
on behalf of itself and its members;
MI FAMILIA VOTA EDUCATION FUND; and
SERVICE EMPLOYEES INTERNATIONAL UNION,
on behalf of itself and its members,

Plaintiffs,

v.

BERNIE BUESCHER, in his official capacity as Secretary of State
for the State of Colorado,

Defendant.

JOINT RESPONSE TO COURT'S SUPPLEMENTAL QUESTIONS REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, Common Cause of Colorado, Mi Familia Vota Education Fund, and Service Employees International Union, by and through their attorneys, and Defendant, Bernie Buescher, by and through the Office of the Attorney General, respectfully submit this Response to Court's Supplemental Questions Regarding Cross-Motions for Summary Judgment.

PREFACE

On October 6, 2010, the Court posed several questions for the parties to answer in a joint submission relating to the current statutory and administrative scheme, as well as questions concerning possible stipulations or concessions. The parties have included the

Court's questions with their responses herein. The Court has posed several questions about terminology used in SCORE for various status designations of registrations and applications. The parties provide the following introductory comments to assist the Court in understanding the responses. Where the parties cannot agree on a response to the Court's questions, we have provided separate answers.

Secretary's Prefatory Comments:

Based on many of the Court's questions, the Secretary believes it may be helpful to provide some background information concerning the technical development of the SCORE database. Should the Court so require, the Secretary is prepared to present evidence in support of this background information.[1] Section 303(d) of HAVA required the Secretary to create and implement the SCORE database by January 1, 2004, but the Secretary received an extension to January 1, 2006. However, because the contract with the first vendor was terminated, the database was not completed on time. As a result, the database was not fully implemented until May of 2008. Due to the time constraints imposed by HAVA, and as a result of conversations with the Department of Justice, the Secretary had to work within the coding restrictions placed by the second vendor in order to complete the database as quickly and efficiently as possible. The second vendor that created SCORE started by using systems created for other states that did not include designations for failed applications.

[1] In addition, the Secretary objects to Plaintiffs' statements to the extent that they amount to legal argument. The Secretary does not believe the Court invited legal argument and that it is inappropriate to include argument in response to the Court's order.

As a result, the Election Code contains more categories than permitted by SCORE; some terms in the Election Code are grouped under broad categories in SCORE. The regulations attempted to bridge the SCORE terminology and the language of the Election Code. Specifically, applications that are deemed "not registered" by operation of §1-2-509(3), C.R.S., are designated in SCORE as "Cancelled- Failed 20-Day." The "cancelled" label within SCORE does not control whether the individual was registered, nor does it dictate the Secretary's interpretation and application of the relevant statutes. In fact, the administrative rules that define "cancelled" records were drafted around the terms already in place within SCORE. *See* 8 CCR 1505-1, Election Rule 2.20.1 ("Rule") (defining "cancelled status" or "cancelled record" to include that the applicant has been deemed not registered in accordance with §1-2-509(3), C.R.S.). Applications for registration that fail the 20 day statute are placed into "Cancelled- Failed 20 Day" because that is the most accurate terminology within the limits of the SCORE system. However, this designation was not intended to mean that the person who falls within the "Cancelled-Failed 20 Day" was a registered elector whose registration was subsequently cancelled.

Summary of relevant statuses used in SCORE:

- **"Inactive – returned mail" and "Inactive – undeliverable ballot"[2]:**
    - These statuses are used when a ballot, voter information card, confirmation card or other election mail sent to a registered elector with an already "active" record is returned as undeliverable. *See* §§1-2-605(1)(b); 1-2-605(1)(b)(5), C.R.S.

[2] One other "inactive" designation exists in SCORE, but since the Court did not raise this status, it is not described above. That status is "inactive- failed to vote."

- The elector remains registered, and eligible; his or her name will appear on the poll book. *See* §1-2-605(3), C.R.S.
- Because the last mailing to the elector was returned undeliverable, the elector will not be mailed voter information cards, pre-election notices, or ballots until the elector activates his record. *See* §§1-5-206(1); 1-8-108(2), C.R.S. Activating his record is not the equivalent of curing a deficiency or "perfecting" a registration. The elector may make the record active by returning a confirmation card, updating the record, voting, or contacting the county clerk and requesting his registration be made active. § 1-2-605(4), C.R.S.; Rule 2.11.
- If the elector does not update his information, does not vote, does not contact the clerk to activate his registration, and otherwise remains inactive for two consecutive general elections, his record will be cancelled. *See* 42 U.S.C. § 1973gg-6(d); §1-2-605(7), C.R.S.; Rule 2.18.

- **"Cancelled – failed 20 day period"**
  - This status is used when an applicant is deemed not registered in accordance with C.R.S. §1-2-509(3). In such instances, the voter information card sent to the elector upon receipt of his application has been returned as undeliverable within 20 days of the application.
  - When a voter information card is returned as undeliverable, the clerk mails the applicant a forwardable confirmation card. *See* Rule 2.17.
  - Applicants will not appear on the poll book until the applicant updates or confirms his address. *See* § 1-2-509(3), C.R.S.; Rule 2.20.2(b). The applicant may confirm his address up to and including election day. On election day and during the 28 days leading-up to election day an applicant can only confirm his address by appearing in person at the County Clerk's office. Rule 2.17.2.
  - On election day, applicants in this status will be able to vote a provisional ballot. If the applicant substantially confirms the address at which he attempted to register anywhere on the provisional ballot affidavit, completes the affidavit and is otherwise eligible, the applicant will be deemed registered and active as of the date of the original application and his ballot will be counted. *See* §§1-2-509(3); 1-8.5-106, C.R.S., Rule 26.4.4(a). In such circumstances, the applicant's status designation in SCORE is changed to "active."
  - However, if the applicant does not substantially confirm the address at which he attempted to register anywhere on his provisional ballot affidavit, the ballot shall not be counted. Nevertheless, the provisional ballot affidavit shall be treated as a new application for registration. *See* Rule 26.4.4(b).

- **"Incomplete"**
  - This status designation is most similar to the "cancelled – failed 20 day" status.[3] *See* §1-2-509(3), C.R.S. Both statuses: (1) indicate the applicant is not registered and not eligible; (2) indicate the applicant will not appear on the poll book; (3) permit the applicant to perfect their registration up to and including election day; (4) permit the applicant to vote a provisional ballot that will be counted so long as the missing information is provided on the provisional ballot affidavit, or if the applicant confirms his address on the provisional ballot affidavit; and (5) permit the applicant to become registered as of the date of the original application when the missing information is provided or when the address is confirmed. *See* §1-2-509(2) & (3), C.R.S.; Rule 2.20.2(b), 26.4.4 & 26.4.7.
  - Incomplete applications, like all applications, are entered into the SCORE system and kept in the system indefinitely. An "incomplete" status is given to all applications that do not contain all the statutorily required information for registration. *See* §1-2-509 (2), C.R.S. However, the administrative rules do not include the definition of the "incomplete" status designation. Nevertheless, SCORE does contain this designation.[4]
  - When the clerk receives an incomplete application, instead of sending a voter information card, the clerk sends a letter to the applicant advising the applicant that his application is missing information and informs the applicant of the information that is required to perfect the registration. *See* §1-2-509(2), C.R.S.
  - Persons with incomplete applications are not registered, not eligible and do not appear on the poll book until the applicant provides the missing information. *See* § 1-2-509(3), C.R.S.; Rule 2.20.2(b).

Plaintiffs' Prefatory Comments:

Plaintiffs do not dispute that Defendant: a) treats voters and would-be voters in a manner generally consistent with the explanation provided above, and b) interprets Colorado statutes and regulations consistent with the explanation provided above. Plaintiffs do

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[3] The Court appears to conclude that the "cancelled- failed 20 day" status is most similar to "inactive- returned mail" or "inactive- returned ballot." This is not true. The Secretary is providing this information concerning "incomplete" applications because this is the designation most similar to "cancelled- failed 20 day" and therefore, is most comparable.

[4] It is an oversight that the administrative rules do not include a definition of "incomplete" status as the status has existed since SCORE was implemented.

however dispute the relevance and accuracy of a number of Defendant's assertions in his prefatory comments, including, but not limited to, the relationship between Colorado law, the Secretary's interpretation of that law, and the SCORE system, and the extent to which any particular category in the SCORE system is similar to the other categories in the system. Plaintiffs further dispute the Secretary's characterization of voters who have failed the 20-Day Rule as "not registered," as ineligible, or as having never achieved "active" status. These disputed characterizations are repeated below in the Secretary's specific responses to the Court's questions. For the sake of efficiency, Plaintiffs hereby incorporate this statement of disagreement into each of their responses below.

Plaintiffs also object to the Secretary's inclusion in his prefatory comments of factual material regarding the bidding, development, and technical limitations of the Secretary's SCORE database purportedly in response to the requirements of the Help America Vote Act. These factual assertions were not established through discovery, are not supported by citations to the record before the Court, and should not be part of this Court's consideration of the parties' motions for summary judgment and interim relief. Because Plaintiffs have not tested the Secretary's factual assertions, through discovery or otherwise, Plaintiffs dispute each of the Secretary's factual assertions regarding the bidding, development, and technical limitations of the SCORE database.

The relevant issue in this case is not the capacity of the SCORE system or the development of the SCORE system by the Secretary, but the obligation of the Secretary to ensure that all federal and state laws are followed. Plaintiffs reiterate their position that the

National Voter Registration Act, 42 U.S.C. 1973-gg *et. seq.*, (henceforth referred to as the "NVRA"), precludes the cancellation of a registration record on the sole basis of one piece of returned mail, even if that mail is the notice of disposition of the registration application required by the NVRA. *See* 42 U.S.C. 1973-gg-4(d). In the event that returned mail is to be used for list maintenance activities, the NVRA makes clear that a registration record cannot be cancelled (absent confirmation from the voter that her or she has moved outside the jurisdiction) unless the voter both fails to respond to an address confirmation notice and does not present herself to vote for two general federal elections, 42 U.S.C. 1973-gg-6(d).

To the extent that state regulations can be interpreted to avoid the improper cancelation of voter registrations in violation of the NVRA, for example, by reading Rule 2.17 in conjunction with Rule 2.18.1 as leading to the classification of failed-20 day voters as "inactive – returned mail" or "inactive – undeliverable" under Rule 2.20.2(d), Defendant's practices are also in violation of his own regulations.

RESPONSES TO COURT'S QUESTIONS

Question # 1:

Is the voter registration status of an individual deemed "not registered" by operation of the 20-day rule one of "cancelled status"/"cancelled record" under Election Rule 2.20.1(b) or "inactive – returned mail"/ inactive – undeliverable ballot" status under Election Rule 2.20.1(d)?

Secretary's Response:

An individual who is deemed "not registered" pursuant to §1-2-509(3), C.R.S., ("20 day statute") will have a record in SCORE marked "Cancelled – Failed 20 Day period" in accordance with Rule 2.20.1(b). This is a sub-category of "cancelled status" or "cancelled record" within SCORE. This status is the most accurate designation available within SCORE to describe the "not registered" status of failed 20- day applications.

Plaintiffs' Response:

Plaintiffs dispute the Secretary's characterization of such voters as not registered and his assertions regarding the relationship between a particular SCORE designation and the 20-Day Rule, but do not dispute that Defendant treats such persons as having a "cancelled-Failed 20 day period" status, rather than an "inactive" status. Plaintiffs contend that the Secretary's designation and treatment of these voters is unlawful.

Question #2:

As the Colorado voter election laws currently stand, do the names of voters deemed "not registered" by operation of C.R.S. § 1-2-509(3) remain on SCORE and will they, or will they not, appear on the poll books for the November election.

Secretary's Response:

The Secretary never removes any record from the SCORE database, irrespective of the status designation. Thus, an individual deemed "not registered" in accordance with § 1-2-509(3), C.R.S. has an application that will remain in SCORE indefinitely. However, in accordance with Rules 2.20.1(b) and 2.20.2(b), the individual's name does not appear on the poll book. Only registered electors appear on the poll book.

Plaintiffs' Response:

Plaintiffs contend that the Secretary's designation and treatment of these voters is unlawful.

Question #3:

By what specific statutory or administrative authority may such voters also perfect their registration on election day, at the polls, as the Secretary contends in his summary judgment briefing?

Secretary's Response:

An elector who is deemed "not registered" in accordance with the 20 day statute may "perfect" his registration on election day pursuant to the statutory and administrative authority provided by §1-8.5-101, C.R.S., Rule 26.4.4 and Rule 2.17. Such an elector has two options on election day to "perfect" his registration. First, because his or her name does not appear on the poll book, the elector will be offered a provisional ballot. *See* §1-8.5-101, C.R.S. If the elector substantially confirms the street address at which he or she attempted to register anywhere on his provisional ballot affidavit, the elector is deemed registered as of the date of the original application and his ballot will be counted. *See* Rule 26.4.4. In addition, pursuant to Rule 2.17.2, an elector who is deemed "not registered" may "perfect" his registration on election day by completing a certification of registration and presenting identification at the county clerk and recorder's office or designated county clerk satellite office. In such cases, the elector is deemed registered as of the date of the original application and may vote a regular ballot so long as she presents the certificate of registration

at the polls. The elector may vote his regular ballot at the clerk's office; thus, there would be no need to go back to his polling location. *See* Rule 2.17.2.

Plaintiffs' Response:

Plaintiffs dispute that the voters described by Defendant above are given an opportunity to perfect their registrations on election day. Instead, Plaintiffs contend that voters affected by the 20-day rule are given the opportunity to cure their cancellation in accordance with the mechanisms described above by Defendant. Plaintiffs would note that voters placed in this category by the Secretary are treated differently than "inactive" voters who not only can vote a regular ballot if they show up at the polls during early voting or on election day, but can update their registration with a new address if they have moved or can request a mail-in ballot. Any of these actions, and others, will make an "inactive" voter become "active." 1-2-605(4), C.R.S.

Question #4:

Can the parties stipulate that "inactive – returned mail"/"inactive – undeliverable ballot" status voters are "eligible voters" under Colorado law who must be sent a "confirmation card" and may perfect their registrations by (1) sending the card back (Rule 2.17.1); (2) by completing a certificate of registration and presenting identification in person at the county clerk's office (Rule 2.17.2); or (3) at the polling place on election day?

Secretary's Response:

The Secretary stipulates that electors whose records in SCORE are marked "inactive – returned mail" and "inactive – undeliverable ballot" are eligible and registered electors.

These registered electors are not required to take any action to "perfect" their registration because their registration is already perfected. *See* §1-2-605(3), C.R.S. The inactive designation does not negate or otherwise cancel their registration. The inactive designation impacts the elector in only two ways: (1) he will not receive regular election mail and will not receive a mail ballot (unless he activates his record); and (2) if his record remains inactive for two consecutive general elections since the confirmation card was mailed, the clerk shall cancel the record pursuant to 42 U.S.C. § 1973gg-6(d), §1-2-605(7), C.R.S ., and Rule 2.18.3. No registrations may be lawfully cancelled solely for failing to vote. *See* §1-2-605(7), C.R.S. Unlike electors who were deemed "not registered," when the inactive elector submitted his application, she provided an address at which the voter information card was mailed and not returned within 20 days, or she otherwise confirmed her address (e.g., by voting); thus, inactive electors have not failed the 20 day statute, and were active registrants at one point. Just as active electors, inactive electors are listed on the poll book and may vote a regular ballot on election day.

The Secretary stipulates that a confirmation card must be sent to these electors when the status designation changes from "active" to "inactive" due to a returned ballot or returned election mail. *See* §1-2-605(6)(a) and (b), C.R.S. The elector may change their inactive status to active status by returning the confirmation card, updating their record, appearing to vote on election day, or otherwise requesting the clerk to re-designate their record as active. *See* §1-2-605(4), C.R.S., Rule 2.11. Updates to their records also include requesting mail

ballot. *Id.* Thus, inactive electors will receive a mail ballot upon making the request; at the same time, their status designation changes from inactive to active.

Rule 2.17.1 does not govern inactive records. Instead, Rule 2.17 relates to applicants who were deemed "not registered." However, an applicant deemed "not registered" may perfect their registration by returning his confirmation card; likewise, an elector whose record is inactive may have their status changed from inactive to active by returning his confirmation card pursuant to §1-2-605(4). A key distinction is that the "not registered" elector becomes registered when she returns the confirmation card, while the inactive elector merely changes their already perfected registration to an active status when she returns the confirmation card.

Plaintiffs' Response:

Plaintiffs can stipulate that "inactive" voters are "eligible voters" under Colorado law. Plaintiffs dispute the Secretary's claims regarding whether inactive voters are required to "perfect" their registration, for the reasons stated in Plaintiffs' Response to Question #3, and the Secretary's claim that voters in "inactive – returned mail" and "inactive – undeliverable ballot" were "active registrants at one point," while voters who failed the 20-Day Rule were not. In many cases, all that distinguishes a voter in "inactive – returned mail" or "inactive – undeliverable ballot" status from a voter in "Cancelled – Failed 20 Day" status is that mail delivery to and from the former set of voters takes longer than mail delivery to and from the latter set of voters.

Question #5 – Court's Footnote 1

*There is some internal inconsistency in the amended Election Rules. Rule 2.20.1 ("Definitions") simultaneously defines "cancelled status" or "cancelled record" to mean that a "**voter's registration has been cancelled or revoked based upon a determination the voter . . . has been deemed not registered in accordance with these rules and Title 1, C.R.S**." (Rule 2.20.2(b) (emphasis mine) and "inactive – returned mail/undeliverable" status to mean "that a voter information card [notifying a voter of his registration disposition under C.R.S. § 1-2-509]. . . was returned to the county clerk and recorder by the United States Postal Service as undeliverable" (2.20.1(d)), both of which are arguably true for voters caught in the cross-hairs of the 20-day rule. My inclination is to read Rules 2.17 and 2.18.1 together as the more closely tailored, and therefore applicable, Rules on the question and to compel the conclusion that voters deemed "not registered" by operation of the 20-day rule are given a registration status of "inactive," rather than "cancelled" under the applicable Colorado scheme. Query: Does the Secretary agree that conclusion is correct?*

Secretary's Response:

This conclusion is incorrect. The Secretary does not agree that Rule 2.20.1 has an internal inconsistency. The quote provided by the Court is missing key language that clarifies the definition of "cancelled status" or "cancelled record" does not presume that all electors in that status were at some point registered. Rule 2.20.1(b) separates out the two types of records that may fall into this SCORE description. "'Cancelled status' or 'cancelled

record' means that the voter's registration has been cancelled or revoked based upon a determination that the voter is ineligible, or the *applicant* has been deemed not registered in accordance with these rules and Title 1, C.R.S." Thus, the plain language of the rule indicates that "an applicant" has been deemed not registered; it follows, therefore, that the rule *does not* presume that the applicant was registered at all. As explained in the preface, the statuses available in SCORE are imperfect due to technical limitations of the system. The administrative rules were created around those technical limitations, hence the definition of cancelled record and cancelled status shows the sub-categories that are placed into that status within SCORE. The label used by SCORE is not determinative; the administrative rules attempt to clarify this.

The Court appears to conclude that persons whose records are placed in "inactive-returned mail/undeliverable" status for the return of a voter information card means that "a voter information card [notifying a voter of his registration disposition under C.R.S. § 1-2-509]. . . was returned to the county clerk and recorder. . . as undeliverable." However, this is only partially true. A voter information card is sent to electors under many circumstances, not solely upon submitting a registration application. In particular, voter information cards are sent as required pre-election mail to all active and inactive electors. *See* § 1-5-206(1) (county clerk shall mail voter information card "no later than twenty-five days before the general election or a special legislative election") and 1-2-605(1)(a)(I), C.R.S. ("Communication by mail from the county clerk and recorder to the registered eligible electors of a county shall be in the form of a voter information card.") Voter information

cards are pre-election mail that provides eligible electors with their precinct number, polling place, informs the elector as to whether she is designated as a permanent mail-in voter and includes a returnable portion that allows the elector to request designation as a permanent mail-in voter pursuant to §1-8-104.5, C.R.S. *See* § 1-2-605, C.R.S. In addition, pursuant to §1-7.5-108.5, C.R.S. counties must send a voter information card 90 days prior to a county conducted mail-ballot elections to electors that are "inactive- failed to vote" status. Counties also mail voter information cards to electors as confirmation of updates that voters make to their registration records.

Thus, if an elector is placed in "inactive-returned mail/undeliverable" status due to a returned voter information card, the card was sent as pre-election mail, or mail confirming voter updates to registration, and not to inform "the voter of his registration disposition." Indeed, such an elector was already sent a voter information card informing her of the disposition of her application that was *not* returned when she originally registered. Thus, "inactive-returned mail/undeliverable" electors are not "caught in the cross-hairs of the 20-day rule" as the Court implies. Once the 20 day period elapses after the application and a voter information card is not returned, the elector becomes registered and active. If, after the 20 day period, the card is returned, the elector's record is changed from active to "inactive-returned mail" pursuant to Rule 2.20.1(d).

The Secretary also disagrees that Rules 2.17.1 and 2.18 should be read together as more closely tailored. Rules 2.17.1 and 2.18.1 are inapposite. Most notably, the entirety of Rule 2.18 applies to "List Maintenance Pursuant to section 8 of the National Voter

Registration Act of 1993" as the title of this section plainly states. List maintenance pursuant to the NVRA is only for records of electors that are *already* registered. This is exemplified in the Secretary's rules. List maintenance under the NVRA (Rule 2.18) is separate and from Rule 2.17, concerning applicants that failed the 20 day statute. Thus, under the plain reading of the Secretary's rules, Rule 2.18 concerns persons that are already registered, while Rule 2.17.1 concerns persons who were never registered, to wit, applicants whose addresses could not be confirmed because their voter information card was returned within 20 days. Indeed, from the start, the Secretary has maintained that applicants that fail the 20-day statute do not fall under the province of the NVRA because the NVRA applies to registrants, not applicants.

Moreover, Rule 2.18 is plainly distinguishable from Rule 2.17 because Rule 2.18 serves to clarify the process for conducting regular cancellations of inactive records pursuant to 42 U.S.C. § 1973gg-6(d) and §1-2-605(7), C.R.S. Because these Rules apply to distinct and different categories of electors, the Secretary does not agree that the rules should be read together, or that even when read together, the compelled result that an individual who is deemed "not registered" pursuant to the 20-day statute is actually "inactive" rather than "cancelled – failed 20 day period".

Plaintiffs' Response:

Plaintiffs concur with the Court's view that there is some internal inconsistency and ambiguity in the amended Election Rules, and that Rules 2.17 and 2.18.1 could be read together to conclude that applicants whose notices of disposition have been returned should

be given the status of "inactive" registrants rather than "cancelled" applicants. Under this approach, the Secretary would initiate the procedures for removing an individual from the voting rolls established by the NVRA, 42 U.S.C. § 1973gg-6, before removing any registrant, including those affected by the 20-Day Rule, from the list of eligible voters. See Rule 2.18.3.

Crucially, this is the approach described by the NVRA, which requires that applicants be given notice of the disposition of their applications and states, in a section entitled "Undelivered notices," "If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title." 42 U.S.C. § 1973gg-4(d). The Secretary argues that the NVRA's list maintenance procedures apply only to voters who are "already registered." The Secretary's argument ignores § 1973gg-4(d), which can only be read to indicate that under the NVRA these voters are "already registered" and are entitled to all of the processes and protections that other voters receive before their registrations are cancelled.

Plaintiffs' preliminary injunction seeks an order requiring that voters affected by the 20-Day Rule be restored to active status so that they will receive mail-in ballots (as Plaintiffs believe is required by the NVRA), but placing these voters in "inactive" status would, under the existing Colorado laws and regulations, ensure that their names appear on the list of eligible voters at Colorado's polling places on Election Day.

As the Secretary's lengthy answer to the Court's question and his position in this litigation attest, however, the Secretary has not followed such a procedure and will not interpret his own regulations to give voters affected by the 20-Day Rule "inactive" status rather than "cancelled" status. Should this Court choose to interpret the Colorado regulations in the manner described in Footnote 1, the Court should clarify that the Secretary's actions would violate the NVRA and be unlawful if he were to assign "cancelled status" to those voters affected by the 20-Day Rule.

Plaintiffs also note that, contrary to Defendant's representations above, some voters in "inactive-returned mail/undeliverable" status were given that status based on the return of a notice of registration disposition. That status is assigned to any voter whose notice of registration disposition is returned as undeliverable more than 20 days after the initial registration. Accordingly, while a voter whose notice of registration disposition is returned as undeliverable 19 days after his initial registration will be placed in "Cancelled – Failed 20-day" status, a voter whose notice of registration disposition is returned as undeliverable 21 days after her initial registration (perhaps because it takes more time for mail to be sent to and from her address) will be placed in "inactive – returned mail/undeliverable" status.

Question #5:

Is it correct to assume that all voters deemed "not registered" by operation of the 20-day rule since February 29, 2010, have avoided "cancellation" and remain on the list of eligible – albeit "inactive" – voters for the purposes of the November 2, 2010 election? If this is incorrect, can the Secretary stipulate immediately, or by no later than 28 days before

the election, to move these voters to either "active" status or to "inactive – returned mail/undeliverable mail" status in accordance with Rule 2.18.1 and send these voters mail-in ballots?

Secretary's Response:

The assumption is incorrect. Changes to election rules effective in February 2010 did not negate the application of §1-2-509(3), C.R.S. Records for electors deemed "not registered" since February 29, 2010 have been placed in "Cancelled – Failed 20 Day" status in SCORE, pursuant to Rules 2.17 & 2.20.1(b). Therefore, these applicants have never been registered, or deemed eligible. As explained above, these electors do not carry an "inactive" registration status because they were never registered. Only those electors who were once in an active status, and thus in a registered and eligible status, are moved into an "inactive" status within SCORE.

The Secretary cannot stipulate to change the status designation of applications that failed the 20 day statute to "active" status or "inactive – returned mail/undeliverable mail" status because this would effectively require the Secretary to ignore the mandates of §1-2-509(3), C.R.S. The Secretary lacks authority to override the General Assembly's clearly stated intent. However, should the Court find §1-2-509(3), C.R.S. violates the NVRA, the Secretary can order the counties to designate these records as "active" or "inactive- returned mail" or "inactive- undeliverable ballot." However, inactive electors do not receive mail ballots. *See* § 1-8-108(2)(b)(III), C.R.S. Only electors with active registrations are mailed

ballots. *Id.* Thus, the Secretary also cannot stipulate to mail ballots to electors in an inactive status without violating yet another statutory provision.

SCORE has the technical capability to move the applicants to "active" status or "inactive-returned mail" or "inactive- undeliverable ballot" status. However, SCORE does not permit the clerks to pull any registrations in an inactive status to mail ballots.[5] The technical capabilities of SCORE require that only those registrations in an active status may be pulled up by SCORE to mail ballots.

Plaintiffs' Response:

Plaintiffs would stipulate that Colorado law could be interpreted to lead to such a designation so as to avoid the improper cancelation of voter registrations in violation of the NVRA. Plaintiffs submit that this Court should order the Secretary to make any and all necessary changes to SCORE and to take all action necessary to conform to federal and state law.

Question #6:

With regard to voters placed in "Failed 20-day" status after the November 2008 election and for whatever reason, remain there, can the Secretary stipulate to moving them to "active" or "inactive – returned mail/undeliverable mail" status under the conditions set forth above?

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5 The only exception to this is that the system is designed to print ballots for "inactive-failed to vote" electors.

Secretary's Response:

The Secretary cannot stipulate to move these records to either "active" status or to "inactive – returned mail/undeliverable mail" status because this would effectively require the Secretary to ignore the mandates of § 1-2-509(3), C.R.S. However, if the Court orders the Secretary to do so, the Secretary can and will comply by ordering the county clerks to take such action.[6] If the Court is so inclined, the Secretary requests that the Court enter such an order immediately in order to ensure that these electors' names will appear on the pollbooks.

Plaintiffs' Response:

Plaintiffs would not oppose such a stipulation and submit that designation of these voters as "active" or "inactive-returned mail/undeliverable mail" status would allow Colorado to avoid the improper cancelation of voter registrations in violation of the NVRA, and that state law could be read to allow for this designation. Plaintiffs have requested that these voters be designated as "active" so that those among them who have requested mail-in ballots will be sent those ballots.

Question #7:

Is there any utility to sending voters in the "Failed 20-day" status confirmation cards at this late date in accordance with amended Election Rule 2.17?

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[6] The Secretary cannot make these status changes; it can only be done by the counties.

Secretary's Response:

It does not appear that there is much utility in sending confirmation cards at this late date. The Court has scheduled this matter for oral argument on October 15, 2010. The Court should be aware that all applicants that have failed the 20 day statute since January 2009 have already been sent forwardable confirmation cards pursuant to Rule 2.17 (applicants shall be mailed a forwardable confirmation card upon the return of a voter information card within 20 days of the application).

Because the election is imminent, there will be very little time for the cards to reach the voters, and for the voters to take any action. Specifically, the confirmation cards are sent by forwardable mail; the addresses provided by the electors have already proven to be defective. It is likely that the confirmation cards will either be forwarded, or will be returned as not forwardable. This often takes several weeks. Thus, even if the cards are forwarded to the applicants, it likely would not be received until after the election. Moreover, only the clerks may send the confirmation cards. Clerks are in the midst of the busiest possible time. Presently, the county clerks are: preparing to mail ballots by the statutory deadline, updating voter registration records as requested by voters to ensure the poll books are accurate, preparing for early voting, training pollworkers, and conducting a variety of other important pre-election activities. Notably, clerks must mail ballots to electors within 72 hours of receiving the request for the ballots; thus, the clerks' obligation to mail ballots is on-going through to the days leading up to the election. *See* §1-8-113(1), C.R.S. The added burden of sending confirmation cards to all applicants that have failed the 20 day statute likely will

impair the clerks' ability to complete all other statutorily mandated election activities. Indeed, the benefit of mailing the cards is well out-weighed by the burden it would impose.

Plaintiffs' Response:

Plaintiffs contend that providing voters adequate notice that their registration status has been cancelled via forwardable mail, such as through a confirmation card, would be helpful to some voters. More than two-thirds of the roughly 6,000 voters who remain in "Canceled – Failed 20-day" status have never received forwardable confirmation cards, because their registrations were canceled before January 2009. Furthermore, receipt of a forwardable confirmation card would also be of use to the remaining voters who are more likely to be concerned about their registration status in the month before a federal election than they may have been at the time that their registration was first cancelled. Failures of the 20-day rule attributable to postal delivery error or voters moving could be alleviated by providing voters this type of notice, even if it comes after the election. Plaintiffs agree with Defendant's response suggesting that additional notice is unlikely to assist voters whose failure of the 20-day rule is attributable to typos resulting from data entry errors by election worker or if the voter made a mistake as to address information. Given the uncertainty that such notice may reach the voter before the election, this election should not be included in the waiting period consisting of two general federal elections required before list maintenance activity can occur.

Submitted this 13th day of October, by the parties:

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