

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs: VET VOICE FOUNDATION, LESLIE DIAZ, RANDY EICHNER, JOHN ERWIN, AMANDA IRETON, and GREGORY WILLIAMS</p> <p>v.</p> <p>Defendant: JENA GRISWOLD, in her official capacity as Colorado Secretary of State</p> <p>and</p> <p>Intervenor-Defendants: VERA ORTEGON and WAYNE WILLIAMS.</p>	
<p><i>Attorneys for Intervenor-Defendants</i></p> <p>Christopher O. Murray, #39340 Julian R. Ellis, Jr., #47571 Max Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Telephone: (303) 223-1100 Fax: (303) 223-1111 Email: cmurray@bhfs.com jellis@bhfs.com mporteus@bhfs.com</p>	<p>Case No.: 2022CV033456</p> <p>Division: 215</p>
<p style="text-align: center;">COLORADO ELECTORS’ RESPONSE TO DEFENDANT GRISWOLD’S MOTION FOR DETERMINATION OF QUESTION OF LAW UNDER C.R.C.P. 56(h)</p>	

Intervenor-Defendants Vera Ortegon and Wayne Williams (Colorado Electors) submit this Response to Defendant Griswold’s (the Secretary) Motion for Determination of a Question of Law Under C.R.C.P. 56(h) (Motion) and state:

RESPONSE IN JOINDER TO THE SECRETARY'S MOTION

Colorado Electors do not oppose the Secretary's Motion. They respond only to emphasize an additional reason why the requirement for signature verification of mail ballots is not severable from Article 7.5 of Title 1. In Colorado, all voters must be identified before their ballot may be counted. The statutory default method of voter identification of mail-ballot voters is signature verification. Thus, any holding that signature verification is severable from the remainder of Article 7.5 would allow what the statute expressly does not: mail ballot voting without any identification requirement. This would be a radical change to Colorado elections (*cf.* Motion at 9-10), never once sanctioned by the General Assembly.

Colorado Electors write separately to stress that a holding in favor of severability will necessarily result in an unlawful identification-less free-for-all, and to explain why the Court is obligated to avoid that result. Simply, if the Court holds signature verification is unconstitutional, there is no way for *the Court* to supply its own alternative means for the identification of mail-ballot voters. At best, a severability holding would compel the Court to graft onto mail voting the only other identification method set forth in Colorado law. But that would lead down one of two paths, both of which would be unconstitutional. These results only confirm that signature verification is *not severable* from mail balloting in Colorado.

First, on initial review, it might appear that C.R.S. 1-7.5-107.3 can be severed from the rest of the mail balloting regime because all mail-ballot voters could be required to submit one of the thirteen forms of identification provided for in subsection 1-1-104(19.5) with their mail ballots. Not so. Any order of this nature would necessarily be unconstitutional on the same grounds that the Court would strike down signature verification. In other words, regardless of

what *these* plaintiffs might say, the Court should have no doubt that another group of plaintiffs will shortly use its constitutional holding to attack the identification regime set forth in subsection 1-1-104(19.5). As Plaintiffs argue, signature verification is a dramatic infringement on the franchise because it forces approximately one percent of mail-ballot voters to submit identification in the cure process when their signatures cannot be verified. (*See* Pls.’ Mot. for Summ. J. at 15-16.) While Plaintiffs are wrong on the law, if the Court were to agree that such a convenient and straightforward cure process requiring a small minority of mail-ballot voters to verify their identification does not pass constitutional muster, the Court could not possibly correct this constitutional infirmity by mandating that all mail-ballot voters provide *more stringent* forms of identification subject to *fewer* opportunities to cure.¹

Second, the Court might be tempted to supply an alternative form of voter identification for mail-ballot voters. But any form of identification beyond the thirteen provided in subsection 1-1-104(19.5) would require the court to do something it cannot do: exercise legislative discretion to write substantive law. “The General Assembly is the branch of government charged with creating public policies, and the courts may only recognize and enforce such policies.” *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 553 (Colo. 1997). “To the extent that a change in the law is desirable, the place to accomplish that is at the state legislature, across the street from our courthouse.” *In re Marriage of Zander*, 480 P.3d 676, 682 (Colo. 2021); *see also Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010) (“[W]e cannot rewrite or actively reshape a

¹ The breadth of Plaintiffs’ legal theory betrays their lawsuit as a collateral attack on the constitutionality of Colorado’s identification requirement, a direct attack already foreclosed by longstanding precedent. *See Colorado Common Cause v. Davidson*, 2004 WL 2360485 at 12-13 (Colo. Dist. Ct., Denver Cnty., Oct. 18, 2004).

law in order to preserve its constitutionality.”) The choice of any new method for mail-ballot voter identification would require prospective considerations of issues of general applicability characteristic of the legislative function. *Vagneur v. City of Aspen*, 295 P.3d 493, 506-07. Hence, no matter how worthwhile or wise, any substantive addition to Colorado’s voter identification law cannot be imposed by this Court; it must be chosen by the General Assembly after deliberation and process.

At bottom, the Secretary has it right: it is impossible to sever signature verification from mail ballot voting under Article 7.5. To do so would be to sanction identification-free voting, which clearly is against Colorado statute and prohibited by Article VII, Section 11 of the Colorado Constitution. For this reason and those provided by the Secretary, the Court should grant the Secretary’s Motion and do so in advance of trial.

Respectfully Submitted this 11th day of December, 2023.

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s/ Christopher O. Murray

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CERTIFICATE OF SERVICE

I certify on December 11, 2023, I electronically filed a true and correct copy of **COLORADO ELECTORS' RESPONSE TO DEFENDANT GRISWOLD'S MOTION FOR DETERMINATION OF QUESTION OF LAW UNDER C.R.C.P. 56(h)** with the Clerk via the Colorado Courts E-Filing system, which will send notification of such filing to:

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