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CASE NUMBER: 2024CV30677

<table>
<tr><td>District Court
Arapahoe County, State of Colorado
7325 S. Potomac Street
Centennial, CO 80112

Plaintiffs:

DANIEL TAYLOR, ROBIN O’MEARA, DEBORAH PARKER, JOHN RASMUSSEN, GWEN ALEXANDER, JOHN GUISE AND FOREST MCCLURE, as eligible electors of Heather Gardens Metropolitan District, DANIEL TAYLOR AND ROBIN O’MEARA, as HGMD directors subject to recall,

v.

Defendant:

AJ BECKMAN, as Designated Election Official.</td><td>▲ COURT USE ONLY ▲

Case Number:
1983CV105

Div.: 204 Ctrm:</td></tr>
<tr><td>Attorneys for Defendant:

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<tr><td colspan="2">DEFENDANT’S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)</td></tr>
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Defendant A.J. Beckman, Designated Election Official, respectfully moves to dismiss the complaint filed by Plaintiffs[1] pursuant to Colo. R. Civ. P 12(b)(1) and (5), and states in support:

Conferral

Counsel for Defendant has conferred with Plaintiffs’ counsel, and Plaintiffs oppose.

[1] Plaintiffs filed their complaint as a Rule 106(4)(a) action under case number 2024CV030677. On April 19, 2024, the Court granted Defendant’s motion to transfer and consolidate their complaint into the matter that governs the special district (case 1983CV105). That consolidation has not yet occurred and, therefore, this motion is being filed into the new case.

Factual Background[2]

Heather Gardens is a retirement community in Aurora, which was formed as a special district. (Compl. ¶ 1.) The district is governed by a board of directors elected by district voters. These elected officials are subject to recall. (*Id* ¶ 2.) A committee of district electors initiated the process to recall four (4) directors (*Id.* at 1 & ¶ 2.) On November 21, 2023, this Court appointed the Designated Election Official to oversee the recall proceedings and election. (*Id.* ¶ 3.)

The electors submitted recall petitions to the Designated Election Official for approval of the petitions as to form. (*Id*. ¶¶ 3-7.) The Designated Election Official approved the petitions in December 2023 as to form, and the petitions were circulated in or about January 2024. (*Id.* ¶¶ 7-9.) The recall committee submitted the signed petitions to the Designated Election Official on February 6, 2024, and he issued a sufficiency determination on February 13. (*Id*. at 2.)

Several protests of his sufficiency determination were filed. (*Id.* ¶ 12.) The Designated Election Official set a hearing to consider protests. (*Id.* ¶¶ 15-16.) The Designated Election Official held the consolidated hearing during the week of March 11, 2024, and he issued his decision on March 22, 2024, denying the claims of the protesters. (*Id.* at 2 & ¶ 16.) He issued a corrected decision on March 25, 2024.

Legal Background

Heather Gardens was formed pursuant to and is subject to the provisions of Colorado's Special Districts Act. *See* C.R.S. §§ 32-1-101 *et seq.* Voters elect a board of directors to manage a special district. *See* C.R.S. § 32-1-305.5 (initial election); *id.* §§ 32-1-901 to -915 ("Organization of Board"). Once elected, directors are subject to recall, which right originates in the Constitution:

[2] Although the complaint contains numerous inaccuracies and omissions regarding the proceedings before the Designated Election Official, the allegations are assumed true solely for purposes of this motion.

> Every elective public officer of the state of Colorado may be recalled from office at any time by the registered electors entitled to vote for a successor of such incumbent through the procedure and in the manner herein provided for, which procedure shall be known as the recall, and shall be in addition to and without excluding any other method of removal provided by law.

Colo. Const. art. XXI, sec. 1. The Supreme Court has recognized the right of recall as a "fundamental right of citizens." *Shroyer v. Sokol*, 550 P.2d 309, 311 (Colo. 1976). Consistent with this constitutional imperative, the Special Districts Act provides for the recall of directors of a special district. C.R.S. § 32-1-906(1).

The Act further provides procedures that govern the recall of district directors. *See id.* §§ 32-1-906 to -915; *id.* § 32-1-908 ("Procedures to recall a director of a special district are governed by this part 9."). To begin the recall process, district voters file a request with the court having jurisdiction over the special district for appointment of a designated election official to oversee recall petition and election processes. *Id.* § 32-1-909(2). The designated election official then reviews the recall petition "as to form." *Id.* § 32-1-909(1) & (3)-(6). This review is limited, as the petition need only include (1) the identities of the voters constituting the recall committee, (2) the name of the director to be recalled, (3) a "general statement … of the grounds on which the recall is sought," (4) a mandatory legal warning that appears on every signature page, and (5) a petition recall statement. *Id.* § 32-1-909(4)-(6).

A statement of the grounds for recall may not include "any profane or false statement." *Id.* § 32-1-909(4)(c). However, only the "electors of the special district" may review the "legality, reasonableness, and sufficiency of the grounds," and the statement of grounds is "not subject to a protest or to judicial review." *Id.* § 32-1-909(4)(c). In other words, in determining the sufficiency of a recall petition as to ***form*** (which, by definition, is distinct from petition signatures or circulator affidavits), the designated election official's review is limited to whether the petition includes a "general statement … of the grounds on which the recall is sought"—the

official cannot review the materiality or even the factual correctness of the content of the statement. Rather, only the voters can consider those issues. This limitation arises from the Constitution, which precludes review of grounds for recall:

> The sufficiency, or the determination of the sufficiency, of the petition referred to in this section ***shall not*** be held, or construed, to refer to the ground or grounds assigned in such petition for the recall of the incumbent sought to be recalled from office thereby.

Colo. Const. art. XXI, sec. 2 (emphasis added).

An approved petition is then circulated to the voters of the district, and the signed petition must be filed with the designated election official within 60 days of their initial approval as to form. C.R.S. § 32-1-910(2)(a). The statute identifies the information that a voter signing a recall petition must include, and it requires sworn affidavits by those who circulated the petition. *Id.* §§ 32-1-910(2)(b)-(c). Although the designated election official reviews the petition for sufficiency, that review is again limited. The designated election official

> ***shall*** deem the petition sufficient if he or she determines that it was timely filed, has the required attached circulator affidavits, and was signed by the requisite number of eligible electors of the special district within sixty days following the date upon which the designated election official approved the form of the petition."

Id. §§ 32-1-910(3)(c) (emphasis added). Protests of the designated election officer's determination of sufficiency may be filed. *Id.* § 32-1-910(3)(d). The statute provides for an expedited process to review a protest, including authorizing a hearing. The designated election official may affirm the determination of sufficiency or return the petition to the recall committee for possible corrective action. *Id.* § 32-1-910(3)(d)(IV) & (3)(e).

The statute authorizes judicial review of the designated election official's sufficiency decision. Such review may be sought by a director subject to recall (or his/her representative) or the recall committee, and it must be filed within five (5) business days of the designated election official's decision. *Id.* § 32-1-910(3)(f). The statute explicitly provides that "the statement of the

grounds on which the recall is sought provided pursuant to section 32-1-909(4)(c) is ***not*** subject to such review." *Id.* (emphasis added).

The remaining statutory procedures for referral and conduct of a recall election that are relevant here are discussed below.

Argument

I. The Court should dismiss the complaint because Rule 106(4)(a) does not apply to this action as a matter of law.

"A court may not decide cases over which it does not have subject matter jurisdiction." *Zook v. El Paso Cty.*, 2021 COA 72, ¶ 7; *see* Colo. R. Civ. P. 12(b)(1) (providing for a motion to dismiss for "lack of jurisdiction over the subject matter"). Where, as here, a jurisdictional challenge does not involve factual disputes, the Court may decide the question without a hearing. *Seefried v. Hummel*, 148 P.3d 184, 188 (Colo. App. 2005).

Plaintiffs brought this action under, and as to each claim seek relief pursuant to, Colorado Rule of Civil Procedure 106(4)(a). (*See* Compl. at 1, ¶¶ 31, 41, 52, 57, 63, 71, 78.) Rule 106(4)(a) provides for judicial review "[w]here, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion…" Colo. R. Civ. P. 106(4)(a).

A Rule 106(4)(a) action is not the proper vehicle to challenge every judicial and quasi-judicial determination by a government official or agency. The Rule applies only where "there is no plain, speedy, and adequate remedy otherwise provided by law." *Id.* A statutory remedy for a claim—as exists here—is one circumstance in which a plaintiff has a "plain, speedy, and adequate remedy" such that Rule 106 does not apply. Thus, a statutory "legal remedy" renders Rule 106(4)(a) "inapplicable." *See C Bar H, Inc. v. Bd. of Health*, 56 P.3d 1189, 1191 (Colo. App. 2002); *see also Wilson v. Avon*, 749 P.2d 990, 992 (Colo. App. 1987) (explaining that a

statutory remedy for judicial review was a "plain, speedy, and adequate remedy" that "preclud[ed] judicial review under C.R.C.P. 106(a)(4)").

As described above, the General Assembly included a specific statutory remedy in the Special Districts Act for judicial review of a designated election official's determination that a recall petition is sufficient—C.R.S. § 32-1-910(3)(f). This provision establishes (1) who can seek review; (2) what is reviewable; and (3) the procedure for obtaining review. It is a complete remedy through which those who have standing to seek review of a designated election official's sufficiency determination may obtain relief. It is a "plain, speedy, and adequate remedy."

The need for expedited judicial review of a recall petition (filing within five business days) reflects the constitutionally warranted urgency associated with resolving such a dispute, as the Constitution directs that judicial review "shall be had and determined ***forthwith***." Colo. Const. art. XXI, sec. 2 (emphasis added). This urgency protects the fundamental right of voters to seek recall of officials. Where voters are concerned that their elected representatives are unresponsive or worse, the need to test whether those officials should stay in office does not lend itself to the extended time periods associated with an appeal brought under Rule 106(a)(4), which includes compiling the administrative record and a lengthy briefing schedule. Hence, the General Assembly was warranted in adopting a specific statutory avenue for judicial review of contests over recall petitions. And Plaintiffs were not at liberty to ignore that remedy in favor of one that will make the exercise of this fundamental right illusory. *See Shroyer*, 550 P.2d at 311(explaining that "limitations on the power of recall must be strictly construed").

Plaintiffs had no choice but to utilize this procedure, but they chose not to do so. But neither the Special Districts Act nor Rule 106(4)(a) gave Plaintiffs such discretion. Plaintiffs' decision not to file for judicial review under C.R.S. § 32-1-910(3)(f) deprives this Court of jurisdiction over their claims, and the Court must dismiss the action. *See State, Dep't of Rev.,*

Motor Vehicle Div. v. Borquez, 751 P.2d 639, 644 (Colo. 1988) ("when the legislature has provided a statutory right of review, the statutory procedure is the exclusive means to secure review" and failure to comply with the statute leaves the court "with no jurisdiction to act" (quoting *Barber v. People*, 254 P.2d 431, 434 (1953))).

II. Each individual claim should be dismissed under Rule 12(b).

Even if the Court does not dismiss the entire action for lack of jurisdiction, each claim should be dismissed under Rule 12(b) for either lack of jurisdiction, lack of standing, or failure to state a claim upon which relief can be granted.

A. The First and Sixth Claims for relief impermissibly ask the Court to review the "statement of the grounds on which the recall is sought."

In the first claim for relief, Plaintiffs contend that the Designated Election Official erred in finding the petition sufficient because the statement of grounds for the recall includes "false statements." The sixth claim for relief repackages the claim as a due process challenge, arguing that the "[r]efusal to determine the falsity of the allegations prior to the circulation of the petitions containing libelous statements violated the Directors [*sic*] procedural due process rights." (Compl. ¶ 70.) Both approaches fail.

1. <u>Neither the Designated Election Official nor this Court can review the content of the statement of the grounds for recall</u>.

Both the Constitution and the statute make plain that a designated election official and the court lack jurisdiction to consider whether the grounds for recall contains "false statements." The Constitution states that the availability of judicial review over a sufficiency determination "***shall not*** be held, or construed, to refer to the ground or grounds assigned in such petition for the recall of the incumbent sought to be recalled from office thereby." Colo. Const. art. XXI, sec. 2 (emphasis added). Although the statute prohibits a "profane or false statement" in the statement of the grounds for recall, it then provides the voters are the "***sole and exclusive judges*** of the ***legality***, reasonableness, and ***sufficiency*** of the grounds on which the recall is sought." C.R.S.

§ 32-1-909(4)(c) (emphasis added). The requirement that a petition not contain a "profane or false statement" is a legal requirement. As the "sole and exclusive judges" as to the "legality" and "sufficiency" of the "grounds on which the recall is sought," it is for voters to determine if a stated ground is "false" or not. To emphasize the point, the statute expressly states that the statement of "grounds are not subject to a protest or to judicial review." *Id.* The statute then says again "the statement of the grounds on which the recall is sought provided pursuant to section 32-1-909(4)(c) is not subject to such [judicial] review." *Id.* § 32-1-910(3)(f).

Moreover, this Court's jurisdiction is limited to reviewing the Designated Election Official's "determination that a recall petition is sufficient or not sufficient." *Id.* The sufficiency determination encompasses ***only*** the following questions: Was the petition timely completed and filed; does it have the required circulator affidavits; and did enough eligible electors sign the petition? *Id.* §§ 32-1-910(3)(a) & (c). None of those grounds include the truthfulness of the statement of grounds for recall. Since the truthfulness of the statement did not provide a basis for the Designated Election Official to deem the petitions insufficient, it follows that this Court cannot find he erred by declining to consider an issue the statute did not give him jurisdiction to consider. *Cf. Wilson*, 749 P.2d at 992 (explaining that, "[w]here, as here, the lower tribunal had no discretion or jurisdiction to consider [the appealed issue] as a matter of law, review of this issue under C.R.C.P. 106(4)(a) is unavailable"). Thus, Plaintiffs' attempt to have this Court review the content of the statement of grounds for recall fails for lack of jurisdiction.

2. The Court lacks jurisdiction to review pre-circulation conduct.

The gravamen of the first and sixth claims for relief are that the Designated Election Official should not have permitted the petitions to be circulated with the allegedly false statements in them. As the complaint explains, Plaintiff Taylor "objected to the petition approvals on December 16, 2023, based on remaining false statements." (Compl. ¶ 8.) And the due process claim is explicit that their issue is that the "[r]efusal to determine the falsity of the

allegations ***prior to the circulation*** of the petitions containing libelous statements violated the Directors [*sic*] due process rights." (*Id.* ¶ 70 (emphasis added).) As these claims concern pre-circulation conduct, there are additional jurisdictional defects.

The claims raise pre-circulation conduct and, specifically, the Designated Election Official's approval of the petition as to form. However, the statute does not permit or provide any avenue for judicial review of a designated election official's approval of a petition as to form. *See* C.R.S. §§ 32-1-909 & -910(f). Rather, as explained above, the statute limits judicial review to the designated hearing officer's ***sufficiency*** decision. As the statute does not permit review of the approval of the petition's form, the Court lacks jurisdiction over it under C.R.S. § 32-1-910(3)(f).

Where the General Assembly provides remedies for addressing petition forms before petition circulation begins, it is direct in doing so. For example, challenges to ballot titles that appear on initiative petition can only be appealed based on specific statutory authority. *See* C.R.S. § 1-11-203.5(2) (local government initiative ballot titles can be contested in district court within five days after they are set); *id.* § 1-40-107(2) (statewide initiative ballot titles can be contested to Supreme Court within seven days after they are set).

Rather than authorize legal remedies to address the grounds for recall as stated in a petition, the General Assembly provided office holders with a clear political remedy. For the ballot presenting any recall question, a district director "may submit to the designated election official…a statement of not more than three hundred words in support of the director's retention." C.R.S. § 32-1-911(3)(a). The director's statement is juxtaposed on the recall ballot against the grounds for recall that appeared on petitions. *Id*. And the statute specifies that the director's statement, supporting his or her retention in office, "shall not include any profane or false statement in the statement in support of his or her retention." *Id*. As is true for the recall's

statement in support of recall, there is no judicial avenue provided in statute for any elector of the district to contest the truth or falsity of the director's statement in support of retention. It is up to the voters—not the designated election official or the courts—to decide on the merits of the arguments that have been presented.

The General Assembly's logic for not affording disgruntled persons a judicial avenue for their political disputes is obvious. The potential back-and-forth of charges about false political statements could be endless and could frustrate the exercise of the fundamental right of recall.

> Article XXI of the Colorado Constitution reserved the power of recall to the people. ***The recall power reserved was political in nature***, and the constitution provides that "the electors shall be the sole and exclusive judges of the legality, reasonableness and sufficiency of such ground or grounds assigned for such recall . . . ." The ***trial court's inquiry into the sufficiency of the statement of the grounds for recall clearly infringes upon the powers reserved by the people*** and was error.

Bernzen v. City of Boulder, 525 P.2d 416, 420 (Colo. 1974). As the Court states, the power of recall is "purely political" in nature. *Id.* at 418.

As the Designated Eleetion Official observed, the cautionary language about false statements supporting or opposing recall of a district elected officials is directory rather than mandatory. "Unless an election regulation expressly declares that strict compliance with its requirements is essential, courts should construe such provisions to be directory in nature and not mandatory." *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994). There is no such declaration that strict compliance is required to prevent false statements on recall petitions. As a directory provision, then, the statutory admonition against false statements is not construed to impose a condition that, if it is violated, will invalidate the recall petition. *See City & Cnty. of Denver Sch. Dist. No. 1 v. Denver Classroom Teachers Ass'n*, 2017 CO 30, ¶ 20.

Accordingly, Plaintiffs ask this Court to weigh into their "purely political" dispute, an extra-statutory move that would be both unprecedented and unsupported by law. The Court should dismiss these claims.

3. Plaintiffs do not plead a right to support their due process claim.

Nor does recasting the claim as one of due process rescue it because the "first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Whatley v. Summit Cnty. Bd. of Cnty. Comm'rs*, 77 P.3d 793, 798 (Colo. App. 2003) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (2000)). With respect to the content of the recall petition's statement of grounds for recall, the right created by state law is vested in the citizens seeking recall—they decide on the grounds of recall, which is made plain by the lack of jurisdiction to review the content of the statement of grounds for recall (*see supra*). Plaintiffs' contention that they may litigate their political dispute as a matter of petition sufficiency is without any legal support and is contrary to both the exercise of the fundamental right of recall and the Supreme Court's holding in *Bernzen, supra*. In the absence of a right, Plaintiffs have failed to state a claim upon which relief can be granted.

B. Plaintiffs' second claim for relief fails for several reasons.

Plaintiffs' second claim for relief ("intimidation of recall opponents") argues that security personnel or other employees or agents of the Heather Gardens Homeowners' Association (i.e. not the special district) violated the First Amendment rights of two district electors. This claim fails as a matter of law for three reasons.

1. The Court does not have jurisdiction over the claim under the statute.

The alleged misconduct is not reviewable under C.R.S. § 32-1-910(3)(f) because it does not concern the timeliness of the petition, whether enough electors signed the petition, or whether the petition had the required affidavits. *See* C.R.S. §§ 32-1-910(3)(a) & (c). As explained above, since the Designed Election Official did not have jurisdiction in this action to

review whether the homeowner's association improperly interfered with a resident's free speech rights, this Court does not have jurisdiction over the claim. *Cf. Wilson*, 749 P.2d at 992.

2. Plaintiffs do not have standing to raise this claim.

This claim rests on the alleged interference with the free speech rights of two electors of the district, Diane Wachter and Chriss Shott. (*See* Compl. ¶¶ 36-39.) However, neither is a plaintiff. Plaintiffs are attempting, therefore, to assert an injury to third parties. The alleged violation of a non-party's rights is not a legally cognizable injury to Plaintiffs, and the complaint does not include any factual allegations or theories as to how Plaintiffs can step into their shoes. As Plaintiffs did not suffer any legally cognizable injury by the alleged intimidation of those two supporters, they lack standing. *See Jones v. Samora*, 2016 COA 191, ¶¶ 33-35 (rejecting third-party standing in recall election where official claimed supporters faced intimidation, as such intimidation was not an "injury" to the recalled official).

3. Plaintiffs have failed to allege a claim for which relief can be granted.

Even if there is jurisdiction to consider this conduct, the claim still fails because Plaintiffs do not allege the conduct affected any signatory to the recall petition.[3] The complaint does not allege that the conduct led a single voter to sign the recall petition who otherwise would not have signed it—let alone affecting enough signatures that the petition would have been found to be insufficient. If the conduct did not affect any signatories to the petition, it necessarily follows that there were no grounds for the Designated Election Official to find the petitions insufficient

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[3] Additionally, the claim fails because the First Amendment does not apply to a homeowner's association acting in a non-governmental capacity. The homeowner's association is not a "state actor," and the complaint does not allege it was functioning in a quasi-governmental capacity. *See Hobaugh v. Indian Peaks Lexington HOA, Inc.*, Case No. 2022CV24, 2023 Colo. Dist. LEXIS 31, at **23-26 (Boulder Cnty. D. Ct. Mar. 22, 2023); *compare Bock v. Westminister Mall Co.*, 819 P.2d 55, 61 (Colo. 1991) (approving First Amendment claim against mall because proof of "governmental involvement exists" and mall was "effectively" a "public place"). Since there is no First Amendment claim, this claim fails to state a claim upon which relief can be granted.

under the statute because of it. *See* C.R.S. §§ 32-1-910(3)(a) & (c). Thus, the allegations fail to state a claim, and the claim should be dismissed under Rule 12(b)(5).

C. Plaintiffs have failed to allege any cognizable deficiencies in the recall petitions.

In their third claim, Plaintiffs assert three purported deficiencies with the recall petitions. The first two issues concern the validity of the notarizations of certain circulator affidavits (Compl. ¶¶ 43-50), while the third argument is that the petition form was incomplete for failure to include a cost estimate (*id.* ¶ 51.). These allegations fail to state a claim under Rule 12(b)(5).

1. Plaintiffs fail to allege they properly asserted these issues in their protests, which is a necessary element of their claim.

A protest to a sufficiency determination relating to a district director "***must*** set forth ***specifically*** the grounds of the protest." C.R.S. § 32-1-910(3)(d)(I) (emphasis added). This specificity standard is constitutionally mandated, as Article XXI requires of recall petition protests that they "set[] forth ***specifically*** the grounds of such protest." Colo. Const., art. XXI, sec. 2 (emphasis added). As to petition protests subject to the mandate that they state "specifically the grounds of such protest," the Colorado Supreme Court has held this requirement is jurisdictional, and "the [election officer who receives a protest] is without power to act in the absence of a substantial compliance with these requirements." *Brownlow v. Wunsch*, 83 P.2d 775, 782 (Colo. 1938) (citing *Ramer v. Wright*, 159 P. 1145, 1146 (Colo. 1918)).

Plaintiffs do not allege they "set forth specifically" in their protests either the notarization or cost estimate issues.[4] While the failure to plead this element of their claim should lead to its

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[4] As explained in the Designated Election Official's decision, Plaintiffs did ***not*** include these issues in their protests, choosing instead to raise them in closing argument at the hearing. The Court would have been apprised of this from the Designated Election Official's decision, but Plaintiffs did not attach the decision to their complaint. The Court need not reach that omission, however, because, as explained above, Plaintiffs' claim still fails based upon their failure to plead facts required to establish its legal elements.

dismissal—as it is ***jurisdictional***—it should be noted that, even if it could be cured at the hearing, *cf.* Colo. R. Civ. P. 15(b) (and, to be clear, it ***cannot*** be cured), Plaintiffs do not allege that happened by, for example, giving the recall committee prehearing notice, raising these issues in opening arguments, or introducing evidence related to these issues during the hearing. Since Plaintiffs can only prevail on this claim if they satisfied this "jurisdictional" requirement—in other words, it is a necessary element of their claim—the complaint must allege that the protests set forth these issues. In the absence of such allegations, their claim fails and should be dismissed under Rule 12(b)(5).

2. The statutes upon which Plaintiffs rely for their notarization date and cost estimate claims do not apply to special district recalls.

Plaintiffs rely upon C.R.S. §§ 1-4-905(2)(III) and 1-40-111(2)(b)(III) in arguing that the dates of the circulator affidavit signature and notarization must match. (Compl. ¶ 43.) Neither provision of these statutes addresses recall elections, as the former concerns petitions to nominate candidates and the latter statewide ballot initiatives. Thus, Plaintiffs' reliance on these statutes is unwarranted, and it would be erroneous as a matter of law for the Court to look to them as setting forth requirements for district director recall petitions. For the cost estimate requirement, Plaintiffs cite C.R.S. § 1-12-108(3.5). (*Id.* ¶ 51.)

These statutory provisions appear in Title 1 of the Colorado Revised Statutes, not the Special Districts Act. This is a consequential distinction because the Special Districts Act precludes application of Title 1 procedures and requirements to the recall of special district directors.[5] Specifically, the Special Districts Act provides: "Procedures to recall a director of a special district are governed by this part 9." C.R.S. § 32-1-908. Nowhere does Part 9 of the

[5] In 2014, the General Assembly repealed language in C.R.S. § 32-1-906 that provided for the application of Article 12 of Title 1, in which the cost estimate provision appears, to special district recall elections. *See* 2014 Sess. Laws, Chap. 170, p. 623, § 15. It is incumbent on the DEO, as it would be on any court, to give effect to the General Assembly's purpose in amending

Special Districts Act incorporate the provisions from Title 1 Plaintiffs assert. To the contrary, the Special Districts Act includes specific requirements for the form of recall petitions and for circulator affidavits. Conspicuous by their absence from the requirements in the Special Districts Act are either deficiency alleged by Plaintiffs. *See id.* §§ 32-1-909(4) & -910(2)(c). If the General Assembly intended for these requirements to apply to the recall of directors, it obviously knew how to include that in the statute. Its decision not to was intentional, and, as such, these claims fail. *See Shroyer, supra*, 550 P.2d at 311(explaining that "limitations on the power of recall must be strictly construed").

3. Plaintiffs fail to allege facts sufficient to support their notary disqualification argument.

Plaintiffs contend that two witnesses testified that the recall petition's reference to "Resident Services Coordinator" was a reference to "Michelle Audet," who notarized certain circulator affidavits. (Compl. ¶¶ 48-49.) This, they say, violates the notary statute, which prohibits a notary from being "named in the record to be notarized." (*Id.* ¶ 47.)

Plaintiffs reference but inaccurately describe *Griff v. City of Grand Junction*, 262 P.3d 906 (Colo. App. 2010), as supporting their argument. In that case, protestors sought to invalidate an annexation petition section that was notarized by a person who signed that section of the petition. *Id*. at 908. The court held as follows:

> "We conclude that the narrow language in section 12-55-110(2)(b)6 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."

Id. at 911 (emphasis added). This restriction "function[s] to disqualify only the notaries who are designated by name on the face of the document they notarized." *Id*. at 910 (emphasis added).

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and repealing statutes. *See Empire Lodge Homeowners Ass'n v. Moyer*, 39 P.3d 1139, 1152 (Colo. 2001).

Examples of "one who is named as the subject matter of the petition" would be "a political nominee or a sponsor whose name is printed on the petition for all signatories to view." *Id.*

Plaintiffs do not allege that Audet was "designated by name on the face of the document" notarized or her name is "printed on the petition for all signatories to view." Their complaint is devoid of allegations meeting the necessary threshold of being one of "the most suspect situations," and, as such, the claim fails.

D. The court lacks jurisdiction over Plaintiffs' fourth claim.

The fourth claim ("deficiencies in petition circulation") asserts that certain petitions may have been left unattended while being circulated. (Compl. ¶ 54.) Plaintiffs, however, have not alleged facts necessary to establish this claim.

An unaccompanied petition conceivably could implicate whether enough voters validly signed the recall petition. Here, however, Plaintiffs do not allege ***anyone*** signed an unattended petition or that they presented any evidence during the hearing that someone signed an unaccompanied petition. Relatedly, an unaccompanied petition could implicate the validity of a circulator affidavit, as circulators must attest that they did not leave their petition unattended. *See* C.R.S. § 32-1-910(2)(c). But Plaintiffs do not allege ***which*** petition(s) were left unattended by ***which*** circulator(s). Nor do they allege if any petitions, if they were unattended, contained any signatures that were counted toward the total of sufficient signatures seeking recall of the four directors or even were filed with the Designated Election Official. The mere fact that Plaintiffs allege there were unaccompanied petitions does not establish that the Designated Election Official erred in his validation of signatures or his consideration and rejection of the claim. As such, Plaintiffs have failed to assert sufficient allegations to support this claim.

E. Plaintiffs fail to allege facts necessary to show any circulator misrepresented the grounds of recall.

In their fifth claim ("misrepresentation of purpose"), Plaintiffs contend that Martha Karnopp misrepresented the grounds for recall in a public meeting about the recall. (Compl. ¶ 60.) Ms. Karnopp, they say, was a petition circulator and, therefore, this requires striking of the petitions she circulated. (*Id.* ¶¶ 61-62.) The Special Districts Act does indeed require a petition circulator to attest that (s)he "made no misrepresentation of the purpose of such petition to any signer of the petition." C.R.S. § 32-1-910(2)(c). However, there is a jurisdiction problem with the argument, and, in any event, the allegations do not support the claim.

As to jurisdiction, Plaintiffs do not allege that Ms. Karnopp's statements affected even a single voter who signed the petition. They do not contend any person signed the petition after hearing, or because of, the alleged misrepresentations as opposed to the statement for grounds of recall that appears on the petition. Or that, if persons signed the petition based on alleged misrepresentations, that their signatures were counted toward the total of legally sufficient signatures found to exist by the Designated Election Official. In the absence of such evidence, there were no grounds for the Designated Election Official to disqualify any signatures gathered by Ms. Karnopp. Indeed, had the Designated Election Official invalidated the signatures of everyone who signed a petition circulated by her, it would have violated the constitutional rights of the voters who signed the petitions. This, the Constitution and the Special Districts Act do not allow. Colo. Const. art. XXI, sec. 2; C.R.S. § 32-1-909(4)(c).

Nor have Plaintiffs alleged sufficient facts to support their claim. First, the circulator affidavit requirement concerns a person's acts when circulating a petition. *See* C.R.S. § 32-1-910(2)(c). Plaintiffs do not allege that Ms. Karnopp made the statements while she was acting as a circulator. Second, even if she made the statements in her role as a circulator, Plaintiffs have not alleged ***which*** signatories signed the petition if and when the misrepresentation occurred. Plaintiffs point to no legal authority allowing the Designated Election Official to invalidate

someone's signature because, at some other time to some other person(s), the circulator made a misstatement. The Supreme Court's decision in *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996), does not stand for that proposition, as the defects that led to invalidation in that case affected identifiable groups of signatories. Here, in contrast, Plaintiffs do not allege that all the signatories to petitions A5 and C10 heard the alleged misrepresentation (or that any signatory heard the statements). (*See* Compl. ¶ 62.) Accordingly, the Court should dismiss the fifth claim.

F. Plaintiffs have not alleged any procedural due process violations.

Finally, Plaintiffs appear to allege there were errors in the conduct of the hearing that violated their procedural due process rights. Plaintiffs' claim is effectively unintelligible. The cornerstones of procedural due process are notice and an opportunity to be heard. *See Mountain States Tel. & Tel. Co. v. Dep't of Lab. & Emp.*, 520 P.2d 586, 588 (Colo. 1974). None of Plaintiffs allegations show a violation of the rights to notice or be heard:

- Evidence of protest as to form and petition deficiencies. Plaintiffs do not allege that they were denied the ability to make these arguments to the Designated Election Official, only that his decision did not reference specific "evidence" on the issues. (Compl. ¶ 73.) Due process does not guarantee Plaintiffs any particular form of decision, and as explained above, Plaintiffs' claims on these issues fail for ***legal reasons*** not for lack of evidence. Hence, there was no error.

- Admission of signed petitions. Although Plaintiffs take issue with how the recall petitions were admitted into evidence, they do not allege that the petitions were not admitted. (*Id* ¶ 74.) Nor could they, because such an allegation would violate Rule 11. Given that the original recall petitions were admitted into evidence by the Designated Election Official at the outset of the hearing, this allegation does not sustain their claim.

- Exhibit list. Plaintiffs again take issue with the form of the Designated Election Official's decision in that it allegedly did not list some documents as exhibits. (*Id.* ¶ 75.) But Plaintiffs do not allege how this error relates to the sufficiency decision or that it affected their ability to present their case. Put plainly, they do not allege they were denied an opportunity to be heard, and they have no due process right to a particular form of decision.

In sum, Plaintiffs do not allege a lack of notice or any defect in the proceeding that prevented them from being heard. As such, they have not alleged a viable procedural due process claim.

III. At a minimum, the Court must dismiss the "Eligible Electors of Heather Gardens Metropolitan District" plaintiff group.

This action was brought by two plaintiff groups: seven (7) plaintiffs grouped as "eligible electors of Heather Gardens Metropolitan District" and two (2) plaintiffs grouped as "HGMD directors subject to recall." The former group, the eligible electors, lacks standing.

Under the statute, only two groups of persons have standing to seek review of a designated election official's sufficiency determination: (1) the director sought to be recalled (or their "representative") and (2) a majority of the recall petition committee. *See* C.R.S. § 32-1-910(3)(f). That's it, and the eligible electors Plaintiffs qualify as neither.

The complaint makes clear that Daniel Taylor and Robin O'Meara are the only directors subject to recall who are suing the Designated Election Official over the sufficiency determination. The other two district directors against whom recall petitions were filed, Rita Effler and Craig Baldwin, are not parties to this action. Therefore, there is no basis for refusing to schedule their recall election, as judicial review of the sufficiency determinations relating to their recall petitions has not been commenced. Further, the eligible electors are not pursuing the action in a "representative" capacity for any director, including Effler and Baldwin.[6] The complaint does not allege that any of the eligible elector Plaintiffs are members of the recall petition committee.

[6] The only representative who could file an action on behalf of a director subject to recall is a lawyer. *See* Colo. R. Civ. P. 11. The complaint does not allege that any of the eligible electors are lawyers for the directors, and none of them signed the complaint in a representative capacity.

Accordingly, as the eligible elector plaintiffs do not have standing under the statute to challenge the sufficiency determination, they should be dismissed. Further, any assertion that recall elections for Director Effler and Baldwin, who did not join in this complaint within the five business days after the Designated Election Official issued his decision, are suspended by operation of the filing of this Rule 106(4)(a) action should be denied.

WHEREFORE, the Designated Election Official respectfully requests that this Court dismiss the Complaint for lack of jurisdiction or, in the alternative, dismiss each claim for lack of jurisdiction, lack of standing, or failure to state a claim upon which relief can be granted.

Respectfully submitted this 23rd day of April, 2024,

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2024, a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)** was served electronically via CCEF to:

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s/ Erin Mohr