

**BEFORE THE CITY CLERK
CITY OF COLORADO SPRINGS, COLORADO**

**FINAL DETERMINATION OF RECALL PETITION SUFFICIENCY
AND ADOPTION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

IN THE MATTER OF:

**ROBERT BLANKEN PROTEST TO PETITIONS FILED BY THE PETITION COMMITTEE TO RECALL
COUNCIL MEMBER HELEN COLLINS**

CLERK’S FINAL DETERMINATION

CERTIFICATE OF SUFFICIENCY

Petition title:

PETITION FOR RECALL OF HELEN COLLINS, 4TH DISTRICT COUNCILMEMBER

Introduction:

On March 10, 2015, the Hearing Officer appointed by the City Clerk to conduct the hearing in this matter, Colorado Springs Presiding Municipal Court Judge HayDen W. Kane II, delivered his Findings of Fact and Conclusions of Law, In The Matter Of Robert Blancken Protest To Petitions Filed By Petition Committee To Recall Council Member Helen Collins (the “Hearing Officer’s Findings”). A true copy of the Hearing Officer’s Findings is attached hereto as Exhibit A. I have carefully reviewed the Hearing Officer’s Findings and I hereby adopt them as part of my final determination as to petition sufficiency, and incorporate the same by reference. In addition, I have conducted additional review and verification of the petition signature lines specifically challenged by the protesting party, Mr. Blancken. Upon such further review, I have determined that forty-two (42) additional signatures on the Recall Petition shall be invalidated for the reasons stated below.

In conducting this analysis of the challenges to these signature lines, I have applied the Colorado Supreme Court’s “substantial compliance” standard to evaluate the sufficiency of signatures submitted in the initiative process. In evaluating whether a signature is in “substantial compliance”, the Colorado Supreme Court has stated the following factors must be considered: (1) the extent of the noncompliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the noncompliance, and (3)

whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate¹.

There are important interests which weigh on both sides of the signature validity determination. In performing this task, I have applied the Supreme Court's "substantial compliance" standard. I recognize the guidance provided by the Court indicating that laws governing the initiative process are to be liberally construed so that the right of petition reserved to the people is facilitated and not hampered by either technical legal provisions or technical construction further than is necessary to guard fairly against fraud and mistake in the exercise of this right by the people, Fabec v. Beck, 922 P.2d 330, 341 (Colo. 1996).

My final determination of signature line validity has been constrained by reliable, probative evidence. In that regard, the probative evidence is found by comparison of these signature lines to the entries found in the voter file supplied to my office on January 8, 2015 by the El Paso County Clerk and Recorder.

I will address each section of the Protestor's Complaint in the order presented by the written Protest concerning signature lines.

Discussion of signature line review:

"Obvious Handwriting Similarities"

The Protestor challenged 4 signature lines in this portion of the Protest Complaint.

Based upon my review of the 4 signature lines in the Protestor's "Obvious Handwriting Similarities" section, I find the following additional 4 signatures to be invalid and not in substantial compliance with applicable requirements due to obvious handwriting similarities: 19.45, 19.46, 18.20 and 18.21. It appears that in two cases involving a total of four signature lines, parties at the same address with the same last name completed the petition line for the other party. Because I am unable to verify the lines on the petition were completed by the person identified in the voter file, I have invalidated each of these four signatures.

"Cannot Find Signatures"

The Protestor challenged 26 signature lines in this portion of the Protest Complaint.

Based upon my review, I find the following additional 10 signature lines listed on the following petition packets to be invalid and not in substantial compliance with the applicable requirements: 13.4, 19.19, 19.36, 25.70, 25.90, 34.32, 35.15, 36.27, 43.89, and 69.17.

¹ Fabec v. Beck, 922 P.2d 330, 341 (Colo. 1996)

Based upon my review, I have determined the Protestor's Complaint erroneously listed the following 4 signatures as verified and counted. I have verified that these signature lines were not counted by the City Clerk's Office as valid, nor were they included in the valid signature number in the following petition sections,: 6.21, 19.59, 37.57, and 67.38.

Based upon my review, I find the remaining 12 signature lines identified in this portion of the Protest to be in substantial compliance with the applicable requirements and these 12 signature lines will continue to be counted as valid signatures.

"Bad Addresses"

The Protestor challenged 4 signature lines in this portion of the Protest.

Based upon my review, I find the signature line on petition packet 43.30 to be invalid and not in substantial compliance with the applicable requirements. It appears the registered voter included an incorrect house number on that line.

Based upon my review, I find that the remaining 3 signature lines to be in substantial compliance with the applicable requirements and these 3 signature lines will continue to be counted as valid signatures.

"Wrong Names"

The Protestor challenged 25 signature lines in this portion of the Protest.

Based upon my review, I find the following 9 signatures listed on the following petition packets to be invalid and not in substantial compliance with applicable requirements: 7.85, 10.02, 13.05, 25.90, 29.20, 30.11, 60.06, 61.41, and 62.25.

Based upon my review, I have determined the Protestor's Complaint erroneously listed the following signature line as verified and counted. I have verified that this signature line was not counted by the City Clerk's Office nor was it included in the valid signature number in this petition section: 15.18.

Based upon my review, I find the remaining 15 signature lines in this section to be in substantial compliance with applicable requirements and they will continue to be counted as valid signatures.

"Wrong Street Name or Address"

The Protestor challenged 40 signature lines in this portion of the Protest.

Based upon my review, I find the 13 signature lines listed on the following petition packets to be invalid and not in substantial compliance with applicable requirements: 11.58, 27.06, 29.78, 29.93, 32.28, 43.15, 43.68, 45.11, 47.31, 47.40, 58.36, 59.36, and 67.24.

Based upon my review, I find the remaining 27 signature lines listed in the Protestor's Complaint in this section to be in substantial compliance with applicable requirements and they will continue to be counted as valid signatures.

"Date Error"

The Protestor challenged 6 signature lines in this portion of the Protest.

Based upon my review, I find the 3 signature lines listed on the following petition packets to be invalid and not in substantial compliance with applicable requirements: 15.31, 35.62, and 60.18.

Based upon my review, I find the remaining 3 signature lines listed in the Protest in this section to be in substantial compliance with applicable requirements and they will continue to be counted as valid signatures.

"Apartment or Unit Errors"

The Protestor challenged 58 signature lines in this portion of the Protest Complaint.

Based upon my review, I find 2 signature lines listed on the following petition packets to be invalid and not in substantial compliance with applicable standards: 47.41 and 69.19. In each case, the registered voter appears to have listed the wrong street number for his or her address.

Based upon my review, I find the remaining 55 signature lines listed in the Protestor's Complaint in this section to be in substantial compliance with applicable requirements and they will continue to be counted as valid signatures. During the review, the Office of the City Clerk reviewed all persons registered to vote at the listed address. The Office was able to verify that the name listed on the petition is the only person with that unique name who is identified on the voter list as registered to vote at that address. I have determined that these lines are in substantial compliance with the applicable requirements by utilizing the three prong test from the *Fabec* case. I took into consideration the fact that courts warn against invalidating petition signatures in a hyper-technical manner which could hamper a citizen's right to put an issue to the popular vote. Because City Code § 5.2.510 does not specifically require an apartment number be listed and because I was able to find that unique voter name on the voter list at that address, I determined the signature lines to be valid. An interpretation that City Code § 5.1.510

constitute individual apartment numbers to be listed in order to validate a signature line would require a highly technical and restrictive interpretation of that provision, so I decline to do so.

Finally, my review determined that the Protestor's Complaint listed line 36.37 twice.

Calculation and adjustment of signatures:

Based upon my review, I have determined that an additional forty-two (42) signature lines are invalid and shall not be counted in the final determination of petition sufficiency. The total number of valid signature lines upon final determination is therefore 1,673.

Conclusion:

For the reasons discussed above, I concur with, adopt and incorporate as part of my final determination as to petition sufficiency, the Hearing Officer's Findings, attached as Exhibit A. Additionally, I have determined that an additional 42 signature lines are invalid and shall not be counted in the final determination of petition sufficiency. Finally, I conclude the Protestor has not made a sufficient showing for me to reverse my previous Certificate of Sufficiency issued pursuant to City Charter § 12-40 and in accord with City Code § 5.1.510. I have determined, with the adjustment and reduction by 42 signature lines, the petition for recall indicates 1,673 valid signatures of qualified registered voters, which is still 188 more signatures than the required 1,485 signatures.

I therefore issue my final determination and Certificate of Sufficiency in accord with City Charter §12-40 and in harmony with City Code § 5.1.511.

| | |
|---|-------|
| Total number of signature lines submitted | 3,007 |
| Total number of signature lines initially not accepted | 1,292 |
| Total number of signature lines invalidated during protest review | 42 |
| Total number of valid signature lines upon final determination | 1,673 |
| Total number of signatures required | 1,485 |

Petition signature requirements are hereby determined to be:

SUFFICIENT

Signed and entered this 12th day of March, 2015.

Sarah B. Johnson



CITY CLERK
CITY OF COLORADO SPRINGS, COLORADO

**BEFORE THE CITY CLERK
CITY OF COLORADO SPRINGS, COLORADO**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF:

**ROBERT BLANCKEN PROTEST TO PETITIONS FILED BY PETITION COMMITTEE TO
RECALL COUNCIL MEMBER HELEN COLLINS**

I. INTRODUCTION

Pursuant to the undersigned's appointment by the Colorado Springs City Clerk, written findings of fact and conclusions of law are due to the City Clerk, so the City Clerk may make her determination and issue her findings in accordance with COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511(E).

Significant effort was made by the undersigned to address the challenges and objections raised by the Protesting Party in the same order as presented in the filed Protest Document. However, multiple arguments were duplicated throughout the document.

After considering the arguments, evidence and testimony presented at the Protest Hearing, the record in its entirety, all applicable federal, state and municipal law and applicable case law, the undersigned makes the following findings of fact and conclusions of law:

II. JURISDICTION

The City of Colorado Springs is a Colorado home rule municipality. COLORADO SPRINGS, COLO. CHARTER art. 1-20, COLORADO SPRINGS, COLO. CODE ch. 1, art. 1.1.111. COLO. CONST. art. XX, § 6 grants home rule municipalities the power to create and amend charters to govern local and

municipal matters. COLO. CONST. art. XX, § 6 further provides that home rule municipalities shall have the power to legislate upon “[a]ll matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof.” *See also* COLO. CONST. art. V § 1(9) (municipalities “may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation”). *Id.*

As pertinent to this dispute, the City of Colorado Springs enacted COLORADO SPRINGS, COLO. CHARTER arts. 12-30 and 12-40 specifically addressing the petition process. Colorado Springs has also enacted codes for Requirements of Petitions; Initiative, Referendum and Recall (COLORADO SPRINGS, COLO. CODE ch.5, art. 5.1.508), the Sufficiency of Petitions (COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.510), and most applicable to the analysis here regarding jurisdiction, a code authorizing Protest and Clerk Investigation Procedures (COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511). A potential conflict arises between COLORADO SPRINGS, COLO. CHARTER art. 12-40 (if a petition is certified sufficient that certification “shall then be a final determination as to the sufficiency of the petition”) and COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511 (providing for a post-certification protest and hearing). *See also Olson v. Hillside Community Church SBC*, 124 P.3d 874 (Colo.App. 2005) (“ordinances that are in conflict with the charter are without effect”). However, the “protest” ordinance can be construed harmoniously with the Charter in that the City Clerk is given additional investigative powers as to the sufficiency of the petition. The City Clerk’s finding after the protest process is completed pursuant to COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511 then “shall be [the] final agency action.” Thus, the City has exercised its authority to establish minimum requirements for the petition process. Municipal ordinances are presumed constitutional, *Kruse v. Town of Castle Rock*, 192 P.3d. 591 (Colo.App.

2008). The City has jurisdiction to conduct the Protest and Clerk Investigation Procedures pursuant to COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511.

III. FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2014, Deborah Hendrix, Victor Torres and Woody Longmire, registered electors of the City of Colorado Springs (hereinafter “Petition Committee”), filed with the Colorado Springs City Clerk’s office their Notice of Intent to commence a recall of Council Member Helen Collins. On December 18, 2014, the Petition Committee was provided with petitions for circulation, the number of signatures required for the recall effort, as well as City Code citations relating to recall petitions. On January 8, 2015, the Petition Committee submitted 61 completed petition packets along with copies of payments made to the petition circulators. After review of the submitted petitions by the City Clerk and staff, a Certificate of Sufficiency was sent to the Petition Committee on January 14, 2015. On January 20, 2015, Council Member Collins submitted a 300-word position statement, announcing her decision not to resign from City Council. City Council, in both their work session on January 26, 2015, and their regular session on January 27, 2015, passed a resolution ordering a recall election to be held during the General Municipal Election of April 7, 2015.

On January 27, 2015, a Notice of Intent to file a protest by Robert Blancken was received by the Colorado Springs City Clerk’s office. A Recall Petition Challenge/Protest and Request for Independent Hearing (hereinafter “Protect Document”) was filed by Mr. Blancken on February 17, 2015, within the 40-day time frame proscribed by COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511(A). The Protest Document raises numerous challenges and objections, both to the petition recall process and the sufficiency of the signatures contained in the petitions, and takes the position that the petitions should not have been certified by the City Clerk.

A Notice of Protest Hearing for the recall of Council Member Helen Collins was sent to Mr. Blancken and the Petition Committee and posted on February 20, 2015. The undersigned was appointed Hearing Officer for the Protest Hearing by the City Clerk on February 27, 2015, at the request of the Protesting Party.

As posted, the Protest Hearing commenced on March 2, 2015 at 1:00 p.m. at the Colorado Springs City Administration Building, 30 S. Nevada, Room 102. Parties present at the hearing were Robert Blancken, the Protesting Party, and Deborah Hendrix as the designated representative of the Petition Committee. The Petition Committee was represented by Attorney Mario Nicolais. After somewhat extensive preliminary matters were completed, each party was given the opportunity to make an opening statement. Because the Protesting Party had the burden of proof at this hearing, the Protesting Party presented their evidence first consisting of the testimony of Thomas Bjorkland and Colorado Springs City Clerk Sarah Johnson. The Petition Committee then presented their evidence in support of the petitions consisting of the testimony of Brit Haley, Corporate Division Chief for the Colorado Springs City Attorney's Office, and a brief recall of City Clerk Sarah Johnson to the stand. The Petition Committee also tendered two affidavits to supplement the record. Because of the difficulty in getting witnesses under subpoena and the limited time available before the Protest Hearing was set (5-15 days from filing of protest COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.511(A)), each party was given an opportunity to make an offer of proof as to the testimony of a witness who was not served with a subpoena and did not testify. Each party was given the opportunity to make a closing argument.

IV. LEGAL ANALYSIS

A. Overview

1. Petition Circulation is Protected Political Speech

The First Amendment, made applicable to the states via the Fourteenth Amendment, provides “Congress shall make no law. . . abridging the freedom of speech.” U.S. CONST. amend. I. It “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Meyer v. Grant*, 486 U.S. 414, 421, 108 S.Ct.1886, 100 L.Ed.2d. 425 (1988) (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed. 1498 (1957)). Because state action includes charter and city ordinances adopted under state authority, the First Amendment’s prohibitions extend to the Colorado Springs Charter and Municipal Code. *See Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 2d. 949 (1938).

Petition circulation is “core political speech” for which First Amendment protection is “at its zenith” because it involves “interactive communication concerning political change.” *Meyer*, 486 U.S. at 422. The United States Supreme Court has also recognized, however, that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order . . . is to accompany the democratic process.” *Buckley v. American Constitutional Law Foundation Inc.*, 525 U.S. 182, 183, 119 S.Ct. 636, 637, 142 L.Ed.2d. 599 (1999).

Analysis of election-related legislation “turn[s] in large measure on whether the regulation at issue is subject to a balancing test or strict scrutiny.” *Citizens for Responsible Gov.’t State Political Action Comm. v. Davidson*, 236 F. 3d. 1174, 1196 (10th Cir. 2000) (quoting *Campbell v. Buckley*, 203 F.3d.738, 748 (10th Cir. 2000)).

Strict scrutiny demands state regulations “impos[ing] ‘severe burdens’ on speech . . . be narrowly tailored to serve a compelling state interest.” *Amer. Const. Law Foundation*, 525 U.S. at 192 n.12. Strict scrutiny is applicable “where the government restricts the overall quantum of speech available to the election or voting process” and “[it] is employed where the quantum of speech is limited due to restrictions on . . . the available pool of circulators or other supporters of a candidate or initiative. *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000).

2. Severability

Invalid portions of an ordinance may be severable. *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1291 (10th Cir. 2002) (citing *City of Lakewood v. Colfax Unlimited Assoc.*, 634 P.2d 52, 70 (Colo. 1981).

As a general rule, if a statute or ordinance is constitutional in one part and unconstitutional in another, the constitutional provision may be sustained and the unconstitutional stricken. Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective portions have been deleted and (2) the intent of the enacting legislative body.

Colfax Unlimited Assoc., 634 P.2d at 70 (citations omitted).

A severability clause “creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment.” *Essence*, 285 F.3d. at 1291.

SEVERABILITY OF CHARTER PROVISIONS. If any provision, section, article, or clause of this charter of the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect any remaining portion or application of the charter which can be given effect without the invalid portion or application, provided such remaining portions or applications are not determined by the Court to be inoperable, and to this end this charter is declared to be severable.

COLORADO SPRINGS, COLO. CHARTER art. 15-90.

B. Registered Elector Requirement for Circulators

The Protesting Party takes the position that the Colorado Springs Charter requires in part a notarized affidavit from the circulator of the petitions stating “the circulator is a registered elector of the City of Colorado Springs.” COLORADO SPRINGS, COLO. CHARTER art. 12-30(2)(b). This alleged non-compliance with City Charter would render the certification of the petitions for recall by the City Clerk invalid. However, the Protesting Party all but concedes the United States Supreme Court case of *Buckley v. Amer. Const. Law Foundation, Inc.* renders an elector requirement on petition circulators unconstitutional. As the court states:

“(b) Beyond question, Colorado’s registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions. That requirement procedures a speech diminution of the very kind procedure by the ban on paid circulators at issue in *Meyer* [where United States Supreme Court held ban on paid circulators unconstitutional]. Both provisions “limi[t] the number of voices who will convey [the initiative proponents’] message” and, consequently, cut down “the size of the audience [proponents] can reach.”

Amer. Const. Law Foundation, 525 U.S. at 183 (citing *Meyer*, 486 U.S. at 422, 423).

Upon review of the signed and notarized circulator affidavits submitted in this matter, reference to the “elector of the City of Colorado Springs” circulator requirement has been eliminated. All other requirements contained in COLORADO SPRINGS, COLO. CHARTER art. 12-30(2)(b) are included in the affidavits or severed from those affidavits consistent with the Charter’s severability clause and applicable case law.¹ The alleged “elector of the City of Colorado Springs” circulator

¹ This elector circulator requirement has apparently also been removed from the City Clerk’s instructions to circulators of a petition for City of Colorado Springs to recall an elected official. *See* Protestors’ Exhibit E-7.

requirement does not constitute grounds to invalidate the City Clerk’s certification of the submitted petitions.

C. Residency Requirement for Circulators

1. City Residency

The Protesting Party argues that the City Clerk should require petition circulators to be city residents. The City of Colorado Springs has no such residency requirement and the United States Court of Appeals Tenth Circuit has held that a city residency requirement for petition circulators is unconstitutional. In *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002), the court stated:

[The] prohibition on non[city] resident petition circulators, then, is similar in effect to the requirement petition circulators be registered voters, found unconstitutional in *ACLF*. The requirement circulators be registered “decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators,” held unconstitutional in *Meyer. ACLF*, 525 U.S. at 194.

Id., at 1243.

Thus, lack of a city residency requirement for petition circulators does not constitute grounds to invalidate the City Clerk’s certification of the submitted petitions.

2. State Residency

The Protesting Party takes the position that:

Colorado has a state residency requirement that was NOT struck down by *Buckley v. ACLF* or *Chandler v. City of Arvada*, the *Chandler v. City of Arvada* decision cited thus at B. “Although the Supreme Court in *ACLF* did not decide whether a state residency requirement for petition circulators offends the First and Fourteenth Amendments, plaintiffs submit that the Court’s opinion suggests such a requirement would be upheld. *See ACLF*, 525 U.S. at 197.

Recall Petition Challenge/Protest and request for Independent hearing at 14.

The Protesting Party cites, in support of their position, an 8th Circuit Court of Appeals case from 2001, *Initiative and Referendum Inst. v. Jaegar*, 241 F.3d 614 (8th Cir. 2001), and a United States District Court decision from Mississippi, *Kean v. Clark*, 56 F.Supp.2d 719 (S.D. Miss 1999). The Protesting Party also raises the residency requirements contained in C.R.S. § 1-40-111.

Colorado Springs' Charter and Code does not have a state residency requirement for petition circulators. As a home rule municipality, Colorado Springs has the power to legislate upon “[a]ll matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter of ordinances thereof.” COLO. CONST. art. XX, §6. Home Rule Municipalities “may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation.” COLO. CONST. art. V, § 1(9).

The Protesting Party takes the position that COLO. REV. STAT. tit. 31 GOVERNMENT - MUNICIPAL imposes a residency requirement for circulators, specifically C.R.S. § 31-10-101, *et seq.* (the Colorado Municipal Election Code of 1965). The only residency requirement in the Election Code is for electors not circulators (*see* C.R.S. § 31-10-201). The Municipal Initiatives, Referenda and Referred Measures addressed in C.R.S. § 31-11-101, *et seq.*, also do not impose any residency requirement for circulators.

The Protesting Party takes the position that C.R.S. § 1-40-111 imposes a state residency requirement for circulators in Colorado Springs, which states in pertinent part:

(2)(a) to each petition section shall be attached a signed, notarized and dated affidavit executed by the person who circulated the petition section, which shall include . . . that he or she is a resident of the state.

C.R.S. § 1-40-111(2)(a).

First, because Colorado Springs is a home rule municipality, it is not bound by certain laws of the State of Colorado and has enacted legislation to that effect:

STATUTES OF THE STATE OF COLORADO SUPERSEDED:

“Any and all laws and statues of the State of Colorado which limit, restrict, regulate, inhibit, direct or impose conditions and restrictions upon the grant of plenary power in local and municipal matters, under article XX of the constitution of the State of Colorado, or which limit, restrict, regulate, inhibit, direct or impose conditions and restrictions in the administration and discharge of the functions, powers and rights of the city in local and municipal matters, shall be and are hereby superseded and declared to be not applicable to any functions, rights and powers of the city in local and municipal matters. Nothing contained elsewhere in this code and specifically in section 1.1.112 of this part shall be construed to limit the generality of this section.”

COLORADO SPRINGS, COLO. CODE ch. 1, art. 1.1.111.

Clearly, the imposition of a state residency requirement for petition circulators in the home rule municipality of Colorado Springs would “limit” or “restrict” . . . “the grant of plenary power in local and municipal matters” under COLO. CONST. art. XX, and this “shall be . . . superseded and declared to be not applicable.” COLORADO SPRINGS, COLO. CODE ch. 5, art. 5.1.502 states, “[t]he City Charter controls the procedure of recall, initiative, and referendum.” As indicated previously, there is no state residency requirement for petition circulators.

Second, even assuming *arguendo* this state residency requirement was applicable to Colorado Springs, numerous federal appellate courts have held that a state residency requirement for petition circulators is unconstitutional.

“This court’s previous determination that § 957 posed a severe burden on recall-petition circulators was based on a consistent line of federal cases that have concluded that residency or registration restrictions on petition circulators pose a severe burden on core political speech and are subject to strict scrutiny . . . see *Buckley v.*

Am. Const. Law Found. Inc., (citations omitted); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008); *Chandler v. City of Arvada*, 292 F.3d 1236, 1242 (10th Cir. 2002); *Lerman v. Board of Elections*, 232 F.3d 135, 149 (2nd Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000).”

Bogaert v. Land, 675 F.Supp.2d 742, 750 (2009).

The Tenth Circuit, appellate court for Federal District Courts in Colorado, decided a case directly on point. In *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (2008), the Tenth Circuit ruled a state ban on non-resident petition circulators violated the First Amendment and was unconstitutional.²

The case relied upon by the Protesting Party to support their position, *Initiative and Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) was decided some seven years prior to the *Yes On Term Limits* case. Further, the *Jaeger* decision has been considered and rejected by multiple federal appellate courts. As the court stated in *Nader v. Brewer*, 531 F.3d 1028, 1036, (9th Cir. 2008):

[i]n *Krislov v. Rednour*, 226 F. 3d. 851 (7th Cir. 2000)], the Seventh Circuit held that an in-district residency requirement, which operates as an in-state residency requirement . . . severely burdened candidates’ rights to association and ballot access . . .

A Brief Eighth Circuit opinion came to the opposite conclusion and upheld a residency requirement for initiative – petition circulators. See *Initiative & Referendum Institute v. Jaeger* (citations omitted). *Krislov* had been decided a few months earlier, but *Jaeger* did not cite it. The Tenth Circuit in *Chandler* did cite *Jaeger* and disagreed with it. See *Chandler*, 292 F.3d at 1244. We do not find *Jaeger* persuasive.

Nader, at 1036-37.

² C.R.S § 1-40-111 does have a severability clause (see section 9).

Thus, the *Jaeger* decision upholding a state residency requirement for petition circulators has been rejected by the Seventh Circuit, Ninth Circuit, and most notably here the Tenth Circuit. The alleged state residency requirement does not constitute grounds to invalidate the City Clerk's certification of the submitted petitions.

D. Preservation of Subpoena Power Requirement

The Protesting Party takes the position that the City Clerk's failure to preserve the subpoena power of the City of Colorado Springs invalidates the certification of the petitions submitted. To a large extent, this is an extension of the residency requirement discussed previously. Because petition circulation is core political speech, any regulation of that speech is subject to strict scrutiny. Strict scrutiny demands any regulations imposing severe burdens on speech be narrowly tailored to serve a compelling state interest. Multiple jurisdictions, including Arizona, Oklahoma, and the City of Arvada have argued the residency requirement was narrowly tailored to meet the state's/city's compelling interest of preserving subpoena power. None of these arguments persuaded the court:

“We . . . defer to the City's contention the power to subpoena non-residents is essential . . . even still, the ordinance is not narrowly tailored to meet the City's compelling interest in policing its petition process. [The ordinance] is substantially broader than necessary to insure the petition process integrity and is therefore unconstitutional. The City could achieve its interest without wholly banning non-residents from circulating petitions.”

Chandler v. City of Arvada, 292 F.3d 1236, 1243-44 (10th Cir. 2002).

Other jurisdictions that have consistently held the residency requirement to be unconstitutional find the “consent to jurisdiction” a more narrowly tailored means to the city's/state's compelling interest of subpoena enforcement. The *Nader* court held:

Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result. *See Chandler*, 292 F.3d at 1242-44 (holding that city residency requirement was “substantially broader than necessary” to ensure the integrity of the petition process in part because the city could instead require circulators to submit to jurisdiction of the city for subpoena enforcement); *Krislov*, 226 F.3d at 866 n. 7 (invalidating residency requirement and suggesting agreement to submit to jurisdiction as permissible restriction to further state’s interest in preventing fraud); *Frami*, 255 F.Supp.2d at 970 (noting that requiring petition circulators to agree to submit to jurisdiction for subpoena enforcement was a “less onerous method[]” than a residency requirement for serving the state’s interest in ensuring circulators were subject to the state’s jurisdiction). *Cf. Kean v. Clark*, 56 F.Supp.2d 719, 733 (S.D.Miss. 1999)³ (holding that a residency requirement was narrowly tailored, but without considering any “consent to jurisdiction” alternative).

Nader v. Brewer, 531 F.3d 1028, 1037.

This “consent to jurisdiction” alternative is constitutional but it is not a requirement to a valid petition process. Further, the Protesting Party bears the burden of proof in this protest and the record is void of any alleged misconduct by any petition circulator,⁴ out-of-city circulators, out-of-state circulators or otherwise. Thus, the 470 signatures gathered by out-of-state circulators and the 1066 signatures gathered by out-of-city circulators are valid signatures and should continue to be counted in the certification process.

³ This is the other case cited by the Protesting Party.

⁴ Each party was given the opportunity to make an offer of proof as to testimony that would have been given by the circulators that were unable to be subpoenaed.

D. Minimum Age Requirement

The Protesting Party takes the position that the minimum age requirement of 18 years for petition circulators was not enforced in this recall petition. This position is not supported by either the facts or the law. First, C.R.S. § 31-11-107 states, “[n]o section of a petition for any initiative or referendum measure shall be circulated by any person who is not at least eighteen years of age at the time the petition is circulated.” Second, there is evidence in the record from the affidavit of Christine Brown, Payroll Director of GOTV Canvassing, that all petition circulators were 18 years of age or older. There is no evidence in the record to the contrary. Thus, this alleged noncompliance with the minimum age requirement for petition circulators does not constitute grounds to invalidate the certification of the petitions submitted.

E. Invalid Notary Public

The Protesting Party raises two objections to petitions notarized by notary public Aaron Ellis. The first objection is that Mr. Ellis did not keep his record up to date with the Secretary of State. The second objection is that Mr. Ellis had a disqualifying financial interest in the recall petition because he was a paid circulator.

1. Failure to Keep Record Current

The Protesting Party has presented evidence that Mr. Ellis moved from 1825 S. Adams Street, Denver, CO 80210 to 371 S. Estes Street, Apt. 10, Lakewood, CO, 80226, in September 2014 and failed to notify the Secretary of State of this change. Assuming these facts to be true, this alleged violation does not constitute grounds to invalidate the notarizations of petitions by Mr. Ellis submitted in this matter.

After a complaint was filed by Thomas Bjorkland⁵ with the Secretary of State, Mr. Ellis received a letter from the Secretary of State. (Recall Petition Challenge/Protest and request for Independent hearing at Exhibit F.) In this letter, Mr. Ellis is advised that violations of the Notaries Public Act “may result in a letter of admonition or in disciplinary action, up to and including a notary revocation hearing.” There is no evidence in the record to suggest that a violation would invalidate records or documents previously notarized by Mr. Ellis.

The Protesting Party questions the credibility of Mr. Ellis, alleging “he intentionally wrote down an incorrect address on recall sections that he notarized” and Mr. Ellis “appears to have intentionally misrepresented his address on official petition document”. (Recall Petition Challenge/Protest and request for Independent hearing at 17:7-11.) These allegations are unsupported by the evidence in the record. All documents notarized by Mr. Ellis contain the language “as registered” in the address line, and on all notarizations Mr. Ellis gave the Adams Street address that was registered with the Secretary of State. Conversely, when Mr. Ellis signed the petition as a circulator on January 8, 2015, he gave the Estes address in Lakewood. There is no evidence in the record to support the Protesting Party’s assertion that “the fact Mr. Ellis deliberately misrepresented his address on all the petition sections he notarized may constitute fraud.” (Recall Petition Challenge/Protest and request for Independent hearing at 17: 5-6.) Mr. Ellis has submitted an affidavit stating he was in good standing with the Secretary of State at the time of the notarizations in question, remains in good standing, and did not receive any compensation for notarizing any petition sections. Nothing in the record challenges this assertion.

⁵ Mr. Bjorkland testified for the Protesting Party at the protest hearing.

2. Financially Disqualifying Interest

The Protesting Party takes the position that because Mr. Ellis was a paid circulator for the same recall effort in which he notarized petitions, Mr. Ellis had a financially disqualifying interest in the transaction. This position is not supported by Colorado case law.

Griff v. City of Grand Junction, 262 P.3d 906 (Colo. App. 2010), is directly on point with the allegations from the Protesting Party. In that case, the notary public was much more involved in the petition effort than Mr. Ellis in the present case:

Ms. Clark helped draft the petition, arranged for its printing with a company she owned, participated in press interviews about the petition efforts, circulated two petition sections, and signed the petition herself as an elector. As a licensed notary public, Ms. Clark notarized the petition circulators' attestations on several petition sections that other people had circulated, including a petition section that she had signed as an elector. After the petition had been submitted to the city clerk for review, she also was designated as a petition representative.

Griff, at 907.

The clerk who originally invalidated the signatures relied on the two cases cited by the Protesting Party. "Her decision cited cases from other states that invalidated petition sections on the basis of notaries' overall involvement with the petition effort. *See Howell v. Tidwell*, 258 Ga. 246, 368, S.E.2d 311 (1988), *Citizens Comm. to Recall Rizzo v. Bd. of Elections*, 470 Pa. 1, 367 A.2d 232(1976)." *Griff*, at 909.

However, the Colorado Court of Appeals in *Griff* distinguished those decisions from the applicable Colorado law:

However, section 12-55-110(2) differs in important ways from the notary disqualification statutes in Georgia and Pennsylvania. . .

[T]he Colorado statute disqualifies those notaries who are “*named, individually*, as a party to the transaction.” . . . These words narrow the scope of disqualification to those transactions where the notary’s interest is apparent from being named on the face of the document to be notarized.

Griff, at 909-10.

The *Griff* court held that because Ms. Clark was not “named, individually, as a party to the transaction”, her actions did not constitute a financially disqualifying interest:

Therefore, because the words of section 12-55110(2)(b) function to disqualify only the notaries who are designated by name on the face of the document they notarized, we hold that the city clerk abused her discretion by considering Ms. Clark’s roles in printing the petition, giving media interviews, and being a general advocate for the protest effort. These actions did not result in Ms. Clerk being “named, individually, as a party to the transaction.”

Griff, at 910.

We conclude that the narrow language in section 12-55-110(2)(b) limits notarial disqualification to the most suspect situations, such as where a candidate notarizes his or her own nomination petition. This interpretation results in the invalidation of fewer signatures and provides more ready access to the ballot, in accordance with public policy in Colorado.

Griff, at 912.

There is no evidence in the record to support the Protesting Party’s contention “the compensation Mr. Ellis received was a proximate result of the notarization.” The only evidence of payment to Mr. Ellis contained in the record is as a circulator where he received \$5.00 per signature.⁶ Thus, Mr. Ellis did not have a disqualifying financial interest in the petition recall process and the 1293 signatures notarized by Mr. Ellis should continue to be counted in the City Clerk’s certification process.

⁶ Although not applicable here as a circulator, C.R.S. §12-55-121 limits the fee a notary may receive for each document attested by a person before the notary public to five dollars (\$5.00).

V. SUFFICIENCY OF PETITIONS AND SIGNATURES

A. Standard of Review

1. Substantial Compliance

The standard of review as to the sufficiency of the petition sections and signatures is substantial compliance. *Fabec v. Beck*, 922 P.2d 330, 331 (Colo. 1996). Whether a petition or a signature is in substantial compliance the following must be considered:

... (1) the extent of non-compliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance, and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate.

Fabec, at 341.

2. Burden of Proof

The party protesting the City Clerk's finding concerning the sufficiency of signatures shall have the burden of proof. COLORADO SPRINGS, COLO. CODE ch. 5 art. 5.1.511(D).

3. Prima Facie Evidence

If a petition contains a notarized affidavit of the circulator that is compliant with COLORADO SPRINGS, COLO. CHARTER art. 12-30(b), "[s]uch petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are electors."

B. Form of Petition Packet

The Protesting Party takes the position that flaws in the petition packets distributed to the Petition Committee invalidate the signatures collected in those petition packets. Specifically, the Protesting Party raises concerns about the affidavit of circulator form and that recall petition pages

were missing headers from lines 53-100 to indicate printed name, signature, street address and the date of the signature.

1. Affidavit of Circulator

Besides the registered elector requirement, a requirement held unconstitutional in *Buckley v. Amer. Const. Law Foundation, Inc.*, (citation omitted), the affidavits of the circulators contain all of the required attestations pursuant to COLORADO SPRINGS, COLO. CHARTER art.12-30(3)(b), “that the Circulator personally circulated the paper, the number of signatures thereon, that all the signatures were affixed in the Circulator’s presence, that to the best of the Circulator’s knowledge each signature appended to the paper is the genuine signature of the person whose name it purports to be, that each signor had an opportunity before signing to read the full text of the matter proposed or sought to be reconsidered, and that to the best of the Circulator’s knowledge each signor is an elector of the City of Colorado Springs.”

This form is compliant with COLO. CONST. art. V, § 1 (6), COLORADO SPRINGS, COLO. CODE ch. 5 art. 5.1.508 (B) and the attestations contained in the affidavit by the circulator used by the Colorado Springs City Clerk is virtually identical to the form adopted by the Colorado Secretary of State. *See Committee for Better Healthcare for all Colorado Citizens v. Meyer*, 830 P.2d 884 (Colo. 1992). Any alleged flaws in the affidavit by the circulator does not constitute grounds to invalidate the signatures on the petitions.

2. Missing Headers

The Protesting Party takes the position that missing headers from lines 53-100 on the petition form labeling the columns “printed name, signature, address and date” invalidates the signatures contained in those petitions. First, the “general form” contained in COLORADO SPRINGS, COLO.

CHARTER art.12-30 refers to the designation of the petition “for either recall, initiative or referendum”, not column headings. All petition packets or sections contained the general form designation “TO THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS: PETITION FOR RECALL”.

Each page of signatures includes the warning required by COLORADO SPRINGS, COLO. CODE ch. 5 art. 5.1.508 (A) and nothing in the petition form diminishes the signature requirements of COLORADO SPRINGS, COLO. CHARTER art.12-30 requiring “signature, the date of signing said petition and his/her place of residence, giving his/her street and number”. Alleged flaws in the form of the petition circulated and submitted do not constitute grounds to invalidate the signatures on the petitions. Even assuming these column headings were required, to invalidate electors’ signatures based on a lack of column headers would apply a “hypertechnical type of approach”, requiring strict compliance, well in excess of the applicable substantial compliance standard of review. *See Fabec v. Beck*, 922 P.2d at 344-45.

C. Invalid Zip Codes on Petition

The Protesting Party claims 73 signatures on the petitions had no zip code, the wrong zip code or the zip code was added by another party. Other than the Protesting Party’s contention, there is no evidence in the record that zip codes were added by another party and COLORADO SPRINGS, COLO. CHARTER art.12-30(a)(3) does not require the signer to give a zip code:

Each signer must his/her own proper signature, the date of signing said petition and his/her place of residence, giving his/her street and number.

Further, COLORADO SPRINGS, COLO. CODE ch. 5 art. 5.1.510 specifies the grounds where the City Clerk may initially find insufficient signatures of individuals in the following categories:

1. Address shown by signer not located with the City limits of the City of Colorado Springs.
2. Any signature appearing on the petition more than once, in which event all signatures of that individual shall be deleted except one.
3. More than one individual's signature on a signature line, in which event the line shall count as one.
4. An incomplete address being given by an individual (i.e., omitted designation of street, avenue, drive, court, place, way, east-west, etc.) and in the event that specific residence number can be applied to more than one residence, that signature shall not be counted.
5. Signature lines containing an incomplete date, inappropriate date, or no date shall not be counted.
6. Signatures of individuals who are not registered electors in the City.

Again, zip codes are not mentioned in any of these six categories.⁷ “When interpreting a statute, we look first at the plain meaning of the words and apply them as written if they are clear and unambiguous. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000).” *Griff*, 262 P.3d. at 909. Had the legislature intended for zip codes to be grounds to invalidate or find insufficient signatures on a petition, they could have included such a condition but chose not to do so. The primary goal of statutory [or charter and ordinance] interpretation is to give effect to legislative intent. *Griff*, 262 P.3d at 909 (citing *In re Marriage of Davisson*, 797 P.2d 809, 810 (Colo. App. 1990)). The lack of zip codes with signatures on a petition does not constitute grounds to invalidate or find those signatures insufficient.

⁷ Although not applicable and superseded by Colorado Springs Charter and Ordinance, the signature requirements in C.R.S. § 31-11-106(3)(e)(I)(A) do not require a zip code.

D. Signature Disqualifications

The Protesting Party contends that the voter file provided by the El Paso County Clerk and Recorder on January 23, 2015 contained 1,697 signatures as compared to the 1,715 signatures received by the Colorado Springs City Clerk on January 8, 2015. (Recall Petition Challenge/Protest and request for Independent hearing at 18.) The courts have long recognized a presumption of validity and regularity with respect to the official acts of state and local officials in Colorado, and in the absence of clear evidence to the contrary, the courts will presume that these officials have properly discharged their official duties. *Jensen v. City and County of Denver*, 806 P.2d 381, 386 (Colo. 1991).

The El Paso County Clerk and Recorder's issuance of its voter file to the Colorado Springs City Clerk on January 8, 2015 is clearly an official act that, absent clear evidence to the contrary, carries with it the presumption of validity. The Protesting Party's review of a voter file issued two weeks later finding a discrepancy of 18 signatures falls short of clear evidence that the January 8, 2015 voter file is invalid.

E. Elector Moved Before Signing

The Protesting Party takes the position that 23 accepted signers do not live at the addresses signed on the recall petition and thus those addresses are invalid and describes these addresses as "inactive". The Protesting Party correctly cites the law where if a person moves from one county or precinct in this state to another with the intention of making the new county or precinct a permanent residence, the person shall be considered to have lost residency in the county or precinct from which the person moved after 30 days. However, the Protesting Party provides no evidence that these 23 persons intended on making their new county or precinct a permanent residence.

F. City Clerk Review

The City Clerk has indicated to the undersigned that she will re-evaluate all challenges that require cross reference to other official governmental materials and review of individual signatures, including challenges to obvious handwriting similarities, signatures that cannot be found, bad addresses, wrong names, wrong street name or address, date errors, and apartment or unit errors.

VI. CONCLUSION

Wherefore, having fully considered the evidence and arguments of the Protesting Party, both through their filed Protest Document and evidence presented at the Protest Hearing on March 2, 2015, the undersigned finds the elector requirement and residency requirements proposed by the Protesting Party to be unconstitutional. The undersigned further finds the Protesting Party's allegations that Mr. Aaron Ellis is an invalid notary is not supported by the evidence or applicable case law and the Protesting Party has failed to meet their burden of proof regarding allegations of flaws to the petition packet, improper zip codes, signature disqualifications, and electors who have allegedly changed their residence. The Colorado Springs City Clerk should make a finding as to the sufficiency or insufficiency of the petitions submitted pursuant to COLORADO SPRINGS, COLO. CODE ch. 5 art. 5.1.511(E) consistent with this opinion and her re-evaluation and cross referencing of the individual signatures contained in the petitions.

Dated this 10th day of March, 2015.

APPOINTED HEARING OFFICER BY COLORADO
SPRINGS CITY CLERK



Judge HayDen W. Kane II
Presiding Judge, Colorado Springs Municipal Court