DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 PASTOR MICHAEL DANIELSON, COLORADO CRIMINAL JUSTICE REFORM COALITION, AND COLORADO CURE, Plaintiffs, v. GIGI DENNIS, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO, Defendant.	Case No. 06 CV 954 COURTROOM 9
ORDER	

THIS MATTER is before me on multiple motions filed by the Defendant Secretary of State (hereinafter "Secretary") and the Plaintiffs, Pastor Michael Danielson, Colorado Criminal Justice Reform Coalition and Colorado Cure (hereinafter "Plaintiffs"). Defendant Secretary's Motion to Dismiss for failure to state a claim under COLO. R. CIV. P. ("CRCP") 12(b)(5) was filed on February 27, 2006 and Plaintiffs' Combined Motion for Determination of a Question of Law pursuant to CRCP 56(h) and Response to Motion to Dismiss was filed March 22, 2006. I have considered the motions and the arguments of counsel as set forth in the hearing held May 5, 2006. I have also considered all pertinent pleadings, the court file and all relevant authorities, and being sufficiently advised, conclude as follows.

The Plaintiffs' contend that COLO. REV. STAT. §1-2-103(4) (2005) violates the Colorado Constitution's guarantee of the right to vote following release from imprisonment and that the provisions of section 1-2-103(4), which bar parolees from voting or registering to vote, are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Defendant seeks to dismiss the Complaint and all claims therein on the following grounds: 1) The organizational Plaintiffs lack jurisdiction pursuant to § 1-1-113(1) of the Colorado Revised Statutes; 2) § 1-2-103(4) is consistent with and does not violate the Equal Protection Clause; and 3) § 1-2-104(4) is consistent with and constitutional under the COLO. CONST. art. VII, §10.

STANDARD OF REVIEW

The well-established standard of review is a deferential one. In addressing a Motion to Dismiss under CRCP 12(b)(5), the court must view the allegations in the complaint in the light most favorable to plaintiffs, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992), and accept all averments of material fact contained in the complaint as true. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, (Colo. 1995) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992). The court cannot grant a motion to dismiss for failure to state a claim unless "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim(s) which would entitle [them] to relief." *Dunlap*, 829 P.2d at 1291.

Summary Judgment is proper under CRCP 56(c) if there is no genuine issue of material fact necessary for the determination of a question of law. The rule is properly to be exercised only where the facts are clear and undisputed and the sole duty remaining for the court is the determination of the correct legal principles applicable to those facts. *Rogerson v. Rudd,* 140 Colo. 548, 551, 345 P.2d 1083 (1959). The moving party has the burden of presenting sufficient evidence to establish that there is no genuine issue of material fact in order to succeed in their motion. *Mehaffy, Ricer, Windholz & Wilson v. Cent. Bank of Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995). Once the moving party has met its burden by demonstrating there is no issue of material fact, the burden shifts to the non-moving party to establish the existence of a triable issue of material fact. *Greenwood Trust v. Conley*, 938 P.2d 1141 (Colo. 1997).

FINDINGS AND ORDER

The following facts, as relevant here, are undisputed:

1) The Plaintiff, Pastor Danielson ("Danielson") was sentenced to a term of imprisonment and is currently serving a period of parole. (Comp. ¶ 5.)

2) Plaintiff Colorado Criminal Justice Reform Coalition ("CCJRC") is a not-for-profit Colorado corporation. (Comp. ¶ 7.)

3) CCJRC membership includes Colorado citizens who are currently on parole, who would otherwise be eligible to vote. (Comp. ¶ 7.)

4) Plaintiff Colorado-CURE ("CURE") is a not-for-profit Colorado organization of families, prisoners, former prisoners and other citizens concerned with reform of the criminal justice system. (Comp. ¶ 8.)

5) Danielson now brings this action on behalf of himself, CCJRC and CURE and against the Secretary of the State of Colorado based on the alleged unconstitutionality of § 1-2-103(4). (Comp. ¶ 10.)

6) The Secretary of the State is the official responsible for administering, interpreting and implementing Colorado election laws. Section 1-1-107(1)(c), C.R.S. (2005). (Comp. ¶ 9.)

As the Plaintiffs bear the burden of establishing the unconstitutionality of section 1-2-103(4) beyond a reasonable doubt, *Cacioppo v. Eagle County School District RE-50J,* 92 P.3d 453, 462 (Colo. 2004), I will next address the issues raised by the parties in the following order.

I. Standing

The Defendant first argues that organization Plaintiffs, CCJRC and CURE, have no jurisdictional standing pursuant to § 1-1-113 based on the assertion that organizations are not specifically listed in that section. According to controlling Colorado statutory law, a plaintiff has proper standing to sue "if he or she has suffered an injury in-fact to a legally protected interest." *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004). A representative entity has standing to sue on behalf of its members when its members would have standing to sue in their own right, the interests it seeks to protect are relevant to the organizational purpose, and neither its claims nor its requested relief requires the individual members' participation in the lawsuit. *Colorado Mfr'd Housing Ass'n v. Pueblo County,* 857 P.2d 507, 514 (Colo. App. 1993).

Here, it is clear that members from CURE and CCJRC are citizens of the state of Colorado, several of whom are eligible to vote, but for the provisions excluding them in section 1-2-103(4). Further, those members of such organizations presently on parole would also have standing "in their own right" to raise the issues identified herein, as required by statute. In addition, each organization's underlying purpose is to reform the criminal justice system. Challenging a parolee's right to vote under the Colorado Constitution is directly in line with each organizations purpose. Finally, the claim and requested relief pursued by Danielson does not require participation from the individual members of the organization.

For the reasons set forth in his affidavit, I find that Plaintiff Danielson has standing to bring his individual claims herein. For the reasons set forth above, I find that the Plaintiffs CCJRC and CURE also have proper standing in this matter pursuant to section 1-1-113(1).

II. Constitutional Interpretation of C.R.S. §1-2-103(4)

Plaintiffs' contend that § 1-2-103(4) is unconstitutional and inconsistent with COLO. CONST. art. VII, §10. When a party asserts that a statute is unconstitutional, they must prove their assertion beyond a reasonable doubt. *Cacioppo* 92 P.3d at 462. A statute will be deemed "facially unconstitutional only if no conceivable set of circumstances exist under which it may be applied in a constitutionally permissible manner." *People v. Vasquez,* 84 P.3d 1019, 1021 (Colo. 2004).

To determine whether § 1-2-103(4) is consistent with COLO. CONST. art. VII, §10, it is necessary to discern the meaning of "full term of imprisonment." Colorado courts have long held that in the interpretation of a statutory term, the goal is to effectuate the intent of the General Assembly. *People v. Rockwell,* 125 P.3d 410, 417 (Colo. 2005). When the plain language of the statute does not make it clear, as here, the court must look to additional factors such as the legislative history, prior law, as well as the overall intent of the legislature. *Id.* Further, courts should afford the language of statutes their ordinary and common meaning and construe statutory provisions as a whole . . . whenever possible. *Vigil v. Franklin,* 103 P.3d 322, 327 (Colo. 2004). Applying these principles, this court is persuaded that, while the Colorado Constitution is not a "statute," the rules of statutory construction still apply. *Board of County Com'rs v. Vail Associates, Inc.,* 19 P.3d 1263, (Colo. 2001).

The Colorado Constitution states that a prisoner does not have the constitutional right to vote until the completion of their "full term of imprisonment." COLO. CONST. art. VII, §10 provides in pertinent part:

> No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or *by virtue of having served his full term of imprisonment*, shall without further action, be invested with all the rights of citizenship, except as otherwise provided in this constitution. (emphasis added.)

In comparison, § 1-2-103(4) states:

> No person while serving a sentence of detention or confinement in a correctional facility, jail or other location for a felony conviction or while serving a sentence of parole shall be eligible to register to vote or to vote in any election…

While the concept of parole did not exist in Colorado when the Colorado Constitution was ratified in 1876, the Defendant's interpretation of "full term of imprisonment" to include a term of parole is clearly supported by legislative intent, history, and case law. Further, while the Colorado parole statute has been amended several times, there is a unaniminity over the years that "full term of imprisonment" includes parole and not just the "time behind bars" as Plaintiff contends.

The Supreme Court of the United States held long ago that parole is included in the term of imprisonment. In *Anderson v. Corall,* 263 U.S., 193, 196, 44 S. Ct 43, 44, 68 L. Ed. 247 (1923), the Court held that when a felon is on parole, they continue to be in legal custody and under control of the warden, concluding that the period of parole was "in legal effect, imprisonment."

Colorado Courts have likewise held that a term of imprisonment also includes a period of parole. in *People ex rel. Colorado Bar Ass'n v. Monroe,* 26 Colo. 2323, 57 P.696 (1899). In *Monroe,* the first Colorado case to interpret COLO. CONST. art. VII, §10, the People filed an action seeking disbarment of an attorney who was convicted of a crime and

who was on parole. The attorney argued that he could not be disbarred because under COLO. CONST. art. VII, §10, he was invested with all the rights of citizenship once he was placed on parole. In rejecting the respondent's position that the right to practice law is a right of citizenship, the Colorado Supreme Court also found that 1) while the defendant was on parole, he was still serving out his "full term of imprisonment," and 2) because he was still serving out his "full term of imprisonment" while on parole, he was not restored to the rights of citizenship as articulated in COLO. CONST. art. VII, §10. *Id.*

Plaintiffs argue that *Monroe* is distinguished by *Sterling v. Archambault,* 138 Colo. 222, 332 P.2d 994 (1958), asserting that the *Sterling* court "unanimously" held that "full term of imprisonment," means the time actually behind bars. (Plntf's Resp. pg. 10-13). The question before the Court in *Sterling* was whether a defendant serving a probation sentence had completed his "full term of imprisonment" for purposes of having his rights of citizenship restored, specifically the eligibility to run for public office. *Id.* at 995. Plaintiffs misconstrue the holding in *Sterling* by their reliance on language from the "special concurrence" of Justice Sutton, specifically Sutton's statement that "for one to be ineligible [to run for office] he must be in prison." *Id.* at 996. For purposes of this court's analysis it is important to note that Justice Sutton's discussion and interpretation of COLO. CONST. art. VII, §10 were neither contained in nor adopted by the majority opinion in *Sterling.* Accordingly, I am not persuaded by Justice Sutton's special concurrence nor are his thoughts on probation and parole binding precedent upon this court in this case.

Plaintiffs also contend that *Moore v. MacFarlane,* 642 P.2d 496 (Colo. 1982), supports their argument that the provisions of COLO. CONST. art. VII, §10 are limited to the disenfranchisement of persons while confined in a public prison. I do not agree. In *Moore,* the court was asked to determine the scope of the application of the prohibitions in COLO. CONST. art. VII, §10, specifically as applied to pretrial detainees who had not been convicted of a crime or otherwise found to be in violation of the terms of a probation sentence they were serving as the result of prior conviction. *Id.* at 497. In considering a scenario entirely unlike the circumstances here, the court found that the prohibitions in COLO. CONST. art. VII, §10 did not apply to pretrial detainees. Nothing in the court's analysis or holding was directed to an assessment of the applicability of the prohibitions in COLO. CONST. art. VII, §10 to felons on parole. Therefore, I find the *Moore* case is distinguishable from the case at bar and, therefore, not binding on my determinations here.

While Plaintiff contends that Defendant Secretary relies on the *obiter dictum* of *Monroe*, I find otherwise. Nothing in the *Monroe* holding would lead me to reasonably conclude that the court's interpretation of the term "full term of imprisonment" was anything other than the application of that interpretation to the specific facts then before it. It is undisputed that the court's ruling resolved all issues presented in the case, irrespective of the manner in which that ruling was articulated in its written opinion. The *Monroe* court was the first to interpret and apply COLO. CONST. art. VII, §10 and it remains guiding precedent in resolving the question of whether our constitutional framers intended that "parole," as it is now defined, be included in the "full term of imprisonment." In holding that a person released on parole from confinement, imposed as a felony, is not thereby restored to citizenship, under COLO. CONST. art. VII, §10, the *Monroe* Court demonstrated

that the term "full term of imprisonment" contemplates that a person serving parole, while no longer physically confined, has not completed their full sentence. Accordingly, a person who is serving parole has not served his "full term of imprisonment" and cannot be restored to the rights of citizenship.

As noted above, Colorado Courts have previously considered the nature of parole as an element of a criminal sentence and have determined that a term of imprisonment also includes a period of parole. I find further support for this interpretation, that parole is necessarily included in a felon's sentence, in those several cases. For example, the Colorado Supreme Court held in *People v. Norton*, "a felony offender's penalty or sentence consists of both an incarceration component and a mandatory parole component." 63 P.3d 339, 347 (2003). The *Norton* court went on to say that although a period of parole is not served "within the confines of an institution, parole is nevertheless a clear infringement on an offender's liberty and thus logically part of his or her sentence." *Id.* at 344.

Additionally, in *People v. Lucero,* 772 P.2d 58, 60 (Colo. 1989), the Colorado Supreme Court held that a parolee is one who has been *conditionally* released from actual custody but is, "in the contemplation of the law, still in 'legal custody' and constructively a prisoner of the state." *See also Schooley v. Wilson,* 150 Colo. 483, 485, 374 P.2d 353, 354 (Colo. 1962). In addition, the *Wilson* court held that a parolee is considered to be "under a restraint imposed by law; he is not a free man." *Id.* The consequences of a parole violation also support such a finding. When a parolee violates the terms of mandatory parole, he is subject to an "additional period of confinement." *Rockwell,* 125 P.3d at 415.

Finally, a common sense reading of the plain language of COLO. CONST. art. VII, §10 contemplates a restoration to full citizenship for those whose liberty was once constrained by imprisonment and confinement, yet it is clear that felon's serving parole enjoy no such liberty. In this regard, I find persuasive those cases indicating that a felon on parole is subject to restrictive conditions on their liberty that would be unconstitutional if applied to "free" citizens. *See People v. McCullough,* 629 P.2d 774, (Colo. 2000) (no ordinary right to due process for felon on parole, parole officer was entitled to search without reasonable suspicion, probable cause or a search warrant); *Morrissey v. Brewer,* 408 U.S. 471, 478, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (outlining activities which parolees must not engage in before seeking permission, such as changing employment or living quarters, marrying, and traveling).

The Court in *McGrath v. United States* expressly recognized that COLO. CONST. art. VII, §10 applies to the entire *sentence* in holding that the rights of citizenship, "such as the right to vote, sit on a jury, and hold office" would not be reinstated until the convicted felon serves their entire sentence. 20 F.3d 1066, 1068 (10th Cir. 1994).

Based on the above principles, I find that § 1-2-103(4) is consistent with COLO. CONST. art. VII, §10 in providing that *a person on parole is serving a term of imprisonment and cannot vote*. The term "full term of imprisonment" is an expansive one which encompasses an entire *sentence,* including not only time behind bars, but also time on parole. In *Monroe,* our Supreme Court held that a period of parole is included in the term

"full term of imprisonment." The 10th Circuit Court of Appeals further interpreted art. COLO. CONST. art. VII, §10 in *McGrath* and found that a felon's rights are reinstated upon their completion of a *sentence*. Applying the plain and ordinary meaning to the terms "full term of imprisonment" and "sentence", it is evident that these words and phrases are for all practical purposes synonymous and have historically been used interchangeably in defining the circumstances under which a felon's rights of citizenship may be restored.

Additionally, subsequent case law from both the United States and Colorado Supreme Courts define a period of parole as a part of a "sentence," and within the confines and legal custody of the state. Accordingly, as these cases show, the rights of citizenship are *not* restored upon a period of parole, but only after, when the entire sentence is completed. The logical conclusion that follows is that a period of parole is in fact deemed a continuance of "imprisonment" and a part of the sentence. I find ample support indicating that rights of citizenship, such as the right to vote, are not reinstated until parole is successfully completed.

III. Equal Protection Violation

Plaintiffs' next claim that § 1-2-103(4) violates the Equal Protection Clause because it discriminates between two classes of qualified voters, parolees and non-parolees. Specifically, Plaintiffs contend that COLO. CONST. art. VII, §10 establishes that every person, who was a qualified elector before imprisonment and who has served out "his full term of imprisonment" shall be reinvested with all rights of citizenship, including the right to register to vote and to vote in any election. In sum, plaintiffs argue that, applying the plain meaning to the phrase "full term of imprisonment" necessarily excludes parole because that term is not included anywhere in COLO. CONST. art. VII, §10 and therefore any person who has completed a term of imprisonment, paroled or not paroled, is entitled to reinstatement of the right to vote and is thus a fully qualified voter. Since § 1-2-103(4) provides that "no person . . . while serving a sentence of parole shall be eligible to register to vote or to vote in any election," thereby preventing otherwise fully qualified voters from exercising their constitutionally protected right to vote, it is arguably violative of the Equal Protection Clause of the Fourteenth Amendment and cannot stand.

Defendant Secretary disputes that §1-2-103(4) is inconsistent with the Colorado Constitution and asserts that, while the right to vote is generally considered fundamental, statutes that deny felons the right to vote are not subject to strict judicial scrutiny. There is clear support for their position in the law. In *Richardson v. Ramirez,* 418 U.S. 24, 94 S. Ct., 41 L. Ed. 2d 551 (1974), the United States Supreme Court held that states do not violate the equal protection clause by denying the right to vote to all convicted felons, including those who are on parole and those who have completed their entire sentence. Moreover, while the right to vote is a fundamental right, courts have long held that any statute which distinguishes between felons and non-felons must only pass rational basis review. *Id* at 54-56. Here, this standard is clearly met. Felon disfranchisement statutes are "reasonably related to social contract principles, penal considerations and [the] state's interest in ensuring that elections are free from fraud and corruption." *Baker v. Cuomo,* 58 F.3d 814, 821(2d Cir. 2002).

The Colorado Supreme Court has also held that a parolee's legal status is the same as that of a felon actually incarcerated for purposes of denying them equal protection under the law. *See Lucero,* 772 P.2d at 60. Thus, the state has the power to withhold the right to vote from felons on parole without violating the Equal Protection Clause.

Therefore, the Plaintiffs' argument that an equal protection violation exists in the present case must fail. The choice of allowing a felon to vote is a decision properly left to the states, not the federal government.

IV. Conclusion

In conclusion, as the above findings clearly demonstrate, an offender has not served his "full term of imprisonment" until he has completed all components of his sentence, including parole. Accordingly, I find §1-2-103(4) consistent with COLO. CONST. art. VII, §10 and not in violation of the Equal Protection Clause. The Plaintiffs' have not met their burden of establishing that § 1-2-103(4) is unconstitutional beyond a reasonable doubt and therefore their challenge fails as a matter of law. Plaintiffs' Complaint fails to state a claim upon which relief may be granted and thus the Secretary's Motion to Dismiss, with prejudice, is now GRANTED. Accordingly, Plaintiffs' Motion for Determination of a Question of Law is DENIED as, I find that, applying a summary judgment standard to the facts herein would not alter my determination because there are no genuine issues of material fact and the questions of law are now resolved. By agreement of the parties in open court, the Secretary's Cross Motion for Summary Judgment was withdrawn and so is not addressed here.

DATED THIS 26th DAY OF MAY, 2006.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge