DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Court Phone: 720-865-8301 NORMA V. ANDERSON and ROBERT L. HAGERDORN, Plaintiffs, v. SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado; and ASHLEY BRILLANTE and TOM STOKES, as designated representatives of the proponents of Initiative # 2013-2014 22, Defendants.	**σ COURT USE ONLY σ** Case No.: 2013CV34322 Div: 275

COURT'S ORDER RE: FIRSTAMENDED VERIFIED C.R.S. § 1-40-118(1) PROTEST AND COMPLAINT FOR A FORTHWITH HEARING AND OTHER RELIEF

THIS MATTER coming to be heard upon Plaintiffs' FIRSTAMENDED VERIFIED C.R.S. § 1-40-118(1) PROTEST AND COMPLAINT FOR A FORTHWITH HEARING AND OTHER RELIEF, the Court having considered said PROTEST and being fully informed of the premises, enters the following Order:

This case arises from a citizen-initiated petition to place on the November 2013 coordinated election ballot a proposed constitutional amendment to increase funding for Colorado's educational system. The ballot initiative, # 2013-2014 22, is commonly referred to as Initiative 22 or Amendment 66. In order for the initiative to appear on the ballot, the proponents, who appear in this lawsuit via their designated representatives, Defendants Ashley Brillante and Tom Stokes, are statutorily required to collect 86,105 valid signatures. With the help of petition circulators, the proponents of Initiative 22 circulated petition sections and collected signatures between June and August 2013, and a total of 165,710 signatures with the accompanying affidavits of the petition circulators were tendered to the Secretary of State for verification. The Secretary invalidated 75,890 signatures, but determined that the remaining 89,820 signatures were valid. Accordingly, on September 4, 2013, the Secretary issued a Statement of Sufficiency, which certified Initiative 22 for the November 2013 coordinated election ballot.

The initiative power is a fundamental right in the State of Colorado. COLO. CONST. art. V, § 1(1) (stating, ". . . the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the

general assembly"); COLO. CONST. art. V, § 1(2). (stating, "[t]he first power hereby reserved by the people is the initiative").

In addition to expressly reserving the initiative power for Coloradans, Article V, Section 1 contains a framework for the initiative process, including a requirement that each ballot initiative petition be accompanied by an affidavit from the petition circulator, which attests to the validity of each signature on the petition. These verified petitions "shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors." COLO. CONST. art. V, § 1(6) (emphasis added). Although the constitution's initiative provisions "shall be in all respects self-executing," the "form of the initiative . . . petition may be prescribed pursuant to law." COLO. CONST. art. V, § 1(10).

In their Verified Complaint, Plaintiffs Norma V. Anderson and Robert L. Hagedorn protest the Secretary's sufficiency determination on grounds that a number of circulator affidavits, which accompanied the signed petition sections, were statutorily deficient because the circulators allegedly: (1) improperly verified their own tendered forms of identification; (2) failed to provide their permanent address; and (3) provided an invalid form of identification. See Verified Complaint, at 6-8. Plaintiffs ask the Court to: (a) declare the invalidity of at least 39,555 signatures accompanying the statutorily deficient circulator affidavits; and (b) render void Initiative 22's placement on the November ballot.

Plaintiffs further contend that strict compliance with the Title 1, Article 40, which governs the initiative process, "is necessary to avoid fraud, abuse, and mistake in the petition process" and, without strict compliance, "there is no way to know that the personal information provided by the petition circulator on the circulator affidavit is true or accurate." Verified Complaint, at ¶¶ 57, 65-66, 74-75.

The substantial compliance standard is expressly embraced in the statutes:

> (5) Written entries that are made by petition signers, circulators, and notaries public on a petition section that substantially comply with the requirements of this article shall be deemed valid by the secretary of state or any court, **unless**:
>
> (a) Fraud, as specified in section 1-40-135 (2) (c), excluding subparagraph (V) of said paragraph (c), is established by a preponderance of the evidence;
>
> (b) A violation of any provision of this article or any other provision of law that, in either case, prevents fraud, abuse, or mistake in the petition process, is established by a preponderance of the evidence;
>
> (c) A circulator used a petition form that does not comply with the provisions of this article or has not been approved by the secretary of state.

C.R.S. § 1-40-118(5) (emphasis added).

However, Plaintiffs argue the legislature excepted sections 5(a), (b) and (c) from the substantial compliance standard and requires strict compliance to avoid fraud, abuse, and

mistake in the petition process. Therefore, Plaintiffs further argues that compliance with C.R.S. § 1-40-111(2)(b)(I) requires strict compliance pursuant to C.R.S. § 1-40-118(5) because it specifically enacted for the purpose of preventing fraud, abuse, or mistake in the petition process.

C.R.S. § 1-40-111(2)(b)(I) provides that a notary public cannot notarize a petition circulator affidavit unless:

- The circulator has fully and accurately completed all required personal information on the affidavit;
- The circulator presents a form of identification as defined in C.R.S. § 1-1-104(19.5), and;
- The notary public specifies the form of identification presented to him or her on a blank line that is part of the affidavit form.

The right of initiative is a fundamental constitutional right; as such, any statutes implementing that right must be liberally construed in order to facilitate the exercise of this right. *Loonan v. Woodley*, 882 P.2d 1380, 1383-84 (Colo. 1994). Accordingly, Plaintiffs' position has been rejected by the Supreme Court for at least nineteen years, as strict compliance has been held to be inapplicable to controversies such as these. *Id*. at 1384.

Instead, the standard applicable to matters arising under the initiative statutes is "substantial compliance." The test for "substantial compliance" is three-fold: (1) the extent of non-compliance in the particular ballot issue before the court, that is, a court should distinguish between isolated examples of oversight and what is more properly viewed as systematic disregard for the statute's requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the noncompliance, and (3) whether it can reasonably be inferred that there was a good faith effort to comply or whether the noncompliance is more properly viewed as the product of an intent to mislead the electorate. *Id.* In *Loonan*, the determinative factor was the second one – whether the statute's purpose was substantially achieved. *Id*.

The right of initiative must "not [be] hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Loonan, supra*, 882 P.3d at 1384 (citations omitted). Neither may an election official rely on the "mechanistic application of administrative policies" in the evaluation of signatures or circulators. *Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 899 (Colo. 1992). Where petitions are invalidated in the trial court based on a "hypertechnical approach" toward pertinent laws, the Colorado Supreme Court has reversed the district court. *Fabec v. Beck*, 922 P.2d 330, 345 (Colo. 1996).

The substantial compliance standard specifically applies to the way in which a notary performs his or her job. For instance, where a notary failed to include his notarial stamp on one or more petitions, the court could determine substantial compliance of the notarial act from other sources (i.e. other notarizations which includes seal by same notary). *Id*. The Supreme Court found support for this approach in the fact that there were criminal statutes under the

notary act that provided their own disincentive to commit fraud in the process. *Id*. Criminal penalties exist today for knowing and willful violation of the notary statute. C.R.S. § 12-55-117. The safeguard cited by *Fabec* is in place here as well.

There is no evidence that there was fraud and, therefore, the only issue for the Court is to determine if the challenges made by the Plaintiffs fail or pass the substantial compliance test.

Did some circulators improperly verify their own tendered forms of identification?

The substance of Plaintiffs' argument is that in the affidavit there is a blank to fill in the type of identification used to verify the identity of the circulators. Plaintiffs argue that in order for the notary to notarize an affidavit the notary must fill in the blank to comply with C.R.S. § 1-40-111(2)(b)(I), which requires the notary to specify the form of identification presented.

This Court finds that Plaintiffs' protest regarding this issue will fail whether the compliance standard is substantial or strict.

Notably, the statute does not require the notary to "print" or "write" the ID information on the jurat, as is required for the affixing of all personal identifying information by and about the petition signer. C.R.S. § 1-40-111(1) (each signer "shall print his or her own name, the address at which he or she resides,… and the date of signing"). Nor does the statute require the notary to "complete" that line, as the circulator must do in connection with all personal information placed on his affidavit. C.R.S. § 1-40-111(2)(b)(I)(B) (circulator must have "fully and accurately completed all of the personal information on the affidavit"). Instead, it is the job of the notary to "specify" circulator ID information in the notary block.

Where the General Assembly uses different words within the same statute, the presumption is that the legislature intended those words to have different meanings. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008). Otherwise, the courts would have to assume that the legislature uses language idly and without a design to have different impacts through the specific verbiage employed. *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003).

Thus, "specify" cannot mean, or be the functional equivalent of, "print" or "complete." That term must necessarily be broader and thus encompasses the notary's act of ensuring that the required information was inserted in the blank where it was supposed to be placed and is accurate.

Therefore, this Court finds that the affidavits, where the circulator filled in the blank with the type of identification presented meets the strict compliance test.

On the other hand, even if it is required that the notary must fill the blank with the type of identification presented, the Court finds there was substantial compliance.

By signing the affidavit, regardless who affixes an accurate statement of a circulator's name and form of identification in the jurat, the notary adopts and verifies the information by notarizing the affidavit.

There is no allegation that the information entered (the name of the circulator and his or her form of identification) is inaccurate in any way. Neither does the fact that the circulator entered this information suggest that there was fraud in the process or mistake by the circulator

entering his or her own identifying information in the jurat. Of the hundreds of petitions challenged on this ground, there is no evidence of circulator fraud.

The Protest simply alleges that the wrong person placed completely accurate information in the jurat. This is not fraud. Plaintiffs have effectively conceded that there was no evidence of circulator fraud, as specified by statute, or anything other than a technical reason for invalidating signatures.

As to *Loonan's* three-part test, first, as to the extent of non-compliance, accurate circulator information and ID information was placed in all jurats. The record is void of any evidence suggesting "systematic disregard" for the statute's protections.

Second, as to whether the purpose of the statute was substantially achieved, the statutory goal was to provide an accurate statement of the circulator's name and form of ID. That is not information that becomes more valid if the notary writes it down since the notary must rely on statements from the circulator and the ID provided by the circulator. In any event, there is no allegation that the information entered by circulators was inaccurate. Thus, the state's goal was entirely achieved here.

Third, this was clearly a good faith attempt to comply with the statute rather than some effort to mislead voters or election officials. Again, the objective of this effort was to ensure that the information blanks were completed by a person with knowledge. Given the notary's role in validating this information, there was no attempt to mislead anyone in the process.

Did the affidavit without permanent addresses invalidate the affidavit?

The Plaintiffs argue that each Petition circulator who signed the circulator affidavits attached to the Petition sections was required to include his or her permanent address showing that he or she is a resident of the State of Colorado. See C.R.S. § 1-40-111(2)(a). The temporary vs. permanent address requirement springs solely from the Secretary's regulations. There is no statutory authority or definition of how one would differentiate whether an address is permanent or temporary. The statute itself requires only that the circulator provide "the address at which he or she resides, including the street number and name, the city and town, (and) the county." C.R.S. § 1-40-111(1).

Of course, not every person has a permanent residence. There are circulators who may be homeless, and they need not have anything more than a physical address in order to vote. See C.R.S. § 1-2-102(1)(a)(II) (for voter registration, a mailing address shall constitute the homeless individual's residence). Certainly, that same physical address is sufficient to permit them to participate in the exercise of another fundamental right – speaking out on a public issue as an initiative circulator. 8 CCR 1505-5, SOS Election Rule 15.3.2.b (homeless circulators need only use an address where they were then currently residing).

Arguably, since there is no definitions of permanent or temporary, whether an address is permanent or temporary is determinably only by the circulator. Circulators may have used the temporary line to insert their address because they believe that residence is not permanent. All of the circulators in this protest category presented, and it was verified by the notary, valid forms of Colorado identification. Since every circulator in this protest category possessed valid Colorado identification, it is more likely true than not that they are Colorado residents and are

only required to provide their Colorado address. Only non-residents are required to provide a permanent and temporary addresses. Plaintiffs have not shown that there was any "fraud, abuse, or mistake" associated with this omission or that their ability to investigate petition fraud was frustrated because circulators were untraceable through the temporary addresses provided within this grouping. There must be some consequence of the non-compliance in order for it to be meaningful enough that signatures or whole petitions are invalidated. *See Clark v. City of Aurora*, 782 P.2d 771, 781 (Colo. 1989) (petitions should not be invalidated where there is "particularized information" that, "although not in literal compliance with the ordinance," establishes signer's eligibility nonetheless).

Finally, as a matter of substantial compliance, even providing a temporary address met that standard. The error, if it was one, was not particularly widespread. The purpose of the statute was substantially achieved given the availability of an effective address, denominated as temporary, for each of the affected circulators. And this was a good faith effort to comply, rather than some concerted effort to deceive. This practice substantially complied with the rules' requirement for effective address information from the circulator.

Did some circulators provided an invalid form of identification/

Plaintiffs point to persons whose listed ID is something other than a passport or a driver's license. The most prevalent instance in this category is a Colorado driver's permit.

Each individual notary public who notarized the circulators' affidavits was required to look at the each circulator's form of identification, verify it for accuracy and authenticity, and the form of identification presented is noted in the circulator affidavit. See C.R.S. § 1-40-111(2)(b)(I)(C). The required identification must satisfy C.R.S. § 1-1-104(19.5). See C.R.S. § 1-40-111(b)(I)(C)(II). Any "government document that shows the name and address of the elector" meets this requirement if the address shown is in the state of Colorado. C.R.S. § 1-1-104(19.5)(a)(VII), (b). Clearly, a Colorado driver's permit will meet this test, as it contains this information and more. C.R.S. § 42-2-114(1)(a)(III)(C).

In nearly all respects, the affidavits contained in Exhibit 5 list acceptable forms of identification, such as a Colorado driver's permit, a Colorado or Denver identification, or a United States passport. Only eight[1] of the 57 circulator affidavits contained unacceptable forms of identification, such as an out-of state driver's license, or vague forms of identification such as a "CODO," "PA Passport (US)" and "PA Passport[2]." The eight circulator affidavits are linked to a total of 114 petition signatures. At most, the eight circulator affidavits are isolated examples of mistaken deviations from statute and rule, rather than of an intentional effort to mislead or commit fraud.

While statutory provisions regarding the initiative process should receive a liberal construction to facilitate and not hamper the right to citizen initiatives, "[t]his right does not, however, exist without bounds." *Buckley v. Chilcutt*, 968 P.2d 112, 119 (Colo. 1998). "The breadth of our statutory construction must be limited when 'necessary to *fairly guard against* fraud and *mistake*, in the exercise by the people of this constitutional right.'" *Id.* (emphasis in original) (citation omitted). These forms of identification frustrate the purpose of the

[1] The eight circulators have permanent Colorado addresses according to the affidavits.

[2] The affidavits with the "PA Passport (US)" and "PA Passport" belong to the same circulator.

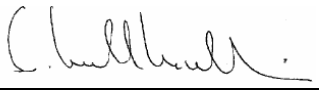
identification for verification. For instance, when the Secretary's petition verification staff is reviewing to determine if the type identification presented complies, one would have to speculate about the form of identification and whether it complies.

The failure to reject those petition sections reflects nothing more than administrative error on the part of the Secretary's petition verification staff, and not fraud or deception on the part of any of the circulators or notaries. The Court finds the eight circulator affidavits are invalid. However, invalidation of the 114 signatures linked to the eight problematic circulator affidavits is insufficient to prevent the appearance of Initiative 22 on the November ballot.

IT IS THEREFORE ORDERED that Plaintiffs' Protest is hereby DENIED.

SO ORDERED this 15th day of October, 2013.

BY THE COURT:



Hon. R. Michael Mullins
District Court Judge