

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-03069-CMA-KLM

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.

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**DEFENDANT'S MOTION TO DISMISS**

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Defendant, by and through undersigned counsel, Josh A. Marks, of Berg Hill Greenleaf Ruscitti LLP, and pursuant to Fed. R. Civ. P. 12(b)(6), principally seeks dismissal of Plaintiff's Second Claim for Relief, a 42 U.S.C. § 1983 claim for alleged violations of the First Amendment and Fourteenth Amendment, as follows:<sup>1</sup>

**I. INTRODUCTION**

As its name suggests, Plaintiff, Committee Seeking the Recall of Firestone Trustees ("Committee"), seeks to recall the seven-member Board of Trustees of the Town of Firestone, Colorado. To that end, the Committee circulated a recall petition and

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<sup>1</sup> **Certificate of Conferral:** Pursuant to D.C.Colo.LCivR 7.1A., counsel for Defendant has conferred with counsel for Plaintiffs, Scott E. Gessler, who indicated Plaintiffs oppose the relief requested herein.

collected voter signatures in an attempt to trigger a recall election. Complaint, Doc. 3 at ¶¶ 2, 7-10. As the Town Clerk, Defendant, Jessica Koenig (“Koenig”), reviewed the Committee’s petitions at certain points in the process. Complaint at ¶¶ 9, 11, 14.

Although she ultimately accepted all of the Committee’s other petition sections, Koenig rejected the petition sections circulated by one of the Committee’s members because they showed evidence of disassembly. Complaint at ¶¶ 18-21. The evidence included an unusually high number of non-sequential signature dates. *Id.* This, Koenig reasoned, rendered the sections in question invalid and of no effect under Colorado’s statutory requirements for municipal recall petitions. See Exhibit 2 to the Complaint, reattached as **Exhibit A** this Motion for the Court’s convenience, at pp. 7-10. Those requirements mandate that each section always contain a full and accurate copy of the title and text of the petition as well as an affidavit completed and signed by the person circulating the section, attesting to personal observation of all of the signatures and compliance with various other requirements. As a result of Koenig’s rejection of the sections in question, the Committee gathered sufficient signatures to trigger a recall election for only one of the Board of Trustees members. Complaint at ¶ 21.

The Committee sued in state court, raising First Amendment, Fourteenth Amendment, and state constitutional challenges to Colorado’s statutory requirements for municipal recall petitions. Koenig removed the case under this Court’s federal question and supplemental jurisdictions. Koenig now moves to dismiss the Committee’s Second Claim for Relief, a 42 U.S.C. § 1983 claim for alleged violations of the First Amendment

rights of association and free speech as well as the Fourteenth Amendment right to due process.<sup>2</sup>

As to the Committee's First Amendment allegations, because the Committee challenges a state election law which regulates ballot access—as opposed to one which regulates or restricts communicative conduct of people advocating a position in a referendum—the Committee lacks a cognizable First Amendment claim. Even if the Committee possesses a cognizable First Amendment claim, however, the Committee cannot prevail and receive relief under the standard for a First Amendment challenge to a state election law. The law in question imposes only reasonable nondiscriminatory restrictions which serve the state's important regulatory interest in ensuring that recall petitions are bona fide and actually supported, on their own merits, by those who have provided the statutorily required support.

As to the Committee's Fourteenth Amendment allegations, the Committee's complaint does not contain enough allegations of fact which, if taken as true, state a claim for violation of the Committee's right to due process that is plausible on its face. Even if the Committee's complaint contains enough allegations of fact, however, Koenig did not violate the Committee's right to procedural or substantive due process because she provided the Committee notice and a hearing, the First Amendment must be the guide for analyzing the Committee's Second Claim for Relief, and the Fourteenth Amendment's Due Process Clause cannot be used to supplement that substantive right.

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<sup>2</sup> If this Motion is successful, the Court should dismiss the remaining claim for lack of supplemental jurisdiction.

Therefore, the Court should grant Defendant's Partial Motion to Dismiss and dismiss the Committee's Second Claim for Relief in its entirety.

## **II. STANDARD OF REVIEW**

"In determining whether a dismissal [for failure to state a claim upon which relief can be granted] is proper," the Court "must accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff." *Hooks v. Atoki*, 983 F.3d 1193, 1197 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2764 (2021) (quoting *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007)).

## **III. ARGUMENT**

### **A. The Committee's 42 U.S.C. § 1983 claim for alleged violations of the First Amendment rights of association and free speech fails to state a claim upon which relief can be granted.**

As to its First Amendment allegations, the Committee's Second Claim for Relief fails to state a claim upon which relief can be granted for two reasons: First, because the Committee challenges a state election law which regulates ballot access, the Committee lacks a cognizable First Amendment claim. Second, even if the Committee possesses a cognizable First Amendment claim, the Committee cannot prevail and receive relief under the standard for a First Amendment challenge to a state election law.

#### **1. The Committee lacks a cognizable First Amendment claim.**

A state election law which regulates ballot access—even a law that makes it more difficult to place an initiative on the ballot—does not give rise to cognizable First Amendment claim. *Seiple v. Griswold*, 934 F.3d 1134, 1142 (10th Cir. 2019); *see also*

*Thompson v. DeWine*, 976 F.3d 610, 615 (6th Cir. 2020) (“The First Amendment doesn’t guarantee the right to an initiative.”); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (“There is no First Amendment right to place an initiative on the ballot.”).

In *Seiple*, the Tenth Circuit rejected a First Amendment challenge to a new provision of the Colorado Constitution which requires citizens seeking to place a constitutional amendment on the ballot to gather a certain number of signatures from all state senate districts. *Id.* at 1137. The plaintiffs argued, as relevant here, that the provision violated the First Amendment because it increased the cost and difficulty of placing a constitutional amendment on the ballot. The Tenth Circuit distinguished between “laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not.” *Id.* at 1142 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006)). Because the provision fell into the latter category, the Tenth Circuit concluded that it “does not give rise to a cognizable First Amendment claim.” *Id.* Then, reasoning that the plaintiff’s argument “fails as a matter of law,” the Tenth Circuit entered judgment for the defendant.

Here, because the Committee challenges a state election law which regulates ballot access—as opposed to one which regulates or restricts communicative conduct of people advocating a position in a referendum—the Committee lacks a cognizable First Amendment claim. The law mandates that each recall petition section always contain a full and accurate copy of the title and text of the petition as well as an affidavit completed and signed by the person circulating the section, attesting to personal observation of all

of the signatures and compliance with various other requirements. C.R.S. § 31-4-503. Thus, the law regulates the *process* of triggering a recall election, not the communicative conduct of persons advocating a position in that election. Finally, although *Semple* dealt with citizens seeking to place a constitutional amendment on the ballot, not citizens attempting to trigger a recall election, no discernable distinction of law or fact prevents its application in the recall election context.<sup>3</sup> Therefore, the Committee lacks a cognizable First Amendment claim, and the Court should grant Defendant's Partial Motion to Dismiss and dismiss the Committee's Second Claim for Relief as to its First Amendment allegations.

**2. Even if the Committee possesses a cognizable First Amendment claim, the Committee cannot prevail and receive relief under the standard for a First Amendment challenge to a state election law.**

Plaintiff's First Amendment challenge to Defendant's application of a non-discriminatory, reasonable procedural requirement to disqualify a disassembled petition packets fails against the relevant review standard. A court considering a First Amendment challenge to a state election law must weigh "the character and magnitude of the asserted injury to the [First Amendment] rights... that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)

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<sup>3</sup> As the Committee's complaint acknowledges, "[t]he 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." Compl. at ¶ 26.

(quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). When a state election law imposes “severe” restrictions on those rights, the law survives challenge if it proves “narrowly drawn to advance a state interest of compelling importance.” *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, (1992)). When a state election law imposes only “reasonable nondiscriminatory restrictions” on those rights, however, “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

This standard makes sense from a policy perspective. The states possess the power to regulate their elections, including access to the ballot. *Id.* at 433; *Am. Const. L. Found.*, 120 F.3d at 1097. Indeed, “as 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 processes.” *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). In attempting to impose order on the democratic process, all election laws inevitably impose some burden upon individual voters. *Id.* That a state election law imposes some burden on individual voters cannot and does not, therefore, automatically make the law unconstitutional or even subject the law to close scrutiny. See *id.* at 433-34.

An election law imposes “nondiscriminatory restrictions” when it “makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender” and does not “limit[] political participation by an identifiable political group whose members share a particular

viewpoint, associational preference, or economic status.” *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (quoting *Anderson*, 460 U.S. at 793).

The courts have repeatedly affirmed state election laws that impose requirements similar to Colorado’s statutory requirements for municipal recall petitions, including affidavits, in-person signing and witnessing, election official verification of signatures, specifications for valid signatures, signature thresholds, and more. See, e.g., *Am. Const. L. Found., Inc. v. Meyer*, 120 F.3d 1092, 1099-10 (10th Cir. 1997), *aff’d sub nom. Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182 (1999) (signature-gathering period, affidavit requirement); *Hawkins v. DeWine*, No. 2:20-CV-2781, 2020 WL 3448228, at \*5 (S.D. Ohio June 24, 2020), *aff’d*, 968 F.3d 603 (6th Cir. 2020) (ink signature and in-person witnessing requirements); *Miller v. Thurston*, 967 F.3d 727, 740–41 (8th Cir. 2020) (in-person signature requirement); *Strayhorn v. Williams*, 430 F. Supp. 2d 661, 671 (W.D. Tex. 2006) (secretary of state’s verification of petition signatures); *Kendall v. Balcerzak*, 650 F.3d 515, 526 (4th Cir. 2011) (specifications for valid signatures); *Jenness v. Fortson*, 403 U.S. 431 (1971) (signature threshold); *Stone v. Bd. of Election Comm’rs for City of Chi.*, 750 F.3d 678, 685 (7th Cir. 2014) (signature threshold); *Wood v. Meadows*, 117 F.3d 770, 775–76 (4th Cir. 1997) (filing deadline); *Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) (filing fees).

A state possesses an important regulatory interest in ensuring that initiatives “granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support.” *Campbell v. Buckley*, 203 F.3d 738, 746 (10th Cir. 2000) (quoting *Timmons v. Twin Cities Area New*

*Party*, 520 U.S. 351, 366 (1997)) (“These interests are sufficient to pass constitutional muster.”); see also *Cunningham v. City Council of City of Stanton*, 19 Cal. Rptr. 297 (Cal. Dist. Ct. App. 1962) (“The notice, statement and answer are intended for the information of the voters... If various sections of a recall petition may be circulated, taken apart, and reassembled..., the integrity of every petition is subject to question [and] the opportunity for fraudulent action in the premises would be increased immeasurably.”). Indeed, the First Amendment “do[es] not... require” a state to “maintain a petition process that, in essence, allows unregulated access to the ballot.” *Am. Const. L. Found.*, 120 F.3d at 1097; see also *id.* at 1098 (collecting cases).

Here, even if the Committee possesses a cognizable First Amendment claim, the Committee cannot prevail and receive relief because the law imposes only reasonable nondiscriminatory restrictions which serve the state’s important regulatory interest in ensuring that recall petitions are bona fide and actually supported, on their own merits, by those who have provided the statutorily required support.

The law provides that, although “[a]ny recall petition may be circulated and signed in sections, ... each section shall contain a full and accurate copy of the title and text of the petition.” C.R.S. § 31-4-503(1). The law provides, furthermore, that each section shall contain “an affidavit of the person who circulated the petition stating... that the affiant circulated the said petition, that the affiant made no misrepresentation of the purpose of such petition to any signer of the petition, that each signature on the petition was affixed in the affiant’s presence,” and various other requirements. C.R.S. § 31-4-503(2)(c). The law provides, finally, that “[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." § 31-4-503(2)(d). Defendant Koenig found after a hearing that 17 petition sections from a particular petition circulator (Mr. Peterson) demonstrated evidence of disassembly. Exhibit A to this Motion at pp. 7-10.

Thus, because the law makes no distinction based on the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender and does not limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status, the law imposes only nondiscriminatory restrictions.

Second, the disassembly requirement is not a severe restriction. Restrictions that merely make it more difficult to obtain signatures to place measures on a ballot do not suffice. *Thompson v. DeWine, supra.* 976 F.3d at 618 (Ohio's signature requirements in combination with COVID-19 stay at home orders were not severe restrictions); *Howard Jarvis Taxpayers Assn. v. Weber*, 67 Cal. App.5<sup>th</sup> 488, 499 (Cal. App. 3<sup>rd</sup> Dist. 2021)(withdrawal period for voters to withdraw petition signatures nor financial disclosures for the cost of recall elections were not substantial burdens under the *Burdick/Anderson* framework).

Furthermore, because (1) the law's requirement that each petition section always contain a full and accurate copy of the title and text of the petition serves to inform voters of exactly what recall proponents ask them to support with their signature and (2) the law's requirement that each petition section contain an affidavit of the person who circulated the petition serves to preclude fraud and other illegal practices during signature

collection, the law serves the state's important regulatory interest in ensuring that recall petitions are bona fide and actually supported, on their own merits, by those who have provided the statutorily required support. Finally, although several of the cases discussed in this section did not deal directly with citizens seeking to trigger a recall election, no discernable distinction of law or fact prevents their application in the recall election context.<sup>4</sup>

Therefore, even if the Committee possesses a cognizable First Amendment claim, the Committee cannot prevail and receive relief under the standard for a First Amendment challenge to a state election law, and the Court should grant Defendant's Partial Motion to Dismiss and dismiss the Committee's Second Claim for Relief as to its First Amendment allegations.

**B. The Committee's 42 U.S.C. § 1983 claim for alleged violation of the Fourteenth Amendment right to due process fails to state a claim upon which relief can be granted.**

As to its Fourteenth Amendment allegations, the Committee's Second Claim for Relief fails to state a claim upon which relief can be granted for two reasons: First, the Committee's complaint does not contain enough allegations of fact which, if taken as true, state a claim for relief that is plausible on its face. Second, even if the Committee's complaint contains enough allegations of fact, Koenig did not violate the Committee's right to procedural or substantive due process.

**1. The Committee's complaint does not contain enough allegations of fact which, if taken as true, state a claim for relief that is plausible on its face.**

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<sup>4</sup> See also *supra*, note 2.

A complaint must contain enough allegations of fact, taken as true, “to state a claim for relief that is plausible on its face” to survive a Rule 12(b)(6) challenge. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 and 79 (2009). The factual allegations in the complaint “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts “are not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quotation omitted). A well-pled claim must demonstrate more than a sheer possibility that a defendant acted unlawfully—it is not enough to plead facts that are “merely consistent with” a defendant’s liability. *Iqbal*, 556 U.S. at 677 (quotation omitted). This standard “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.* at 678. Where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not “shown”—that the pleader is entitled to relief. *Id.* at 679.

Here, the Committee’s complaint does not contain enough allegations of fact which, if taken as true, state a claim for violation of the Committee’s right to due process that is plausible on its face. The complaint deals with the Fourteenth Amendment in a single sentence, stating in a cursory and conclusory manner that “Clerk Koenig has unconstitutionally violated Plaintiffs’ rights under the... Fourteenth Amendment.” Compl. at 7. The complaint does not state when, where, how, or why Koenig allegedly did so and, furthermore, contains no other allegations referencing the Fourteenth Amendment,

the right to due process, or even the phrase “due process.” As explained in the following subsection, Koenig cannot identify and, therefore, does not understand the theory underlying the Committee’s Fourteenth Amendment claim.

Thus, this single sentence proves insufficient to raise a right to relief above the speculative level, does not demonstrate more than a sheer possibility that a defendant acted unlawfully, and does not permit the Court to infer more than the mere possibility of misconduct. Indeed, the sentence constitutes an unadorned, the defendant-unlawfully-harmed-me accusation.

Therefore, Committee’s complaint does not contain enough allegations of fact which, if taken as true, state a claim for relief that is plausible on its face, and the Court should grant Defendant’s Partial Motion to Dismiss and dismiss the Committee’s Second Claim for Relief as to its Fourteenth Amendment allegations.

**2. Even if the Committee’s complaint contains enough allegations of fact, Koenig did not violate the Committee’s right to procedural or substantive due process.**

The Committee’s Complaint fails to state either a procedural or substantive due process violation under the Fourteenth Amendment, as demonstrated below.

**a. Koenig did not violate the Committee’s right to procedural due process because she provided the Committee notice and a hearing.**

To determine whether the government violated a plaintiff’s right to procedural due process, the Court must, engage in a two-step inquiry: “(1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?” *Hennigh v. City of Shawnee*, 155 F.3d 1249,

1253 (10th Cir. 1998). With regard to the appropriate level of process, the individual must receive notice and an opportunity to be heard prior to the deprivation. *Id.* at 1256 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

Here, even if the Committee's complaint contains enough allegations of fact and putting aside the protected interest and deprivation questions, Koenig did not violate the Committee's right to procedural due process because she provided the Committee notice and a hearing. As the Committee's complaint acknowledges, after Koenig rejected recall petition sections circulated by one of the Committee's members because they showed evidence of disassembly, members of the Committee submitted protests, Koenig accepted the protests, scheduled a hearing to consider them, *provided notice of the hearing* to all protesters, and *conducted the hearing*, a transcript of which the Committee attached to its complaint. Compl. at ¶¶ 14-16, and Exhibit 1 to the Compl.

Therefore, because Koenig did not violate the Committee's right to procedural due process because she provided the Committee notice and a hearing, the Court should grant Defendant's Partial Motion to Dismiss and dismiss the Committee's Second Claim for Relief as to its Fourteenth Amendment allegations.

**b. Koenig did not violate the Committee's right to substantive due process because the First Amendment must be the guide for analyzing the Committee's Second Claim for Relief.**

When a particular amendment to the United States Constitution "provides an explicit textual source of constitutional protection" against the alleged government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such a claim. *Albright v. Oliver*, 510 U.S. 266, 273 (1994)

(quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989); While the Tenth Circuit has not had the occasion to apply Albright's holding to a First Amendment Claim other circuit courts have. *see Velez v. Levy*, 401 F.3d 75, 94 (2d Cir. 2005); *Brandenburg v. Hous. Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001); *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir.), *cert. denied*, 139 S. Ct. 2678, 204 L. Ed. 2d 1070 (2019).

Here, as explained above, the Committee's complaint concerns itself almost exclusively with the alleged First Amendment violation and relegates the alleged Fourteenth Amendment violation to a single cursory and conclusory sentence. The Committee's complaint makes clear, furthermore, that the Committee views the First Amendment as a relevant explicit textual source of constitutional protection against Koenig's rejection of the petition sections circulated by one of the Committee's members because they showed evidence of disassembly.

Thus, the First Amendment must be the guide for analyzing the Committee's Second Claim for Relief, the Fourteenth Amendment's Due Process Clause cannot be used to supplement that substantive right, and this § 1983 claim cannot make reference to the broad notion of substantive due process.

#### **IV. CONCLUSION**

For the above reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Second Claim for Relief pursuant to Fed. R. Civ. P. 12(b)(6) and refuse to exercise supplemental jurisdiction on Plaintiff's remaining state law claim.

Respectfully submitted this 23rd day of November 2021.

BERG HILL GREENLEAF RUSCITTI LLP

*s/ Josh A. Marks*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of November 2021, I electronically filed the foregoing **DEFENDANT'S MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system. Counsel will be sent notification via electronic mail, to the following e-mail addresses:

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*s/ Cheryl Stasiak*

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Cheryl Stasiak

## FINDINGS AND DECISION

DATE FILED: October 25, 2021 5:34 PM

THIS MATTER came up for hearing upon the protest by Drew Peterson, Linda Haney, and Lou Ann Matthews dated September 3, 2021, IN RE: THE RECALL PROTEST OF THE CERTIFICATE OF INSUFFICIENCY FOR THE FOLLOWING:

Petition to Recall Bobbi Sindelar from the office of Mayor  
Petition to Recall Samantha Meiring from the office of Trustee  
Petition to Recall Douglas Sharp from the office of Trustee  
Petition to Recall Don Conyac from the office of Trustee  
Petition to Recall Sean Doherty from the office of Trustee  
Petition to Recall Frank A. Jimenez from the office of Trustee  
Petition to Recall David Whelan from the office of Trustee

In addition, Mr. Peterson filed an unnotarized letter of protest on September 1, 2021. Upon notification that the protest letter must be notarized under oath as required by the Colorado Revised Statutes, Mr. Peterson filed a letter of protest on September 3, 2021, that was notarized as a certified copy, not under oath. However, I determined the September 3, 2021, letter of protest submitted by Mr. Peterson was substantially compliant and allowed him to act as a party in the protest hearing.

I, Jessica Koenig, Firestone Town Clerk, am the hearing officer pursuant to C.R.S. 31-4-503(3)(b) that provides that every hearing shall be before the municipal clerk who shall serve as the hearing officer unless another person is designated by the governing body. The Board of Trustees did not designate another person.

I served as the hearing officer to take testimony and other evidence and issue these Findings and Decision with respect to Ms. Linda Haney, Ms. Lou Ann Matthews, and Mr. Drew Peterson's Protest (collectively, the "Parties"). Pursuant to C.R.S. 31-4-503, notice of a properly scheduled and noticed hearing on the Protest and all related matters was mailed to all parties, and the hearing was conducted by me on September 20, 2021, at which time I heard legal arguments, testimony, and considered evidence from the Parties.

## FINDINGS

1. On May 19, 2021, Ms. Haney was provided a Petition Circulator's Guideline in addition to a petition format example to assist with both the petition format and circulator requirements.
2. The petition format submitted by the recall committee, Linda Haney, Gary Gillespie, and Brad Lyons, was disapproved by me on June 11, 2021, June 16, 2021, and June 21, 2021.
3. I find that on June 11, 2021, I rejected the petition format due to an incorrect municipal warning at the top of the petition, the petition signatures pages header, and signature blocks overflowing onto the circulator's affidavit. I included a recommendation to assemble the petitions per statute. I provided the correct municipal warning to assist in perfecting the petition format.



4. I find that on June 16, 2021, I rejected the petition format due to a persisting and incorrect municipal warning at the top of the petition; the circulator affidavit, instead of being a separate page, was still attached to the petition signature pages header, and I provided a circulator affidavit example to assist petitioners in perfecting the petition format.
5. I find that on June 21, 2021, I rejected the petition format due to a formatting issue that shifted City/Town, County, State, and Zip Code over to the right causing the fields to overflow onto a second line. The same occurred with Day, Month, Year, and Printed name of the Circulator above the notary block on the affidavit.
6. I find that on June 24, 2021, the recall petition format was approved as to form.
7. I find that the petitions were timely filed within sixty (60) days of June 24, 2021, the date the petition was approved to form. Petition circulators Ms. Erin Warnecke and Ms. Lou Ann Matthews submitted the petitions on August 23, 2021.
8. Upon receipt of the petitions, I commenced a review of the petitions. This review included a review of the assembly of the 99 petition sections delineated by Trustee and numbered 1 - 14 (15 in the case of Trustee Whelan petition sections), initial signature count, review of the circulator affidavits, and review of the dates of signatures.

Mayor Sindelar Petition Section Nos. 1 - 14  
Threshold - 402  
Number of Signatures from Initial Count - 389

Trustee Jimenez Petition Section Nos. 1 - 14  
Threshold - 378  
Number of Signatures from Initial Count - 397

Trustee Conyac Petition Section Nos. 1 - 14  
Threshold - 378  
Number of Signatures from Initial Count - 401

Trustee Sharp Petition Section Nos. 1 - 14  
Threshold - 379  
Number of Signatures from Initial Count - 388

Trustee Whelan Petition Section Nos. 1 - 15  
Threshold - 379  
Number of Signatures from Initial Count - 395

Trustee Doherty Petition Section Nos. 1 - 14  
Threshold - 379  
Number of Signatures from Initial Count - 390

Trustee Meiring Petition Section Nos. 1 - 14  
Threshold - 378  
Number of Signatures from Initial Count - 398

9. On August 30, 2021, I issued a Certificate of Insufficiency and rejected all petitions sections due to a defect of assembly, in that all petitions were bound merely by a paperclip, one then cannot ensure that the signatures and circulator's affidavit for each petition were securely bound together and remained as one document. In fact, during my initial review, I found petitions which contained signatures that post-dated the circulator's affidavit, which indicates that affidavits had been separated from the signatures. In accordance with Colorado law, disassembly, which has the effect of separating signatures from affidavits, is a defect which renders a petition invalid and of no force and effect (C.R.S. 31-4-503(2)(d)). There is no cure for such a defect because the submittal of a corrected petition can't cure the defect of disassembly, which had the effect of separating the signatures from the affidavit.
10. On September 1, 2021, Ms. Haney, Ms. Matthews filed a letter of protest that was unnotarized.
11. Ms. Haney and Ms. Matthews were informed that a protest letter needed to be notarized under oath.
12. On September 1, 2021, Mr. Peterson filed a letter of protest that was unnotarized.
13. Mr. Peterson was informed a protest letter needed to be notarized under oath.
14. On September 3, 2021, Ms. Haney and Ms. Matthews filed a final letter of protest.
15. On September 3, 2021, Mr. Peterson filed a final letter of protest.
16. The protestors state that the certificate of insufficiency dated August 30, 2021, is incorrect for the following reasons:
  - a. The Clerk failed to uphold the oath of her office by not providing clear expectations or requirements for the submission of approved packets.
  - b. It was incumbent upon the Town Clerk to provide direction as to what constitutes an assembled or disassembled packet. The instructions affixed to the packets did not instruct canvassers to staple the packets.
  - c. That C.R.S 31-4-503(1) specifically allows for sections to be separated as long as the section includes the title and text.
  - d. Any 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 (C.R.S 31-4-503(2)(d)) is correctable by having a petitioner fill out a new affidavit.
17. On September 8, 2021, in accordance with C.R.S. 31-4-503(3)(b), a notice of protest hearing was issued to the Committee Members Linda Haney, Bradley Lyons, and Gary Gillespie; Protestors Linda Haney, Lou Ann Matthews, and Drew Peterson and all trustees subject to the recall; Mayor Sindelar, Trustee Jimenez, Trustee Meiring, Trustee Conyac, Trustee Sharp, Trustee Whelan, Trustee Doherty, and Weld County Clerk & Recorder, Carly Koppes.
18. At the September 20, 2021, hearing, Protestors Ms. Haney, Ms. Matthews, and Mr. Peterson appeared and provided written and oral legal arguments and testimony. The following witnesses were also called and testified; Jessica Koenig, William Hayashi, Chris Woody, Erin Warnecke,

Lou Ann Matthews, Drew Peterson, Keith Heavilin, Kazia Vigortia-Clawson, Sushmita Roth, and Linda Haney.

19. The Parties introduced the following exhibits:

**For the protestors:**

- 1 Petition Approval Email
- 2 Video of Receipt of Petition on 8/23/2021
- 3 Video 2 of Receipt of Petition on 8/23/2021
- 4 Transcript of Video 1
- 5 Transcript of Video 2
- 6 Certificate of Insufficiency
- 7 Clerk's Handbook
- 8 Notice of Request for Unaffiliated Hearing Officer with receipts from Linda Haney & Lou Ann Matthews
- 9 Notice of protest with certified receipts 9/1/2021
- 10 Notice of Procedural Direction to Protestors
- 11 Flash drive contains Exhibits 2 & 3 in hard copy
- 12 Copy of C.R.S. 31-4-502 citation
- 13 Copy of C.R.S. 31-4-503 citation

**For the hearing officer:**

- A1-A7 Petition Format as Approved to form on June 24, 2021
- B1- B15 Doug Sharp Recall Petition Section Nos. 1-14 & Receipt of submission
- C1-C-15 Samantha Meiring Recall Petition Section Nos. 1-14 & Receipt of submission
- D1-D15 Frank A. Jimenez Recall Petition Section Nos. 1-14 & Receipt of submission
- E1-E15 Don Conyac Recall Petition Section Nos. 1-14 & Receipt of submission
- F1-F15 Bobbi Sindelar Recall Petition Section Nos. 1-14 & Receipt of submission
- G1-G15 Sean Doherty Recall Petition Section Nos. 1-14 & Receipt of submission
- H1-H16 David Whelan Recall Petition Section Nos. 1-15 & Receipt of submission
- I 09/01/2021 Protest Letter\_Haney and Matthews\_unnotarized
- J 09/01/2021 Protest Letter\_Peterson\_unnotarized
- K September 8, 2021 Notice of Protest\_Haney and Matthews, re; Sindelar, et al

- L 09/03/2021 Protest Letter\_Peterson
- M 09/03/2021 Protest Letter\_Haney and Matthews
- N 08/30/2021 Certificate of Insufficiency sent to Committee Members Linda Haney, Bradley Lyons, and Gary Gillespie in addition to the Trustees sought to be recalled
- O Circulator's Affidavits Notarized by Sushmita Roth
- P Instructions pg 1 of all petition sections
- Q Transcript of the public comment presented by Keith Heavilin at the September 8, 2021 Board of Trustees Meeting
- R 06/21/2021 Email from Town Clerk Koenig to Linda Haney, Bradley Lyons, Gary Gillespie disapproving of the petition format and providing marked up petitions
- S 05/19/2021 Email from Town Clerk Koenig in response to a question from Linda Haney with Petition Circulator Guidelines and Sample Petition Format
- T Petition Circulator Guidelines Provided to Ms. Haney
- U Sample Petition Format Provided to Ms. Haney
- V 06/16/2021 Email from Town Clerk Koenig to Linda Haney, Bradley Lyons, Gary Gillespie disapproving of the petition format
- W 08/30/2021 Email from Linda Haney to Town Clerk Koenig "challenging" certificate of insufficiency
- X 06/11/2021 Email from Town Clerk Koenig to Committee Members Linda Haney, Bradley Lyons, Gary Gillespie disapproving of format and "I would also recommend assembling the petitions per statute"
- Y Ms. Roth's notary log page for Petitioner's Circulator Affidavits
- Z Ms. Vigatoria's notary log page for Petitioner's Circulator Affidavits
- AA Letters to Mr. Peterson from the Town Clerk requesting correction of his protest letter
- BB Letters to Ms. Matthews and Ms. Haney requesting correction of their protest letter
- CC Circulator's Affidavits Notarized by Ms. Vigatoria where the circulator's date doesn't match her notarization date

- DD 06/22/2021 Email from Town Clerk to Recall Committee approving petition format
- FF Email chain between Town Clerk Koenig and Ms. Haney regarding contact information for the recall petition committee members
- GG Email to Ms. Matthews from Town Clerk Koenig regarding petition questions
- HH Email to Ms. Haney from Town Clerk Koenig regarding questions as to when disapproval/approval of petition format was due
- II 8/18 Email from Town Clerk Koenig responding to Ms. Haney's question regarding due date of signatures
- JJ Karen Goldman's email in response to Ms. Haney
- KK Email from Town Clerk Koenig providing Chris Woody Circulator Guidelines and format
- LL Email from Town Clerk Koenig providing Mr. Peterson Circulator Guidelines and format
- MM Exhibit List dated September 19, 2021

**Protestor argument that the clerk did not provide clear expectations or requirements for the submission of the approved packets**

Protestors Ms. Haney, Ms. Matthews, and Mr. Peterson all asserted that it was incumbent upon the Town Clerk to instruct the Petition Recall Committee of the proper assembly method. Neither Ms. Haney, Ms. Matthews, nor Mr. Peterson ever provided any legal basis for their assertion. In support of their assertions, the Protestor's called Chris Woody, who testified, as to a conversation with Mr. Adam Gonzales, Election Manager of the Weld County Clerk & Recorder's Office. Mr. Woody recounted that Mr. Gonzales had said, "if the clerk wanted the packets a certain way, they must provide that information to the committee to ensure there is no ambiguity" and that "they give examples to the petitioners just to prevent this sort of problem.". Though not obligated, as a best practice, I provided the Protestors an overview of the process for I gave Ms. Haney and Mr. Peterson Petition Circulator Guidelines (Exhibit T), and petition format example (Exhibit U), and to Ms. Haney (Exhibit V) an email with a circulator affidavit example attached. Regarding instructions concerning stapling of the petition, all petition sections included instructions on the first page provided by the Recall Committee that expressly stated, "Do not take the petition section apart or remove the original staples." Therefore, I find the protestors' claim absent any legal basis or merit.

**Protestor Argument that a Petition Page is a Section and that Assembly can be Competed after Signature Gathering - Legal Analysis**

In addition, in both Mr. Peterson's September 3, 2021, letter of protest and during his testimony, Mr. Peterson asserted that each individual petition signature page is a section and therefore can be

disassembled. Additionally, he argued that pages can be assembled, and a circulator affidavit attached after signatures are collected.

As a basis for his opinion, Mr. Peterson cited C.R.S. 31-4-503(1), which states, "Any recall petition may be circulated and signed in sections, but each section shall contain a full and accurate copy of the title and text of the petition." However, Mr. Peterson's assertion is flawed because C.R.S 31-4-503(2)(c ) requires that to each petition or section thereof there shall be attached an affidavit of the person who circulated the petition stating in part that affiant circulated the petition and each signature on the petition was affixed in the affiant's presence. Thus, even if a petition contained but one signature page and contained a full and accurate copy of the text and title of the petition, it would not be valid on its own because to be valid, it must have an attached circulators affidavit. In addition, the Protestor's petition forms each contained six signature pages, with each page having nine sequentially numbered signature boxes with the signatures running consecutively from one to fifty-four. However, other than the first page, which would still have to have the required circulator's affidavit to be valid, none of the other single signature pages could constitute a standalone section because if the page contained, for example, signature lines nine through nineteen or say lines forty-six through fifty-four standing alone, it would be evidence of disassembly and thus violate C.R.S. 31-4-503 (2)(d), which provides that any 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. Thus, Mr. Peterson's argument is absent any merit.

In his testimony, Mr. Peterson stated that the circulator affidavit could be notarized and attached after signatures are collected. Colorado Revised Statutes "31-503-2(d) states any disassembly of a petition which has the effect of separating the affidavit from the signatures; it does not say that I have to have an affidavit per section. I just need to have when I go to the notary, and I fill out my notary that I have the pile of signatures together. I could have easily have had one affidavit for everything. It does not require me to, when I say everything, per petition for an officer, I would have had to have seven at the minimum I would need seven, but I didn't, I kept the petition packets together, and I did an affidavit for each. But, according to the law, as long as my affidavit and the signature page stays together after the affidavit is notarized and handed in, that's it".

This testimony highlights Mr. Peterson's fundamental misunderstanding of recall petitions and what constitutes a section. A single signature page is not a section. A section or petition as used in Officers Recall Part 5 C.R.S. 31-4-501 must include the officers sought to be recalled, grounds for recall, identification of committee, warning language all of which for this petition were set forth on each of the six signature pages which by law must be attached to the circulator's affidavit (C.R.S. 31-4-503(2)). Thus, the petition or section for this matter consisted of the six signature pages and the circulator's affidavit, which by law must be bound and maintained as one inseparable document throughout the entire signature-gathering process.

He then acknowledged under questioning that the purpose of the secure assembly was to establish a chain of custody and to prevent fraud. When asked why the law prohibits disassembly of signature pages from an affidavit, Mr. Peterson responded with "...to ensure that the signatures were circulated by the circulator, me, and that affidavit is my attestation that I collected those signatures". When asked, "do you think the law prohibits disassembly to prevent fraud?" Mr. Peterson responded. "Yes." When asked, "do you think the law prohibits disassembly to establish a chain of custody for circulators?" Mr. Peterson responded, "Yes." "Isn't it true that the petition must be in your physical custody at all times?", Mr. Peterson responded, "Yes."

All of these statements contradict his prior assertions that signature pages may be kept separate throughout the signature-gathering process and then presented in bulk to the notary. What's most notable about this is that though Mr. Peterson denies he kept the signature pages separate, his belief that to do so would not be improper is the only logical obligation for the disassembly of his petitions.

### **Improper Circulator Affidavit and Notarization**

Fourteen circulator affidavits, signed by Mr. Peterson, a circulator, and notarized by Ms. Kaszia Vigorita-Clawson, have a circulator signature date of August 22, 2021, and a notarization date of August 23, 2021. Ms. Kaszia Vigorita-Clawson, when asked by me about the discrepancy, testified that she had simply not noticed that Mr. Peterson had improperly dated his affidavits on the 22<sup>nd</sup> and that the date of Mr. Peterson's signature was, in fact on August 23, 2021, and her notarization was in fact August 23, 2021, and that Mr. Peterson signed in her presence. Mr. Peterson also testified that he signed and had the circulator affidavits notarized on August 23, 2021. Finding Ms. Kaszia Vigorita-Clawson to be credible and that it was an honest error, I deemed her notarization of the petitions to be substantially compliant.

### **Evidence of Disassembly- Warnecke Petition Section: Non-sequential signature dates.**

Upon review, evidence showed that Petition Section No. 5 for Trustee Doherty (Exhibit G5) has nonsequential dates and was circulated by Ms. Warnecke.

Ms. Warnecke testified that the non-sequential dates from August 22, 2021, to August 21, 2021, on the following page, was simply an incorrect date listed by the signer. I find Ms. Warnecke's rationale reasonable and substantially compliant.

### **Evidence of Disassembly- Peterson Petition Sections**

While it is fact that a temporary binding such as a paperclip for assembly calls into question all petitions circulated due to the nature of the assembly, this Finding and Decision will focus on additional evidence in the exhibits and the testimony presented at the hearing.

### **Non-sequential Signature Dates**

Upon review, the petition evidence showed that there were seventeen (17) petition sections circulated by Mr. Peterson that had signature dates that were not sequential despite the petition signature lines serially numbered from one (1) to fifty-four (54). The seventeen (17) petition sections include the following; petition section nos. 5, 6, and 9 for Trustee Conyac – Exhibits E5, E6, and E9, petition section nos. 7, 8, and 11 for Mayor Sindelar – Exhibits F7, F8, and F11, petition section nos. 7, 8, and 9 for Trustee Doherty – Exhibits G7, G8, and G9, petition section nos. 1, 11, and 13 for Trustee Whelan – Exhibits H1, H11, and H13, petition section nos. 7 and 8 for Trustee Sharp – Exhibits B7 and B8, petition section nos. 2 and 10 for Trustee Meiring – Exhibits C2 and C10, and petition section nos. 9 and 10 for Trustee Jimenez – Exhibits D9 and D10.

In testimony, when presented with Exhibit F11 and Exhibit D9 as an example of the defect, Mr. Peterson explained that the non-sequential dates of the seventeen (17) petition sections which he circulated were the result of “wind” and “residue from the tabs” on the petitions that caused them to adhere to other pages. I find no reasonable basis to sustain his explanation. If there was some wind in executing the circulator affidavit, he affirms that each petition was signed in his presence, and it's his obligation to ensure that persons sign on the correct page. Additionally, even if one believes it could have happened

once, there's no reasonable reason that it could happen seventeen (17) times. I reexamined all of the seventeen (17) sections with non-sequential dates and found no evidence of sticky residue. Further, Mr. Peterson could not explain why the non-sequential dates did not occur in the petitions circulated by others.

#### **Incorrect trustee petition pages inserted in Trustee Whelan Petition Section No. 1**

Upon petition review, I found inconsistencies with Trustee Whelan Petition Section No. 1 (Exhibit H1) as described below:

- Trustee Whelan Petition Section No. 1 (Exhibit H1) contained two (2) inserted pages (page 3 & 4) that are titled "Petition to recall Bobbi Sindelar from the office of Mayor".
- Trustee Whelan's Petition Section No. 1 (Exhibit H1), the signature blocks on pages 2 and 3 are crossed-out in their entirety, page 2 belonging to Trustee Whelan, page 3 belonging to Mayor Sindelar.

Mr. Peterson provided no explanation for these issues.

#### **Inconsistencies that Raise Questions**

In addition to the lack of reasonableness in his attempted explanations for the flaws regarding petitions circulated by him, I found an additional inconsistency in his testimony. Mr. Peterson testified that he circulated "half a dozen petition sections". However, that is in direct contradiction to the fact that Mr. Peterson circulated forty-four petition sections. This contradiction opens the door to the possibility that individuals other than Mr. Peterson may have circulated a petition section(s) without properly filing a circulator's affidavit.

#### **Peterson Argument that Disassembly is not Disassembling as a Page is a Section**

Though Mr. Peterson stated that he did not disassemble the petition sections, I find his argument that disassembling individual pages is in fact, not disassembly peculiar, for such a claim can reasonably be interpreted as justification by him of his actions. Yet, if one were to follow Mr. Peterson's argument, he would then need to have submitted more circulators affidavits than he submitted, and his petitions would all then have had but one signature page. Further, that would be evidence of disassembly as it would no longer be in the petition form as approved.

#### **Conclusion**

Pursuant to C.R.S 31-4-503(2)(d), any 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. I find the seventeen (17) petition sections to have been disassembled which renders them invalid, and impacts the number of signatures gathered for the recall petitions as follows:

Mayor Sindelar Petition Section Nos. 1 - 14

Threshold - 402

Number of Signatures from Initial Count without 17 petition sections - 288

Trustee Jimenez Petition Section Nos. 1 - 14

Threshold - 378

Number of Signatures from Initial Count without 17 petition sections - 312

Trustee Conyac Petition Section Nos. 1 - 14

Threshold - 378

Number of Signatures from Initial Count without 17 petition sections - 258

Trustee Sharp Petition Section Nos. 1 - 14

Threshold - 379

Number of Signatures from Initial Count without 17 petition sections- 315

Trustee Whelan Petition Section Nos. 1 - 15

Threshold - 379

Number of Signatures from Initial Count without 17 petition sections - 303

Trustee Doherty Petition Section Nos. 1 - 14

Threshold - 379

Number of Signatures from Initial Count without 17 petition sections - 219

Trustee Meiring Petition Section Nos. 1 - 14

Threshold - 378

Number of Signatures from Initial Count without 17 petition sections - 317

Without the seventeen (17) petition sections, the minimum amount of signatures required is not met. Further, the evidence of disassembly and the invalidity of petition sections is not curable.

Upon finding compelling evidence that there was disassembly of seventeen (17) petitions circulated by Mr. Peterson, which had the effect of separating his affidavits from the signatures, results in all seventeen (17) of the petitions being invalid and of no force and effect, I uphold my initial determination of insufficiency.

Issued this 27<sup>th</sup> day of September, 2021



Jessica Koenig

Town Clerk

Hearing Officer in the matter

**MAILING**

I placed in the United States mail a copy of the foregoing Findings and Decision on this 27th day of September, 2021, addressed as follows and transmitted electronically:

Linda Haney  
5835 Waverley Ave.  
Firestone, CO 80504

Lou Ann Matthews  
P.O. Box 521  
Firestone, CO 80520

Drew Peterson  
6722 Silverleaf Ave.  
Firestone, CO 80504

Bradley Lyons  
6333 Sparrow Cir.  
Firestone, CO 80504

Gary Gillespie  
6320 Snowberry Ave.  
Firestone, CO 80504

Bobbi Sindelar  
6488 Saddleback Ave  
Firestone, CO 80504

Frank A. Jimenez  
6287 Twilight Ave  
Firestone, CO 80504

Douglas Sharp  
6760 Owl Lake Dr.  
Firestone, CO 80504

Don Conyac  
6272 Sage Ave  
Firestone, CO 80504

David Whelan  
4768 Silverleaf Ave  
Firestone, CO 80504

Sean Doherty

11357 Charles Street  
Firestone, CO 80504

Samantha Meiring  
11444 Deerfield Dr.  
Firestone, CO 80504