

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: January 3, 2024 2:29 PM CASE NUMBER: 2022CV33456
VET VOICE FOUNDATION, et al., Plaintiffs,  v.  JENA GRISWOLD, Defendant,  and  VERA ORTEGON, et al., Intervenors.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	Case No.: 2022CV33456  Courtroom: 215
<b>ORDER ON MOTION FOR DETERMINATION OF LAW</b>	

THIS MATTER comes before the Court on Defendant’s Motion for Determination of a Question of Law Under C.R.C.P. 56(h) (“Motion”). The Motion is opposed by Plaintiffs, supported by Intervenors, and fully briefed. Having considered the parties’ briefs, relevant case law, the submitted evidence, and the file, the Court finds and orders as follows.

## I. INTRODUCTION

Plaintiffs are a veterans’ advocacy organization and four individuals. The instant action alleges that Defendant (who is sued in her official capacity as the Colorado Secretary of State) has implemented certain statutorily-mandated signature verification procedures which have deprived the individuals of their ability to cast ballots in past elections and may do so in the future. Plaintiffs seek declaratory and injunctive relief to prevent Defendant from implementing these procedures in future elections.

Defendant moves for a determination of law under C.R.C.P. 56(h). Specifically, Defendant seeks a determination that the statutory signature verification procedures in C.R.S. §

1-7.5-107.3 are not severable from the balance of Article 7.5, which authorizes voting by mail. If the verification procedures are not severable, then, according to Defendant, the entirety of Colorado's mail-in ballot process would have to be enjoined in the event Plaintiffs are successful at trial.

Plaintiffs respond that the Motion is premature, and that they never have sought to invalidate the whole of the mail-in ballot process or, indeed, the whole of the signature verification process. This latter position is new and runs somewhat counter to the relief Plaintiffs have requested in their Second Amended Complaint. Nevertheless, Plaintiffs argue that the Court should defer a decision on this issue until the trial is concluded, since some potential remedies may not require a severability analysis at all. Alternatively, Plaintiffs maintain that the signature verification procedure is severable.

## **II. STANDARD OF REVIEW**

The court may grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Bebo Const. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999). The court may not grant summary judgment when the pleadings and affidavits show material facts in dispute. *GE Life and Annuity Assur. Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 706 (Colo. App. 2001). An order deciding a question of law is proper if there is no genuine issue of any material fact necessary for the determination of the legal question. C.R.C.P. 56(h); *In re Estate of McCreath*, 240 P.3d 413, 417 (Colo. App. 2009).

## **III. ANALYSIS**

None of the parties assert that there are disputed factual issues preventing resolution of the Motion. The Motion is purely a legal one, raising the question whether the signature verification procedures can be severed from the balance of the mail-in voting process. The parties' dispute initially hinges on whether this issue should be decided now or later. Thus, the Court turns first to the timing question.

### **A. The Motion is not Premature.**

At the outset, it is important to define the parameters of the Motion. Plaintiffs argue that Defendant "oversimplifies" the issue by seeking a determination whether the entirety of the signature verification process is severable. Resp. p. 8. Plaintiffs maintain that the "precise formulation of severance" will depend on the Court's findings and conclusions after trial. But in making this argument Plaintiffs improperly reformulate the question Defendant is asking the Court to decide. That question is based on the actual relief that Plaintiffs seek, as set forth in their Second Amended Complaint, namely:

a) [A declaration that] the Signature Matching Procedure violates Sections 5 and 25 of Article II of the Colorado Constitution;

b) [a permanent injunction] enjoining the Defendant, her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to the Signature Matching Procedure [; and]

c) [a permanent injunction] enjoining Colorado election officials and election judges from using the Signature Matching Procedure for a purpose other than confirming that the return envelope has been signed . . . .

Second Amended Complaint p. 39 (filed Feb. 6, 2023).

Defendant's Motion simply asks the Court to determine whether the signature verification procedures can be excised from Colorado's mail-in voting statutes without dooming the entirety of the mail-in voting process (C.R.S. §§ 1-7.5-101 through 1-7.5-210).<sup>1</sup> The Court agrees that severability does not (necessarily) affect whether the provision is constitutional, but it does affect the potential remedies that can be afforded. In fact, Plaintiffs concede this point. Resp. p. 11. Because the remedy question will be front and center at trial, it makes sense to resolve the severability question now. The answer will assist both sides in their analysis and presentation at trial regarding any appropriate remedies.

To repeat, on the present record Plaintiffs seek wholesale invalidation of the signature verification requirement. If it cannot be severed, then Plaintiffs are not entitled to the relief they seek as articulated in the Second Amended Complaint for two reasons. First, if the signature verification procedure is unconstitutional, then the entire vote-by-mail statute would be unconstitutional; Plaintiffs' request to enjoin enforcement of signature verification effectively would be moot. Second, it appears Plaintiffs do not seek to invalidate the entire vote-by-mail scheme in Colorado; a finding of non-severability thus would presumably result in a reevaluation of the action or a refinement of the remedies sought. *See* Mot. Ex. A. It is for these reasons that it is appropriate to examine severability now. *See e.g. I.N.S. v. Chadha*, 462 U.S. 919, 931 n. 7 (1983); *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977) (analyzing severability first because lack of severability would deprive plaintiff of the relief he was seeking).

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<sup>1</sup> The parties' briefs focus exclusively on C.R.S. § 1-7.5-107.3. However, the provisions of that statute are explicitly or implicitly incorporated into other parts, including C.R.S. §§ 1-7.5-204, 205 and 209.

## **B. The Signature Verification Procedures are not Severable.**

### *1. Standard of Review*

The Court now turns to whether the signature verification procedures in C.R.S. § 1-7.5-107.3 are severable from the rest of the article. The answer depends on the intent of the legislature.

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.

C.R.S. § 2-4-402.<sup>2</sup>

In other words, the Court must examine “whether the constitutionally valid provisions are complete in themselves and can, in turn, be given legal effect.” In conducting this inquiry the Court should balance “the obligation to construe statutes as constitutional and valid whenever possible against the duty to avoid judicially rewriting statutes in derogation of legislative intent.” *Williams v. City and County of Denver*, 607 P.2d 981, 983 (Colo. 1979). If “the invalid portions of a statutory scheme are essential and pervasive parts of that scheme, remaining portions inevitably fail to reflect legislative intent and therefore cannot be given independent legal effect by the judiciary.” *Id.* Accordingly, the Court turns to the statute itself to determine whether the allegedly invalid portions are “essential and pervasive.”

### *2. Analysis*

Article 7.5 applies to all “mail ballot elections,” defined as “elections for which eligible electors receive ballots by mail and vote by” mailing or dropping off their ballots. C.R.S. § 1-7.5-103(4). Part of what an eligible elector receives by mail is a “return envelope” which “is designed to allow election officials, *upon examining the signature*, name, and address on the outside of the envelope, to determine whether the enclosed ballot is being submitted by an eligible elector” who has not already voted in the subject election. *Id.* § 103(7) (emphasis supplied). All Colorado county clerks must conduct elections by mail. C.R.S. § 1-7.5-104. First-time electors may vote by mail but must supply identification along with a signature to be stored in the statewide voter information system. C.R.S. § 1-7.5-104.5(2)(b)(I.5). Voters are instructed to “sign the affirmation on the [return] envelope.” *Id.* § 104.5(4)(a). The Secretary of

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<sup>2</sup> The statute at issue does not contain its own severability clause, hence the general severability statute applies. *Montezuma Well Serv., Inc. v. Industrial Claim Appeal Office*, 928 P.2d 796 (Colo. App. 1996).

State may prescribe other duties to the county clerks, but all mailed ballots must include “a return envelope”

Once the ballots are received by the county clerk, the signature verification procedures of C.R.S. § 1-7.5-107.3 are implemented. A ballot is counted when (and only if) the signature is verified. C.R.S. §§ 1-7.5-107(6), 107.3(5)(b); 1-7.5-204(1)(a). The ballot may not even be opened unless and until the signature is verified by an election judge or judges. C.R.S. §§ 1-7.5-204(1)(a), 205(1). Rejected ballots (including those with unverified signatures) must be returned to the “designated election official.” C.R.S. § 1-7.5-209.

In crafting this state’s mail-in ballot procedures, the legislature quite clearly has placed signature verification as the front-and-center method for validating the legitimacy of each ballot. This can be seen starting with the requirements of the return envelope, ballot verification and ballot counting, all of which emphasize the signature verification requirement. The ballot cannot even be removed from the envelope until and unless the signature on the envelope is verified. The signature verification process embodied in C.R.S. § 1-7.5-107.3 thus is pervasive throughout Article 7.5. It further appears to this Court that the signature verification process is, in the eyes of the legislature, essential to the process of mail-in voting. It is the only way that the vast majority of the ballots are authenticated under the statutory scheme.

The gradual embrace of mail-in voting by Colorado’s legislature has always required some form of signature verification. *See generally* Reply at pp. 11-13 (filed Dec. 22, 2023). The current statutes, which now fully embrace mail-in elections, heavily emphasize this requirement. Indeed, given the statutory provisions and the history of mail-in voting in Colorado, it is hard to believe that the legislature would embrace mail-in voting without some form of verification. Separating signature verification from the statute removes the sole mode of ballot verification provided by the legislature. This leaves the Court with two options: 1) rewrite the statute to include another form of verification; or 2) eliminate entirely any form of ballot verification. Both alternatives seem hostile in the extreme to the legislature’s obvious intent – allow voting by mail, but verify each ballot by voter signature.<sup>3</sup>

The Court thus concludes that the signature verification requirements set forth in Article 7.5 are essential and pervasive. As such, they are inseparable from the Article as a whole.

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<sup>3</sup> Alternatively, a voter may provide thirteen other forms of identification to verify a ballot. C.R.S. § 1-1-104(19.5).

#### IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Determination of Law under C.R.C.P. 56(h) is GRANTED.

ENTERED this 3d day of January, 2024.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Eric Elliff". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

J. Eric Elliff  
District Court Judge