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| DISTRICT COURT, WELD COUNTY, COLORADO 901 9 TH Ave. PO Box 2038 Greeley, CO 80631 | DATE FILED: October 25, 2021 5:34 PM FILING ID: B65D5BF648A18 CASE NUMBER: 2021CV30649 |
| COMMITTEE SEEKING THE RECALL OF FIRESTONE TRUSTEES, Plaintiff, v. JESSICA KOENIG , in her official capacity as the Town Clerk of the Town of Firestone, Colorado, Defendant. | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <i>Attorney for Plaintiff:</i> Scott E. Gessler, (28944), sessler@gesslerblue.com Gessler Blue LLC 7350 E. Progress Place, Suite 100 Greenwood Village, CO 80111 Phone: (720) 839-6637 | Case No: |
| COMPLAINT UNDER C.R.S. § 31-4-502(1)(a)(I) | |

INTRODUCTION

1. Defendant Jessica Koenig, the Clerk for the Town of Firestone, employed a standard never used before to reject petitions seeking the recall of the Firestone Board of Trustees. Specifically, she found that non-sequential petition signatures on recall petitions were evidence proving that petition sections had been dis-attached from their accompanying affidavits. This standard violates Colorado and Federal law, and this Court should order Koenig to accept the petitions in question and order the recall election to go forward.

PARTIES

2. The Plaintiff is a committee formed to seek the recall of the Firestone Board of Trustees under C.R.S. § 31-4-502(1)(a)(I) (the “Recall Committee”). By law, the Recall Committee represents the signers of the recall petition in all matters affecting the recall petitions. C.R.S. § 31-4-502(1)(a)(I). The Recall Committee submitted petitions seeking the recall of all seven Trustees of the Town of Firestone.

3. Defendant Koenig serves as the Clerk for the Town of Firestone. In that capacity she improperly rejected seventeen petition sections and improperly held that the Committee failed to collect enough signatures to trigger a recall of six of the seven Trustees.

JURISDICTION AND VENUE

4. Jurisdiction is proper under C.R.S. § 31-4-503(3)(d), which states “[t]he finding as to the sufficiency of any petition may be reviewed by the district court for the county in which such municipality or portion thereof is located upon application of . . . a majority of the committee, but such review shall be had and determined forthwith.”

5. Venue is proper under C.R.S. § 31-4-503(3)(d) and C.R.C.P. 98(b)(2).

GENERAL ALLEGATIONS

6. The Town of Firestone is governed by a seven-member Board of Trustees.

7. In mid-2021, several citizens in the Town of Firestone sought to recall all seven Trustees. To that end, three citizens formed the Recall Committee to launch the recall effort.

8. The Recall Committee formatted petitions to collect signatures and trigger a recall under C.R.S. §§ 31-4-501 through 31-4-507

9. The Recall Committee submitted formatted petitions to Koenig for approval. After several attempts, on June 24, 2021, Koenig finally approved the format of the recall petitions.

10. On August 23, 2021, two voters in Firestone submitted to Koenig the Recall Committee’s signed petitions seeking recall of the seven Trustees.

11. On August 30, 2021, Koenig issued a Certificate of Insufficiency. In it, she rejected every single petition section and every signature, because the petition sections were held together by paperclips, not staples.

12. This finding was wholly contrary to law. As a result, on September 1, 2021, Linda Haney (a member of the Recall Committee), Lou Ann Matthews, and Drew Peterson all filed protests.

13. Koenig rejected all protests because they were not notarized.

14. On September 3, 2021, Haney, Matthews, and Peterson submitted notarized protests. Koenig accepted the protests and scheduled a hearing to consider them. Prior to

the hearing, Koenig provided notice of the hearing to all protestors, members of the Recall Committee, and the Trustees subject to a potential recall.

15. The protest hearing took place on September 20, 2021. Koenig presided over the protest hearing as the hearing officer.

16. A true and authentic transcript of the hearing is attached at **Exhibit 1**.

17. Relevant to this *Complaint*, at the hearing Koenig questioned one of the circulators – Mr. Drew Peterson – about possible disassembly of the petitions. In response to this questioning, Peterson stated under oath that he kept all petition sections bound together while circulating them, and that he personally witnessed every person’s signature on the petition sections. Specifically, Peterson testified that:

- a. While circulating the petitions, he kept the packets of petition sections together (Administrative Hearing Transcript 58:19-20, September 20, 2021), and that the petitions were all paperclipped together and bound by a clipboard. (Hr’g Tr., 60:7-9),
- b. He witnessed every single signature on his petitions (Hr’g Tr. 64:8-9), and
- c. From the time he signed the affidavit attached to the petition sections until the time he submitted his petition sections to the Recall Committee for submission to Koenig, he kept the petition sections paperclipped together. (Hr’g Tr. 59:20-23).

18. On September 27, 2021, Koenig issued her Findings and Decision, attached as **Exhibit 2**.

19. In her ruling, the Clerk accepted all petition sections, except for the seventeen petition sections circulated by Mr. Drew Peterson.

20. Koenig reasoned that the petitions showed evidence of disassembly, because:

- a. Sections bound together with paperclips “call[ed] into question all petitions circulated due to the nature of the assembly. (Findings and Decision, p. 8),
- b. Peterson’s petition sections contained “signature dates that were not sequential despite the petition signature lines serially numbered from one (1) to fifty-four (54)” (Findings and Decision, p. 8),

- c. There was “no reasonable reason” that seventeen signatures appeared out of sequence in the seventeen petition sections Peterson circulated (Findings and Decision, pp. 8-9), and
- d. Peterson could not explain why other petition sections did not contain many signatures out of sequence (Findings and Decision, p. 9).

21. Because Koenig rejected Peterson’s petition sections, six out of the seven petitions failed due to a lack of valid signatures.

22. If Peterson’s petitions sections are accepted and the signatures in the petition sections counted, all of the Trustees except for Mayor Sindelair will be subject to a recall election.

**FIRST CLAIM FOR RELIEF
(Violation of Right to Recall,
Colo. Const. art. XXI, §§ 1 and 4)**

23. Plaintiffs incorporate all previous allegations.

24. Election laws and regulations governing the recall process must be liberally construed to ensure that the citizens can exercise their right to recall without undue hinderance or overly technical rules that ensnare good-faith efforts.

25. The purpose behind recall petitions is to determine whether adequate public support exists to hold a recall election.

26. The collection and submission of signatures to trigger a recall election serves the exact same purpose as the collection and submission of signatures to trigger a vote on a ballot initiative, or to place a candidate’s name on the ballot. They all are used to measure public support for placing the recall, initiative, or candidate on the ballot.

27. The requirements for municipal recall petitions are set forth in C.R.S. 31-4-502 and 503(1) and (2).

28. Under C.R.S. § 31-4-503, “[a]ny disassembly of the petition which has the effect of separating the affidavits from the signatures shall render the petition invalid and of no force and effect.

29. The use of paperclips and a clipboard to fasten petition sections and affidavits together does not, in and of itself, provide evidence of disassembly “which has the effect of separating the affidavits from the signatures.”

30. Furthermore, signature dates that are out of sequence cannot provide evidence of disassembly “which has the effect of separating the affidavits from the signatures.”

31. Finally, Peterson testified under oath – without contradiction or dispute – that he kept all petition sections together while circulating them, that he personally witnessed every signature, and that he kept petition sections together with his completed affidavit.

32. The the petitions submitted by Peterson fully complied with Colorado law, and Koenig improperly rejected them.

33. In reviewing regulations that govern the petition process, Colorado courts have also adopted the substantial compliance test in order to ensure that fundamental constitutional rights “may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.” *See, e.g., Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (quotations and citations omitted).

34. The Supreme Court has formally adopted the substantial compliance test for both voting rights and the initiative and referendum process.

35. The recall process is a fundamental right guaranteed by the Colorado Constitution, equally as important as initiative and voting rights.

36. Review of petitions for the recall process is also governed by the substantial compliance standard.

37. The substantial compliance standard has three considerations:

- a. the extent of noncompliance;
- b. the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance; and,
- c. whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate. *See, e.g., Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996).

38. Before rejecting the petition sections that Peterson circulated, Koenig was required to also apply Colorado’s substantial compliance test.

39. Here, Koenig failed to apply the substantial compliance standard, and she failed to accept or review evidence regarding Peterson’s petition sections necessary to make a determination under the substantial compliance standard.

40. The petitions circulated by Peterson met both strict compliance with Colorado statute, as well as substantial compliance.

41. Defendant Koenig improperly rejected Peterson's petition sections, and she alternatively failed to apply the appropriate substantial compliance standard under the Colorado Constitution.

42. Defendant Koenig unconstitutionally hindered and violated the Recall Committees right to initiate a recall election.

SECOND CLAIM FOR RELIEF
(Violation of Right of Association and Free Speech,
Violation of Due Process, 42 U.S.C. § 1983)

43. Plaintiffs incorporate all previous allegations.

44. When determining whether state regulations violate the rights protected by the First and Fourteenth Amendments, a court must "first consider the character and magnitude of the asserted injury to the rights protected." *Anderson v. Celebrezze*, 460 U.S. 780, 789, (1983).

45. A court must then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.*

46. This framework applies to petitions for ballot access. *Id.*

47. This constitutional framework also applies to regulations governing recall elections. *See In re Hickenlooper*, 312 P.3d 153, 159 (Colo. 2013).

48. The right to sign and submit petitions to support a recall election is a fundamental right. *Groditsky v. Pinckney*, 661 P.2d 279, 281 (Colo. 1983).

49. By failing to follow Colorado law and applying a requirement on the recall petition process that petition signatures must be sequential, Koenig improperly rejected voters' signatures collected by Peterson, effectively silencing the voice of those voters, the Recall Committee members, and Peterson.

50. Koenig's sequential-signature requirement did not further any state interest in determining that an adequate number of citizens supported the recall efforts.

51. Koenig's sequential-signature requirement did not help ensure the integrity of the petition collection process.

2. Clerk Koenig has unconstitutionally violated Plaintiffs' rights under the First and Fourteenth Amendment. This violation extends to all Firestone citizens who signed petitions and collected petition signatures.

PRAYER FOR RELIEF

FOR THESE REASONS, Plaintiff request this Court:

1. Conduct a hearing forthwith to consider all appropriate evidence and legal argument;
2. Order Koenig to accept all of Peterson's petition sections;
3. Declare that, with the addition of signatures collected by Peterson, the Recall Committee obtained adequate signatures to trigger the recall of all Trustees except Mayor Sindelair;
4. Order the recall election to go forward;
5. Hold that Koenig's actions unconstitutionally infringed upon Plaintiffs First and Fourteenth Amendment rights;
6. Award the Recall Committee attorney fees under 42 U.S.C. 1988; and
7. Order all such other relief as just and proper.

Respectfully submitted this 25th day of October 2021,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

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| <i>Attorney for Plaintiff:</i> Scott E. Gessler, (28944), sessler@gesslerblue.com Gessler Blue LLC 7350 E. Progress Place, Suite 100 Greenwood Village, CO 80111 Phone: (720) 839-6637 | Case No: |
| <p style="text-align: center;">DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD-PARTY COMPLAINT AND JURY DEMAND</p> | |

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.
2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):

X This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**

- ☐ This party is seeking a monetary judgment against another party for more than \$100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification:

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed \$100,000."

Or

- ☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.
3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Dated: October 25, 2021.

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

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| SUMMONS | |

TO THE ABOVE-NAMED DEFENDANT:

Jessica Koenig, in her official capacity as the Town Clerk of the Town of
Firestone, Colorado
c/o William P. Hayashi, Esq.
Williamson & Hayashi, LLC
1650 38th Street, Suite 103 W.
Boulder, CO 80301

You are hereby summoned and required to file with the clerk of this court an answer or other response to the attached complaint. If service of the summons and complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 21 days after such service upon you. If service of the summons and complaint was made upon you outside of the state of Colorado, you are required to file your answer or other response within 35 days after such service upon you.

If you fail to file your answer or other response to the complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the complaint without further notice.

Dated: October 25, 2021.

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

This summons is issued pursuant to Rule 4, C.R.C.P., as amended. **A copy of the complaint must be served with this summons.** This form should not be used where service by publication is desired.

WARNING: A VALID SUMMONS MAY BE ISSUED BY A LAWYER AND IT NEED NOT CONTAIN A COURT CASE NUMBER, THE SIGNATURE OF A COURT OFFICER, OR A COURT SEAL. THE PLAINTIFF HAS 14 DAYS FROM THE DATE THIS SUMMONS WAS SERVED ON YOU TO FILE THE CASE WITH THE COURT. YOU ARE RESPONSIBLE FOR CONTACTING THE COURT TO FIND OUT WHETHER THE CASE HAS BEEN FILED AND OBTAIN THE CASE NUMBER. IF THE PLAINTIFF FILES THE CASE WITHIN THIS TIME, THEN YOU MUST RESPOND AS EXPLAINED IN THIS SUMMONS. IF THE PLAINTIFF FILES MORE THAN 14 DAYS AFTER THE DATE THE SUMMONS WAS SERVED ON YOU, THE CASE MAY BE DISMISSED UPON MOTION AND YOU MAY BE ENTITLED TO SEEK ATTORNEY'S FEES FROM THE PLAINTIFF.