DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203 **Plaintiffs:** VET VOICE FOUNDATION, LESLIE DIAZ, RANDY EICHNER, JOHN ERWIN, AMANDA IRETON, AND GREGORY WILLIAMS **v.** **Defendant:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State and **Intervenor Defendants** VERA ORTEGON and WAYNE WILLIAMS	**□COURT USE ONLY□** Case No. 2022CV33456 Ctrm./Div.: 215

MOTION FOR DETERMINATION OF A QUESTION OF LAW UNDER C.R.C.P. 56(h)

Defendant Jena Griswold, in her official capacity as Colorado Secretary of State, hereby submits this Motion for Determination of a Question of Law Under C.R.C.P. 56(h). The Secretary asks this Court to issue an order determining that signature verification of mail ballots pursuant to § 1-7.5-107.3, C.R.S (2023), is not severable from the remainder of Article 7.5.

The relief Plaintiffs seek—declaring signature verification unconstitutional and either enjoining its implementation entirely or "enjoining Colorado election officials and election judges from using [signature verification] for a purpose other than confirming that the return envelope has been signed"— would vitiate the legislative intent behind mail ballot voting under

Article 7.5, and create, by judicial fiat, the only means of unverified voting in Colorado. *See* 2d Am. Compl. 39. For that reason, the statute is not severable from the remainder of Article 7.5, and a decision rendering signature verification under § 1-7.5-107.3 unconstitutional would require the Court to invalidate the entirety of Colorado's mail ballot system. Because resolution of this purely legal issue has profound implications for the parties and this litigation, Defendants request this Court enter an order deciding the question of § 1-7.5-107.3's severability.

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

Counsel for the Secretary conferred with counsel for Plaintiffs and Intervenors regarding this Motion. Counsel for Plaintiffs oppose and counsel for Intervenors do not oppose the relief sought herein.

BACKGROUND

Colorado is a voter identification state. Before voting in person, a voter must provide one of the state-approved forms of identification, § 1-7-110(1)(a), (b), C.R.S.[1], such as a Colorado driver's license, a passport, or a current utility bill, § 1-1-104(19.5), C.R.S. Although most voters in Colorado do not vote in person, all voters are subject to the identification requirement. For those who vote by mail ballot, their identity is confirmed through signature verification. § 1-7.5-107.3(2)(a), C.R.S. If election judges are unable to confirm a voter's identity using signature verification, then the voter is required to submit a copy of their identification, just as if they had voted in person. *Id.*

[1] Except where otherwise noted, all citations to the C.R.S. refer to the 2023 Colorado Revised Statutes.

Consistent with the identification requirement for in-person voting, Colorado has verified identities through signature verification of mail ballots for decades. The General Assembly passed what is today Article 7.5, the "Mail Ballot Election Act" in 1990, upon finding that "self-government by election is more legitimate and better accepted as voter participation increases" and further that "mail ballot elections are cost-efficient and have not resulted in increased fraud." *See* § 1-7.5-102, C.R.S. (1990); *see also* S.B. 90-97, 57th Gen. Assemb., 2d Reg. Sess. (Colo. 1990). Mail ballot elections at the time could be conducted only if they did not "involve partisan candidates" and were not held "in conjunction with, or on the same day as, a primary, general, or congressional vacancy election." *See* § 1-7.5-104, C.R.S. (1990). Nevertheless, as they do in partisan elections today, election officials "examin[ed] . . . the signature, name, address and birthdate" appearing on the envelope enclosing voters' ballots and "compar[ed] the information on such envelope to the registration records to determine whether the ballot was submitted by a qualified elector who has not previously voted in the election." *See* §§ 1-7.5-103(7), 107(4), C.R.S. (1990). Ballots that did not so qualify could not be counted. § 1-7.5-107(5).

In 2003, Colorado standardized the signature verification process through S.B. 03-102, "An Act Concerning Voter Identification," which added § 1-7.5-107.3, to Article 7.5. *See* S.B. 03-102, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003). This amendment established signature verification substantially as it exists today, including two tiers of election judge review and the "cure" process by which a voter whose mail ballot signature was deemed to be non-matching can submit an alternate form of identification to satisfy the statutory requirement. § 1-7.5-107.3(2)(a), C.R.S. (2003).

Under then-current provisions of § 1-7.5-104, C.R.S., "mail ballot elections" could be conducted only in elections involving non-partisan candidates, ballot questions, or ballot issues, and only at the discretion of the governing board of a political subdivision of the state. *See* §§ 1-7.5-103(4) (2003), 1-7.5-104 (2003). Following the successes in election administration and expanded voter participation after the 2003 amendments, the legislature further amended section 104 in 2009 to provide that mail ballot elections could be conducted in primaries. *See* § 1-7.5-104, C.R.S. (2009). In 2013, the General Assembly expanded mail ballot elections to all coordinated elections. *See* H.B. 13-1303, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013). In passing the 2013 Voter Access and Modernized Elections Act, the legislature declared that "the peoples' self-government through the electoral process is more legitimate and better accepted when voter participation increases" and that "it is appropriate to expand the use of mail ballot elections as a means to increase voter participation," requiring mail ballots to be sent to all voters in all coordinated elections. *Id.*

LEGAL STANDARD

Under Rule 56(h), "a party may move for a determination of a question of law" at any time. C.R.C.P 56(h). "If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." *Id.* Rule 56(h) allows courts "to address issues of law which are not dispositive of a claim . . . but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." *Stapleton v. Public Emps. Ret. Ass'n*, 2013 COA 116, ¶ 19 (quotations omitted). Resolution under Rule 56(h) is particularly appropriate when resolving the issue "will enhance

the ability of the parties to prepare for and realistically evaluate their cases." *Id.* Rule 56(h) motions are subject to the summary judgment standard of review. *Id.* ¶ 20. Whether a statutory provision is eligible for severance is a matter of law. *See, e.g.*, *Dallman v. Ritter*, 225 P.3d 610, 621, 638 (Colo. 2010) (analyzing severability issue as a matter of law).

Because Article 7.5 does not contain a severability clause, the issue of severability is governed by Colorado's general severability statute, § 2-4-204, C.R.S. Under that section, severability is a question of legislative intent:

> If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 2-4-204; *see also People v. Nguyen*, 900 P.2d 37, 40 (Colo. 1995) ("[I]n determining the severability of the section of a statute, the court must look to legislative intent.") (quotations omitted). For a statutory section to be severable, "[t]he law in question must be 'readily susceptible' to a limiting construction." *Dallman*, 225 P.3d at 638 (Colo. 2010) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). "Where the invalid provisions in the statute are . . . inextricably intertwined with the other valid provisions, . . . the statute must be invalidated in its entirety." *Riverton Produce Co. v. State*, 871 P.2d 1213, 1226 (Colo. 1994).

ARGUMENT

I. Signature Verification Cannot be Severed from Colorado's Mail Ballot System.

Plaintiffs are wrong on the merits of their claims: signature verification is a lawful, practical means of confirming voter identity and preventing and deterring fraud. But even if this Court were to find that signature verification is unconstitutional, it could not, as Plaintiffs request, extricate signature verification from Colorado's mail ballot system as a whole. The General Assembly has never provided a manner of voting without an identification requirement and would not have expanded mail ballot voting in 2013 without one. If signature verification is unconstitutional, Colorado's mail ballot system is unconstitutional, because verifying a mail ballot voter's identity is an inseverable component of mail ballot voting.

The touchstone of severability is legislative intent. *See Dallman*, 225 P.3d at 638 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006)); *see also City of Lakewood v. Colfax Unlimited Ass'n, Inc.*, 634 P.2d 52, 70 (Colo. 1981) ("Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body."). If the constitutional provisions of a statute can operate autonomously consistent with the legislature's purpose, and if the legislature would have passed the law even knowing a portion would be rendered unconstitutional, the statute may be severable. *See Robertson v. City & Cnty. Of Denver*, 874 P.2d 325, 335 (Colo. 1994). If, instead, the "purposes of the [law] cannot be carried out without the section which is stricken . . . the [law] is not severable and the entire enactment must fail." *White v. Anderson*, 394 P.2d 333,

337–38 (Colo. 1964); *see Gallegos v. Phipps*, 779 P.2d 856, 863 n.12 (Colo. 1989) (explaining that if statute operates as a "unitary" scheme and severing one portion would frustrate the legislature's intent, it is not severable).

The intent of Colorado's Election Code is to ensure that "all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." *See* § 1-1-103(1), C.R.S. To those ends, Colorado (1) makes available to its citizens an array of convenient, accessible ways to vote, and (2) provides for a means of verifying voters' identities appropriate to each of those methods. In person, voters must show one of thirteen different forms of physical identification at the polls. *See* §§ 1-1-104(19.5)(a)(I)–(XIII), § 1-7-110(1)(b), C.R.S. Electronically, voters must provide a copy of such identification or sign an affidavit subject to signature verification. *See* § 1-5-706(2)(c), C.R.S. By mail ballot, voters must sign their return envelope to be reviewed according to the signature verification process under § 1-7.5-107.3(2)(a), C.R.S. *See* §§ 1-7.5-107(5)(c); 1-7.5-204(1)(b)(III), C.R.S.

Indeed, voter identification is the express purpose of § 1-7.5-107.3. *See* S.B. 03–102, "An Act Concerning Voter Identification"; *cf. People v. Friederich*, 185 P. 657, 658 (Colo. 1919) ("By all authority and precedent it is firmly settled that the purpose of a statute must be ascertained and determined by its title, and that the title is presumed to be the controlling and conclusive index of the legislative intent."). That fact is confirmed by the structure of the cure process: if a voter's identity cannot be confirmed using signature verification, the voter must provide alternative identification to prove their identity. § 1-7.5-107.3(2)(a). And signature

verification is the only means of checking a mail ballot voter's identity. At every stage in the passage and amendment of mail ballot voting under Article 7.5—from its inception in non-partisan elections, to its discretionary use in primaries, and to the now mandatory availability of mail ballots to all Coloradans in all coordinated elections—the legislature's expansion of mail ballot voting has been premised upon signature verification to confirm voters' identities.

This court cannot discard a core premise of Article 7.5 without undermining the law itself. *See Dallman*, 225 P.3d at 638 (explaining that, when assessing severability, the court asks whether it can "functionally preserve a [a law's] intent after excising the problematic sections"); *Williams v. City & Cnty. of Denver*, 607 P.2d 981, 983 (1979) ("[I]f the invalid portions of a statutory scheme are essential and pervasive parts of that scheme, the remaining portions inevitably fail to reflect legislative intent and therefore cannot be given independent legal effect by the judiciary."). In *City & County of Denver v. Lynch*, 18 P.2d 907, 910 (1932), the Court determined that the invalid portions of a law (those improperly delegating judicial power to county commissioners to administer a pension system) were "apparently an inducement to the passage of the valid [portions]" (i.e., establishing the pension system in the first place). For that reason, the "unconstitutional portion of [the law] carrie[d] the whole down with it." *Id.*

Just so here. The availability of mail ballot voting is predicated on signature verification as a means to verify voters' identities.[2] To sever the two would fundamentally rewrite Title 1 to

[2] Election judges are not permitted even to open a mail ballot prior to signature verification. *See* § 1-7.5-204(1)(a), (d). Without section 1-7.5-107.3, election judges would be left with no way to determine whether a voter's self-affirmation is "valid" within the meaning of section 1-7-5-204(1)(b). Short of rewriting section 204—to say nothing of other provisions of Article 7.5—

allow, for the first time in modern Colorado history, not only a means of voting unverified by any form of identification, but one accessible to any person with access to a mail ballot. This court cannot "judicially rewrite statutes in derogation of legislative intent," *Williams,* 607 P.2d at 983, nor can it reshape Article 7.5 to verify voters' identities another way. *See Dallman*, 225 P.3d at 640 ("[W]e are in no position to arbitrarily decide to whom and to what types of cases . . . [the valid provisions of an inseverable law] should apply—that is the role of the lawmaking body.").

Unlike other provisions of Title 1, Article 7.5 does not contain a severability clause. *Compare* C.R.S. § 1-7.5-101 *et. seq.* with *e.g.*, § 1-45-118, C.R.S. (providing Article 45 of Title 1, the Fair Campaign Finances Act, is severable). Where a statute lacks a specific severability clause, any power to sever derives from Colorado's general severability provision, under which a court may not sever the statute unless it "can be presumed that the legislature would have enacted the valid provisions without the void one." *High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 n.10 (Colo. 1984) (citing § 2-4-204). But Colorado's legislature has *never* created a means of voting unattached to a method of voter identification. There is no reason to presume it would have done so in passing, recodifying or amending Article 7.5 in 1990, 2003, 2009, or 2013—when it had every opportunity to address the identification requirements applicable to mail ballots—or that the legislature would require no identification whatsoever from mail ballot voters while insisting on a driver's license or comparable form of physical identification from in-

severance would render the statute unworkable. *See Dallman*, 225 P.3d (refusing to sever when doing so would not create an "autonomous and functional law").

person voters. *See Gallegos*, 779 P.2d 856, 863 n.12 (statute not severable where the legislature intended to create a "unitary" scheme to "establish the liability of landowners to any person coming on the land," and "to sever one provision, and to thereby create an entire class of persons exempt from the statute, would frustrate rather than advance the legislative intent").

If this Court deems the only means of verifying a mail ballot voter's identity to be unconstitutional, mail ballot voting cannot be conducted consistent with the General Assembly's intent. Signature verification pursuant to § 1-7.5-107.3 is not severable from the remainder of C.R.S. Title 1, Article 7.5, and a decision enjoining the former would carry the latter down with it.

II. The Court should address the issue of § 1-7.5-107.3's severability now.

Rule 56(h) allows the Court to resolve significant issues of law in advance of trial. Here, whether Plaintiffs' claims will result in the invalidation of Colorado's best-in-the-nation mail ballot system is exactly the type of issue that warrants determination before trial. The Court should address the issue of severability now for three reasons:

First, resolution of this question "will have a significant impact upon the manner in which litigation proceeds." *Stapleton*, 2013 CO 116, ¶ 19. In their Motion for Summary Judgment, Plaintiffs assume that § 107.3 is severable, and that assumption underlies many of their ensuing arguments. *See, e.g.*, Pls.' Mot. for Summ. J. at 15 (Nov. 7, 2023) (assuming that without the signature-matching procedure, the state interest in mail-ballot integrity will be served by the affirmation on the mail ballot envelopes). To the extent trial will involve identifying and articulating state interests, whether Plaintiffs' requested relief would invalidate the mail ballot

system affects the state interests involved. Moreover, if the mail-ballot system as a whole is under attack in this lawsuit, the parties will be required to produce evidence regarding the relative benefits and costs of Article 7.5 in general, as opposed to signature verification in particular.

Second, if § 107.3 is not severable, many—if not all—of the Plaintiffs lack standing. Take, for example, the organizational Plaintiff, Vet Voice. In denying the Secretary's Motion to Dismiss, the Court held that Vet Voice had standing because this action was "directly relevant to Vet Voice's purpose," as articulated in its mission statement. Order at 3 (April 17, 2023). But Vet Voice has conceded that a declaration that Article 7.5 as a whole is unconstitutional "would not be in Vet Voice's interests." Ex. A (C.R.C.P. 30(b)(6) Dep. Tr. of Vet Voice) at 32:14–15; *see also id.* at 32:16–21 (admitting that Vet Voice "would not like to see" Colorado's voting-by-mail scheme declared unconstitutional). If § 107.3 is not severable, then Vet Voice's alleged injury is not redressable by an order from this Court, and it lacks standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (To satisfy standing, a plaintiff must show "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

Finally, addressing the severability question now will enable the parties to "realistically evaluate their cases." *Stapleton*, 2013 CO 116, ¶ 19. As noted, "losing voting by mail would not be in Vet Voice's interests." Ex. A at 32:14–15. Given the considerable evidence to suggest that losing all of Article 7.5 of Title 1 would be the outcome of Vet Voice succeeding on its claims

that signature verification is unconstitutional, it—and the other parties—cannot realistically evaluate the strength of their cases without knowing whether § 107.3 is severable.

CONCLUSION

For the foregoing reasons, the Secretary asks this Court to issue an order finding that signature verification of mail ballots pursuant to § 1-7.5-107.3 is not severable from the remainder of Article 7.5.

Dated this 20th day of November 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2023, a copy of the foregoing **MOTION FOR DETERMINATION OF A QUESTION OF LAW UNDER C.R.C.P. 56(h)** was served, via Colorado Courts e-filing, on the following:

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