DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
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▲**
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COLORADO ELECTORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Intervenor-Defendants Vera Ortegon and Wayne Williams (Intervenors) submit this Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment and state:

INTRODUCTION

Since statehood, Colorado's Constitution has mandated that the general assembly "pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Colo.

Const. art. VII, § 11. For decades, the general assembly has fulfilled this constitutional mandate by insisting on voter identification to ensure that Coloradans are voting in their own name. In mail ballot elections, where voters necessarily cannot present identification in-person, the general assembly has—again, for decades—prescribed that voters' identities be verified by comparing the signature on the mail ballot envelope with signatures previously submitted by the voter. These measures both deter and detect ballot irregularities and promote public trust and confidence in the state's elections.

Plaintiffs' Motion for Summary Judgment would have this Court hold Colorado's signature verification regime is somehow subject to strict scrutiny: a standard reserved in Colorado—and the rest of the country—for severe or discriminatory restrictions on the franchise. In so doing, Plaintiffs mock the general assembly's good-faith and eminently reasonable effort to implement Article VII, Section 11's constitutional command while also affording Coloradans extremely generous and forgiving access to the franchise. Plaintiffs' motion also scoffs at the practical and instrumental necessity of ensuring that mail ballots are actually voted by the voter in whose name they are cast. Plaintiffs motion ignores (1) the disenfranchisement that results from mail ballots being voted by the improper person, (2) that signature verification is important to confidence in Colorado's elections, and (3) that signature verification's primary purpose is not to generate prosecutions for voter fraud, but to identify the voter casting a ballot as the voter to whom the ballot was issued. Because signature verification serves the voter identification function required to guard against abuses of the elective franchise in mail ballot elections as

required by the Colorado Constitution, Plaintiffs' Motion for Summary Judgment must be denied.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

I. The Consequence of Mail Ballots Being Voted by an Improper Person Is Disenfranchisement of the Legitimate Voter; Signature Verification Protects Against Such Disenfranchisement.

In Colorado, each eligible elector (voter) is mailed a ballot in advance of an election in which he or she is eligible to vote. C.R.S. § 1-7.5-107(3)(a)(I). A voter may then complete their ballot and return it by either placing it in the mail, dropping it at a ballot drop-box, or returning it to a Voter Service and Polling Center (VSPC). C.R.S. § 1-7.5-107(4)(b)(I)(A) and (B). In each of these cases, the voter must ordinarily sign the mail ballot envelope. C.R.S. § 1-7.5-107(4)(a). A voter may also choose to vote in-person at their County Clerk's office or at a VSPC. C.R.S. § 1-7.5-107(4)(a)(I)(C). If a voter chooses to vote in-person, they must present identification before being issued an in-person ballot. C.R.S. § 1-7-110(b). In either case, the voter must successfully identify him or herself as the voter in whose name he or she intends to cast a ballot. Moreover, before being permitted to vote in-person, election judges are required to check to ensure the voter has not already cast a ballot in the election. C.R.S. § 1-7.5-107(5)(a). If the voter has already cast a ballot, the voter will not be permitted to vote, except via provisional ballot. C.R.S. § 1-8.5-101.

Similarly, a voter who does receive their mail ballot, loses their mail ballot, or spoils their mail ballot may request a replacement. C.R.S. § 1-7.5-107(3)(d). In the event a replacement

ballot is issued to a voter, the first ballot accepted for processing will be counted; any later received ballot will be rejected. C.R.S. § 1-7.5-107(6).

Hence, if someone casts a ballot in some other person's name, that person in whose name the ballot was cast loses their vote. In other words, they are disenfranchised. For example, in the 2016 general election, Steve Curtis fraudulently signed and cast his ex-wife's mail ballot in Weld County. *See People v. Curtis*, 498 P.3d 677, 680 (Colo. App. 2021); *see also* Williams Dep. 208:20-210:7. When Mr. Curtis' ex-wife noticed she had not received a mail ballot, she requested a replacement. *Id.* She was informed by the Weld County Clerk and Recorder's Office that she could not get a replacement ballot, because her ballot had already been cast. *Id*. While she was permitted to cast a provisional ballot, that ballot was not counted. Williams Dep. 209:16-210:7. As a result, Mr. Curtis' ex-wife was disenfranchised—she was unable to vote in the 2016 election. *Id.* As the Colorado Supreme Court has noted, "when assessing voters' fundamental right to vote in the moments preceding an election, there are no do-overs." *In re Hickenlooper*, 312 P.3d 153, 157 (Colo. 2013). In this instance, signature verification did not work. 498 P.3d at 681. Given that Colorado's signature verification system requires no less than three election judges to agree to reject a signature, it should come as no surprise that it sometimes fails to catch ballots that should not find their way to the tabulator. But it unquestionably catches some, as some voters each election affirmatively report to their county clerks that they did not vote a ballot they were asked to cure. *See, e.g.*, Zygielbaum Dep. 143:4-21; Koppes Dep. 90:18-94:2; Lepik Dep. 117:10-15.

Plaintiffs' Motion ignores the risk of this sort of uncorrectable disenfranchisement and instead focuses exclusively on the correctable harm occasioned when a voter's signature is

incorrectly determined to be a mismatch. *See* Motion at 4-6. But where a voter's signature is rejected, there is no automatic disenfranchisement as there is when a ballot is successfully cast in the name of another. Rather the voter is merely asked to present identification to have their mail ballot counted. C.R.S. § 1-7.5-107.3(2). Colorado law provides for myriad options to do this, including via text message, and allows for up to eight days after the close of the election to accomplish this "cure." *Id.*; Def.'s Second Suppl. Resps. at 5. Only if the voter does not so "cure" his or her ballot on time is their ballot not counted. *Id.* Because signature verification protects against disenfranchisement that cannot be remedied in the context of an ongoing election (a ballot fraudulently cast in another's name) while providing ample opportunity to prevent any disenfranchisement because of its operation (submission of ID via the cure process), Plaintiffs cannot prevail on summary judgment.

II. Mail Ballot Voting In Colorado Was Premised on Signature Verification and Signature Verification Is Important to Confidence in Colorado's Elections.

Plaintiffs blithely assert that there is "no actual evidence" that signature verification increases voter confidence, the popularity of mail ballot voting, or voter participation in Colorado. Motion at 10. Leaving aside the unavoidable fact that mail ballot voting in Colorado was adopted on the premise that signature verification would safeguard its integrity, *See* S.B. 03-102, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003) (adopting the current signature verification regime a decade before the adoption of universal mail ballot voting in 2013), Intervenor Defendants Ortegon and Williams each testified at their depositions that they believe signature verification increases voter confidence. Exh.1, Deposition of Wayne Williams (Williams Dep.) 137:24-140:7; Exh. 2, Deposition of Vera Ortegon (Ortegon Dep.) 50:8-53:18. Both Mr. Williams and Ms. Ortegon based their testimony on their personal experience in retail politics.

Indeed, both Mr. Williams and Ms. Ortegon are themselves voters. Plaintiffs have offered no evidence contradicting Mr. Williams and Ms. Ortegon's testimony based on their experience in politics. Mr. Williams' and Ms. Ortegon's unrebutted testimony is competent evidence from electors and political actors on a key point that, at a minimum, presents a factual question precluding summary judgment.

Indeed, Plaintiffs' own testimony belies their conclusory assertion that signature verification does not promote voter confidence. In this very action, they testified that ballots cast by someone other than themselves should not be counted. Exh. 3, Deposition of John Erwin (Erwin Dep.) 32:13-21; Ireton Dep. 26:18-25. Given that signature verification is the only method by which Colorado election officials can check a mail ballot voter's identity—and indeed, routinely fulfills this function—the only logical inference of these Plaintiffs' testimony is that signature verification increases Plaintiffs' own confidence in Colorado's elections by protecting against the possibility that someone else may successfully cast their ballots.

LEGAL STANDARD

Under C.R.C.P 56(c), summary judgment may only be granted when there are no material issues of disputed fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing "the nonexistence of a genuine issue of material fact." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (en banc). All evidence must be viewed in the light most favorable to the nonmoving party, and the nonmoving party is entitled to all reasonable inferences that may be drawn from the evidence in its favor. *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

ARGUMENT

I. Signature Verification Is Not Subject to Strict Scrutiny.

Despite the unambiguous benefits to Colorado voters from signature verification, Plaintiffs argue that because around one percent of mail ballots are referred back to voters for the submission of ID in the cure process, signature verification amounts to severe restriction of the franchise requiring the application of strict scrutiny. Motion at 15-16. But as explained in Section II, *infra*, Colorado courts, like their federal counterparts, recognize that the state must regulate the franchise and apply the flexible standard articulated by the Supreme Court in *Anderson v. Celebrezze* and *Burdick v. Takushi* to evaluate regulations. Only where an alleged infringement on the right to vote discriminated between citizens in the exercise of the right to vote have Colorado courts applied strict scrutiny. *See Jarmel v. Putnam*, 499 P.2d 603, 603-04 (Colo. 1972) (noting that only a compelling state interest can sustain a discriminatory restriction on the right to vote). Because there is no discrimination in the application of signature verification (it applies to every mail ballot in Colorado) and because signature verification is no burden at all, let alone a severe burden, this Court cannot review signature verification under strict scrutiny.

Indeed, a contrary conclusion would interpose the courts between the legislature and its constitutional authority to regulate elections to a degree beyond contemplation in the document's text or the decisions of the Supreme Court interpreting it. It would require the courts to put under the microscope every legislative enactment touching on voting, irrespective of the burden it might place on any voter. In other words, it would set the courts up as super-legislatures when it comes to elections, gutting the grant of authority set forth in Article VII, section 11.

II. Because Signature Verification Obviates the Need for Most Mail Ballot Voters to Produce Identification, It Satisfies Constitutional Scrutiny.

Of course, Intervenors agree the right to vote is fundamental. *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983). Indeed, that is why signature verification must be preserved. Under the flexible standard applicable to election regulations articulated by the U.S. Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court must "weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against the State's interests "as justifications for the burden imposed by its rule." 504 U.S. at 433. As recognized by the Colorado Supreme Court, this test means that "[e]ssentially, the severity of the burden on individuals' voting rights determines the constitutionality of the State's election procedure." *In re Hickenlooper*, 312 P.3d at 158 (citing *Burdick*, 504 U.S. at 433). While Plaintiffs bring their claims under the Colorado Constitution, the Colorado Supreme Court has held that the Colorado Constitution provides the same protection for the fundamental right to vote as the federal Constitution. *See MacGuire v. Houston*, 717 P.2d 948, 954-55 (Colo. 1986). Here, because signature verification functions to ease voting—by obviating the need for most mail ballot voters to present identification—and also fulfils the general assembly's duty to safeguard the franchise, it is unquestionably constitutional. At a minimum, there are material questions of fact as to how burdensome signature verification really is to Plaintiffs before the Court and as to the benefits accruing to the state from its implementation. In light of these disputes, Plaintiffs are not entitled to summary judgment.

The general assembly not only may, but *must* regulate the right to vote to guard the franchise against chaos or abuse, as well as to protect against the erosion of public trust and confidence. None of this is controversial and has been repeatedly and consistently acknowledged

by the Colorado Supreme Court, the U.S. Supreme Court, and those who drafted and ratified Article VII, Section 11 of the Colorado Constitution. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing that any state regulation of elections will invariably affect the right to vote); *Burdick*, 504 U.S. at 433 (noting that States retain the power to regulate their own elections and necessarily have an interest in those elections being "fair and honest."); *Littlejohn v. People ex rel. Desch,* 121 P. 159, 162 (1912); *Nicholls v. Barrick,* 62 P. 202, 205 (1900); *see also Colorado Common Cause v. Davidson*, 2004 WL 2360485 at *3 (Colo. Dist. Ct. October 18, 2004) (observing that the right to vote is jeopardized by insufficient protections against illegitimate voting).

There are, of course, limits to this command. The outer limit is this: regulations that outright deny the franchise to a voter or class of voters or renders its exercise so difficult and inconvenient as to amount such a denial are suspect and, absent the most compelling justification, illegal. *Littlejohn,* 121 P. at 162. But the signature verification regime at issue here does not even come close to this line. It eases the voting process for the vast majority of Coloradans by relieving them of the obligation to present identification and for those few whose ballots are rejected, this rejection is eminently and easily curable with as little as a text message.

Any person still unable to vote at the end of this generous process has not been "denied the right to vote" any more than a person turned away at the polling place for failure to adequately identify themselves or to be a registered voter in the first place. The proper way to characterize such people is not to say that they have been "disenfranchised" but that they have

been unable—and perhaps unwilling—to establish their status as qualified voters. In the end, signature verification merely tests every mail voter's claim to be a qualified voter of this state. And it cannot be seriously contended that anything other than taking a putative voter's say so on this point constitutes the outright denial of the right to vote.

The next question, then, is whether signature verification is so difficult and inconvenient such that its implementation is no different than an outright denial of the right to vote. Given the generous cure process in Colorado, it is not. At a minimum, the Court must evaluate whether signature verification with Colorado's generous cure procedures *is no different* than outright denying qualified voters access to the ballot box. Because there is a great deal of evidence in the record that would support a finding that cure in Colorado is exceedingly easy, including the testimony of a Plaintiff in this action, that it is not. Ireton Dep. 22:14-24:21.

In fact, taking the proper view of this case, the Court should conclude that signature verification places no relative burden on Plaintiffs' right to vote, as measured from the baseline established and upheld for in-person voting. Far from restricting any Coloradan's right to vote, signature verification is properly understood as an aspect of regulatory *relief* for voters. Before signature verification, casting a ballot required voters to undertake the burden of traveling to the polls *and* producing documentation to confirm their identity. *See* C.R.S. § 1-7.5- 107.3 (requiring the submission of a traditional form of voter identification in the event of a signature mismatch, but excepting mail ballot voters from traditional identification requirements where signatures match). This form of identity verification has a long history in Colorado. And a long history of being sustained by the courts are reasonable regulations of the franchise, even if framed as a "restriction" on the franchise. *See Aichele v. People ex rel. Lowry*, 90 P. 1112, 1124 (Colo. 1907)

(affirming district court's injunction barring county clerk from including fictitious names on voter rolls); *Colorado Common Cause v. Davidson*, 2004 WL 2360485 (Colo. Dist. Ct. October 18, 2004) (finding Colorado's modern voter-identification requirement constitutional under the Colorado Constitution). Mail ballot voters are *relieved* from the requirements of showing up and of producing documentation. They need only sign their ballot. On the off chance their signature does not match, unlike their predecessors, they need not muster documentation and travel to a government office to establish their identity. Rather, all they need to do is to confirm to a government official, through the mail, over email or even over the phone by text, that the ballot is theirs. C.R.S. § 1-7.5-107.3(2). They need to do *less* than what is required of any person who votes in person in this state.

Because signature verification in Colorado eases the burden of voters, only requires that the small minority of voters whose ballots cannot be verified provide the same identification they would already provide in a polling place, and because Colorado law allows these voters ample opportunities and simple options to present their identification, signature verification is unquestionably constitutional. At a minimum, summary judgment must be denied to put the parties to their proof regarding the relative burdens and benefits of signature verification.

III. In the Event the Court Applies Strict Scrutiny, Trial Will Show Signature Verification Satisfies this Standard

Even if this Court were to apply strict scrutiny to Colorado's signature verification regime (it should not), summary judgment should be denied because trial will show that signature verification is the least restrictive method for protecting dual compelling state interests that are often in tension: (1) enabling increased participation in democracy through mail ballot

elections while (2) identifying the person casting a mail ballot and thereby ensuring that only the voter to whom a ballot is issued casts that ballot at minimal burden to the voter.

Importantly, trial will demonstrate that while these dual interests could be served in other ways, any system which reduces the possibility for erroneous rejection of ballots is likely to also decrease the ease of voter participation. *See* Williams Dep. 167:2-168:3 (noting other potential methods for ensuring the identification of voters). There are necessarily disputed questions of fact as to whether those other means produce a better mixture of costs and benefits as signature verification. For example, far from eliminating impediments to the right to vote, these other potential schemes are as likely to impose greater burdens—or more predictable burdens—on more voters, perhaps more often or more consistently, than any harms these plaintiffs have established from signature verification.

In the end, Plaintiffs ask this court to jettison, without trial, the only mechanism Colorado has for verifying the identity of the millions of voters who participate in its elections each year. As noted above, under Colorado law, voter identity must be verified. Widespread failure to accomplish voter identification will inevitably lead to the disenfranchisement of persons whose ballots are cast by others in their name and at least some loss of confidence in the electoral process. Trial will show that the minimal burden of "curing" a mail ballot—that is submitting identification as otherwise required under Colorado law—eliminates any real threat of erroneous disenfranchisement provided the law is followed. And that there is real doubt as to whether any

other system known to the legislature at the time of enactment accomplishes this objective as efficiently and effectively as signature verification.

Moreover, trial will show that the system is highly effective at accomplishing its goals. The relative paucity of voter fraud convictions generated by signature verification is not indicative of the system's proves nothing. As noted by Intervenor Williams at deposition, there are a meaningful number of ballots rejected at each election for signature mismatch and never cured. Williams Dep. 37:3-38:25. When prosecutors investigate these ballots, it is often the case that the voter in whose name the ballot was cast affirmatively represents that he or she did not cast the ballot, but that the voter has no idea who did so. *Id.* These cases typically do not result in prosecution for want of suspects or investigative leads. *Id.* But the lack of a prosecution does necessarily not mean that signature verification did not accomplish its job. Indeed, in cases where the ostensible voter disclaims the ballot cast in his or her name, the system would appear to have prevented an illegal vote. This is a factual question for trial.

While Colorado law does not support the application of strict scrutiny in this Court's review of signature verification, to the extent the Court concludes otherwise, trial will show that signature verification balances at least two compelling state interests and is narrowly drawn to serve these interests.

IV. Plaintiffs' Equal Protection Claim Cannot Be Decided on Summary Judgment

Finally, Plaintiffs' argument for summary judgment on a portion of their equal protection claim fails out of the gate. As correctly stated by Plaintiffs, Article II, Section 25 of the Colorado Constitution guarantees equal treatment under the law. *Lujan v. Colo. State Bd. Of Ed.*, 649 P.2d 884, 1005, 1015 (Colo. 1982). This "ensures that all individuals be treated fairly in their exercise

of fundamental rights, and that *suspect classifications based on impermissible criteria* be eliminated." *Id.*(emphasis added). The first question in evaluating an equal protection claim under the Colorado Constitution is whether the law produces "dissimilar treatment of similarly situated individuals'" *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010). It is the Plaintiffs' burden to demonstrate in the first instance a discrimination against them of some substance. *Colorado Libertarian Party v. Secretary of State*, 817 P.2d 998, 1005 (Colo. 1991).

Here, Plaintiffs argue that because there are differences between Colorado's 64 counties in the relative number of mail ballots referred back to voters for cure as a result of signature verification, signature verification is "inherently subjective" and therefore "*cannot* be applied uniformly." Motion at 24 (emphasis in original). This argument would have this Court find there is no other possible explanation for the different rates of initial ballot rejection across Colorado's counties—many of which are calculated on the basis of very small absolute numbers—other than an unidentified, unworkable flaw in Colorado's signature verification regime.

But such a finding is impossible on the record here and indeed, Intervenors will present evidence at trial showing that many of the counties with the highest rates of rejection tend to have more transient populations. Intervenor Williams has already testified that variations between counties are, in his experience likely the result of more transient populations in some counties versus others and more sporadic voting patterns in some counties versus others:

> **Q.** And was that change that was a result of this White Paper, was that done at least in part in an effort to try to reduce the variation among the counties in their signature discrepancy rejection rates?
>
> **A.** I don't know if that -- I don't know if I'd characterize it that way. I'd say it was design. It was done primarily to try to make the process better.
> For example, some of our counties are more transient than others. And in a more transient community, you will almost always have a higher

> rejection rate because the single most determinative factor whether a ballot is accepted or not, or whether their signature is accepted, is how recent and how often that person has voted, because that determines how many exemplar signatures we have on file and how recent those matters are.
>
> So in a four year period in Colorado, we have seven elections that people can vote in, that are run through the Secretary of State's Office. You have two coordinated, three primaries, and two generals.
>
> So if you voted in every one of those seven, then we've got, hey, just in a four year period we get seven exemplar signatures, and we can see the variation that may occur within a particular individual's signatures. If on the other hand, you only vote in a presidential election or sporadically, you're going to vote less -- you're more likely to have a signature that doesn't match.
>
> And so the issue for a particular county, one of the factors is what's their percentage of first time voters, or voters who vote only sporadically as opposed to regularly. And so saying the goal was to eliminate any difference amongst counties is not accurate, but the goal was to make the process as good as it can be.

Williams Dep. 110:18-111:25. Moreover, Defendant's 30(b)(6) designee testified that while the Secretary is aware of variations between counties in signature verification rejection and cure rates, these rates shift from election to election and the Secretary believes she may be able to reduce these variances through more uniform training. Beall Dep. 26:12-29:20. This testimony does not support a finding that the signature verification system cannot be applied uniformly.

At bottom, this goes to the heart of an equal protection challenge—whether these allegedly dissimilar signature mismatch rates are in fact the result of dissimilar treatment of similarly situated individuals. *Dallman*, 225 P.3d at 634. Plaintiffs offer no evidence to support their assumption that the voters in the different counties cited in their Motion are in fact similarly situated. Intervenors have identified evidence that they may not be. To the extent the Court is at all concerned with the variations in signature rejection rates between Colorado's counties, trial is necessary to determine whether these differences are a result of a "standardless" system

incapable of administration or are just as readily explained by the differences between the counties or remediable by improved administration.

CONCLUSION

For the foregoing reasons, Intervenor Defendants respectfully request this Court deny Plaintiffs' Partial Motion for Summary Judgment.

Respectfully Submitted this 30th day of November, 2023.

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CERTIFICATE OF SERVICE

I certify on November 30, 2023, I electronically filed a true and correct copy of **COLORADO ELECTORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT** with the Clerk via the Colorado Courts E-Filing system, which will send notification of such filing to:

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