

District Court, Adams County, Colorado 1100 Judicial Center Drive Brighton, Colorado 80601	DATE FILED: April 16, 2021 10:43 PM CASE NUMBER: 2021CV30004
Plaintiff: Westminster Citizens for Responsible Government, et al.	COURT USE ONLY
v Defendant: Michelle Parker, in Her Capacity as The City Clerk for the City of Westminster, Colorado	
ORDER	

This matter came before the Court for a hearing on the Complaint on April 7 and 9, 2021 (the Hearing), to address Plaintiffs’ claim that Defendant violated their recall rights under Article XXI, §§ 1 and 4, of the Colorado Constitution.¹ Having considered the testimony and other evidence offered at the Hearing, the parties’ briefs,² relevant portions of the case file, and the applicable law, the Court finds and rules as follows.

I. BACKGROUND³

This case arises from an organized recall effort to remove four Westminster city council members: namely, Mayor Herb Atchison, Mayor Pro Tem Anita Seitz, Councilmember Kathryn Skulley, and Councilmember Jon Voelz. There is no dispute that these four individuals are elective officers subject to recall provisions of state law and the Westminster City Code. Plaintiffs, Westminster Citizens for Responsible Government (WCRG), Deborah Mac Master Teter, and Gary Shea, are pursuing these recalls because they believe Westminster water rates are excessive, and that these council members are

¹ Plaintiffs also asserted a claim for relief based on rights of association, free speech, due process, and rights under 42 U.S.C. § 1983. The parties suggested those issues were not at issue for purposes of the Hearing, and neither party presented evidence specific to them, though Plaintiffs argued them in closing.

² The parties were encouraged to submit pre-hearing briefs to address matters for the Court’s resolution. To that end, Plaintiffs filed a Motion for Summary Judgment on March 12, 2021, Defendant filed a Hearing Brief in response on March 30, and Plaintiffs filed a Reply on April 6.

³ Additional background information regarding the recall process is set forth in the Order re Partial Motion to Dismiss Plaintiffs’ Second Claim for Relief for Failure to State a Claim, issued March 17, 2021.

responsible for increasing water rates, for failing to lower water rates when they had the opportunity to do so, or both.⁴

Plaintiffs prepared proposed petition forms, 19 pages in length, for each candidate, which the City Clerk reviewed and approved. Plaintiffs engaged the assistance of several community volunteers (Circulators), tasked with obtaining signatures on recall petition sections.⁵ Plaintiffs prepared an instruction sheet to assist the Circulators. Problematically, after obtaining approval of the petition forms, and without notifying the City Clerk, Plaintiffs added their instruction sheet to the petitions upon distributing them to the Circulators. The bottom of each page of the petition was numbered, and when the instruction sheet was added, the 19 approved petition pages were numbered as “Page 2 of 20” through “Page 20 of 20.”

Once circulation was complete, the sections were submitted to the Westminster City Clerk for review. The Clerk rejected dozens of petition sections due to the presence of a cover page (the instruction sheet) or evidence such a page had been removed from the section before submission to the Clerk.⁶ Plaintiffs contend the Clerk rejected hundreds of otherwise valid signatures because she applied an overly strict, technical review. They argue the Clerk should have applied the substantial compliance test, which they believe would have resulted in enough signatures to require recall elections for all four candidates.

Plaintiffs argue the additional page was merely an instruction sheet for the Circulators, that it did not materially modify the approved petition, and that voters were not misled regarding the purpose of the petition.

Defendant contends the incorporation of the instruction sheet as a cover page required her to reject signatures in petitions in which it appeared. Defendant submits that

⁴ The issue before the Court is limited to the Clerk’s determination of insufficiency. The reasonableness of water rates or the council members’ responsibility therefore are not matters for the Court’s consideration.

⁵ According to the Amended Certification of Insufficiency, Plaintiffs needed 5,009 valid signatures to trigger a recall election for Mayor Herb Atchison, and 6,098 valid signatures to trigger a recall election for Mayor Pro Tem Anita Seitz and council members Kathryn Skulley and Jon Voelz.

⁶ Signatures were rejected for various reasons, including illegible signatures, missing city or county information, or names that did not match voter rolls. But the parties focused exclusively on rejections related to the cover page at the Hearing.

the instruction sheet was not part of the approved petition and failed to include warning language as mandated by the city code. Defendant also contends the instruction sheet contained misleading language about the nature and purpose of the petition and obscured the warning language of the pre-approved petition.

II. STANDARDS AND LAW

A. Recall

“The right of recall is a fundamental right of the People. Statutes governing this right are to be liberally construed in favor of exercising such right, and any limitations on this power must be strictly construed.” *Mirandette v. Pugh*, 934 P.2d 883, 884 (Colo. App. 1997) (citing *Hazelwood v. Saul*, 619 P.2d 499 (Colo. 1980)); *see also Groditsky v. Pinckney*, 661 P.2d 279, 281 (Colo. 1983).

1. Colorado Constitution

Article XXI, § 4, of the Colorado Constitution provides that recalls may be exercised by the registered electors of a city, “under such procedure as shall be provided by law.” Cities are prohibited from requiring a recall to be signed by more than 25% of the entire vote cast at the last preceding election, as set forth in Art. XXI, § 1. *Id.*

2. Westminster City Code

Westminster City Code § 7-1-10 applies to “Elections on Recall Petitions.” The Code has specific formatting requirements for petitions, among which, specific warning language must be included at the top of each section of the petition and each signature page. Westminster City Code § 7-1-10(B). It requires petition signatures to include “the signer’s printed name, the date of signing, his or her place of residence by street and number, and the county designation...” *Id.* at (C). It sets forth the method for determining the number of signatures needed for a recall. *Id.* It does not expressly require that names and signatures must specifically match voter registration logs. The Code contains provisions for submitting signatures and amendment, but not for protesting certified results. *Id.* at (D). If a petition is insufficient after amendment, the petitioner must begin the process anew. *Id.* Plaintiffs contend – and Defendant has not disputed – that state law fills in any gaps in the municipal code.

3. State Election Law

The procedure for municipal recall elections is set forth in C.R.S. § 31-4-502. Petitions for recall must contain the name of the elective officer sought to be recalled, one such officer per petition. *Id.* at (1)(a)(I). It is to “contain a general statement, in not more than two hundred words, of the grounds on which the recall is sought, which statement shall be intended for the information of the electors of the municipality. Such electors shall be the sole and exclusive judges of the legality, reasonableness, and sufficiency of the grounds assigned for recall, and said grounds shall not be open to review.” *Id.*

The statute further requires warning language, similar to that required by Westminster’s city code:

The signatures to a recall petition need not all be on one sheet of paper. At the top of each page shall be printed, in bold-faced type, the following:

WARNING:

IT IS AGAINST THE LAW:

For anyone to sign this petition with any name other than one’s own or to knowingly sign one’s name more than once for the same measure or to sign such petition when not a registered elector.

Do not sign this petition unless you are a registered elector. To be a registered elector, you must be a citizen of Colorado and registered to vote in (name of municipality).

Do not sign this petition unless you have read or have had read to you the proposed measure in its entirety and understand its meaning.

C.R.S. § 31-4-502(1)(a)(II). The Colorado Court of Appeals has interpreted this provision to mean the warning language is required on each signature page; not on a cover page. *Mirandette*, 934 P.2d at 885 (“The plain meaning of this provision [C.R.S. § 31-4-502(1)(a)(II)] is that the warning language must be printed at the top of each page upon which a person might sign his or her name.”).

Directly below the warning, the petition must indicate the name of the person sought to be recalled and the title of the office. C.R.S. § 31-4-502(1)(b). The recall petition must be approved by the clerk as to form before it can be circulated for signatures. *Id.* at (1)(c). “The petition shall be signed by registered electors entitled to vote for a successor of the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast for all the candidates for that particular office at the last preceding regular election held in the municipality.” *Id.* at (1)(d).

B. Clerk’s Review

States and municipal authorities are entitled to create procedures and regulations for the election process, including recall elections. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The United States Supreme Court has recognized there must be “substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724 (1974)).

The Colorado Supreme Court considers a recall itself to be a “fundamental constitutional right” and the reservation of this power is to be “liberally construed.” *Groditsky*, 661 P.2d at 281. In addition to recall, voting rights and the rights of initiative and referendum are considered fundamental constitutional rights. *See Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996). In the context of the right of initiative processes, the Colorado Supreme Court has held such processes “should be liberally construed so that the constitutional right reserved to the people ‘may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.’” *Id.* (quoting *Loonan v. Woodley*, 992 P.2d 1380, 1384 (Colo. 1994)). To the extent there are deficiencies leading to a determination that petition signatures are invalid, those deficiencies are to be assessed under a standard of substantial compliance. *Id.*

In determining whether initiative proponents have achieved substantial compliance, we must consider (1) the extent of noncompliance, (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.

See also Loonan, 882 P.2d at 1384 (reviewing substantial compliance under the election regulations of Article X, § 20, of the Colorado Constitution).

Whether the substantial compliance test applies to recall petitions has not been specifically addressed in Colorado law. While municipalities have the right to regulate the recall process, such regulation is not to be so heavy-handed as to interfere with the practical ability of the public to address their fundamental constitutional rights. Legal authority consistently reflects that the People’s recall rights are fundamental voting rights and are to be liberally construed, while limitations on these rights are to be strictly construed. The rationale and purpose for applying a substantial compliance test to the initiative process applies equally to the recall process. Therefore, the Court finds that the substantial compliance test applies to the recall at hand.

III. FINDINGS OF FACT

Based on the evidence presented at the Hearing, the Court finds as follows.

A. Petition and Review History

WCRG members Jessica True and Plaintiffs Teter and Shea served as representatives of all petition signers. According to the Amended Certification, Ms. True submitted a sworn affidavit to the Clerk on August 31, 2020, providing the statement of grounds for recall pursuant to Westminster City Code § 7-1-10, and provided a 19-page petition for each official subject to recall. As submitted to the Clerk, the first page contained the required warning language and the statement that it was a petition to recall a specific individual from their office (Mayor for Mr. Atchison, Councilor for the other officers). Ms. True, Plaintiff Teter, and Mr. Shea were identified at the bottom of the page as the petition endorsers. The following paragraph appeared at the middle of the page:

We, the undersigned registered electors of the City of Westminster, Colorado, demand the Westminster City Council order that a recall

election be held, and, if successful, a successor be elected, all as provided for by the Charter of the City of Westminster. The grounds for such recall are: *HIS FAILURE TO SUPPORT LOWER WATER RATES IN WESTMINSTER*.

Exhibit 4 (emphasis original). The remaining pages were signature pages. Each page contained the required warning language and the charging statement; i.e., that it was a petition to recall a specific individual from their office, followed by the sentence “The grounds for such recall are: his failure to support lower water rates in Westminster.” *Id.*

After working with the Westminster City Attorney to determine whether the proposed petitions met legal requirements, the Clerk approved the petitions as to form on September 1, 2020.⁷ As approved, the petitions included the required warning language and charging statement on all pages except for the last two pages, which were a non-substantive page and an affidavit for the responsible circulator. Subsequently, Plaintiffs added a 20th page to each petition section. Plaintiffs refer to this as an instruction sheet; Defendant identifies it as a cover sheet.

It is clear from the content and format of the document that it was *intended* to serve as instructions for Circulators.⁸ It includes a line of thanks for help, the deadline for submission and total signature goal, and 10 enumerated “Recall Petition Instructions.” Those instructions include an explanation for the existence of four separate petitions, and provide directions for communicating the location where they are collecting signatures, keeping petition sections orderly, using pen instead of pencil, observing signatures, notarizing their own signatures, and submitting completed petitions. In addition to concerns that the instruction sheet was not part of the approved petition and does not contain the

⁷ As approved, each 19-page petition contained 96 signature lines. Due to numbering errors acknowledged by both WCRG and the clerk, the last enumerated signature line on each petition was 104.

⁸ In the interest of avoiding any confusion or misinterpretation, it was, without doubt, a needless mistake to include the instruction sheet with the petitions. There was no need for it to be incorporated into each petition section, particularly if doing so created formatting problems with the previously-approved pagination. The more practical approach would have been to provide the approved petition sections to the Circulators, and to separately provide each circulator with an instruction page. The decision to add the instruction sheet is ultimately what led to the need for this proceeding.

warning language, Defendant contends the instruction sheet contains misleading statements. The first line reads, “Thank you for helping to lower our water rates in the City of Westminster!” Hearing Ex. 4, p. 1. Instruction No. 1 also states, “Please ask persons interested in lowering our water rates to sign all four recall petitions. All these councillors [sic] voted for these high water rates.” *Id.*

This sheet was added, as page 1, to the 19-page document the Clerk had approved. The warning page was marked “page 2 of 20,” and the signature pages were marked pages 3 through 20 of 20.

The Circulators consistently testified that they understood the instruction sheet was intended for their information. For example, Joyce Bockman testified she kept the instruction sheet separate because she understood it was designed to serve as her instructions. Likewise, Bruce Baker testified it served as instructions as well as a management tool because it contained contact information for the Circulators.⁹

Pursuant to the Westminster City Code and state law, the petitioners had 60 days from the Clerk’s approval (or, until October 31, 2020) to return signed petitions. Plaintiffs timely submitted signatures. Defendant was required to review the signatures within 15 days to determine whether sufficient signatures were obtained for each petition. It was not until the signed petitions were first provided to the Clerk’s office that the Clerk became aware of the instruction sheet.

As the Clerk’s office reviewed petition sections, some were disqualified because they included an unauthorized page, or contained evidence that an unauthorized page had been removed before submission to the Clerk. The Clerk had an evidence photographer take pictures of the disqualified petition sections, which the Clerk published on the public records portal. Plaintiffs were able to access that portal during the review process, and began to anticipate the Clerk would not find sufficient qualified signatures. In turn, Plaintiffs scheduled a protest hearing with the Clerk, pursuant to C.R.S. § 31-4-503(3)(b),

⁹ Mr. Baker, as a former council member, determined pages 2-20 were the approved petition based in part on his experience with candidate petition packages. Other Circulators do not share his background, but testified they understood the instruction sheet was directed at them, not electors.

before the clerk's determination was issued. The protest hearing was scheduled for November 20, 2020. Of note, Westminster City Code provides no process for protesting or objecting to a determination of insufficiency. State law, which applies by default in the absence of a municipal provision, provides such protests must be made within 15 days of the original submission of the petition, and five days from the submission of an amended petition. As applied by Westminster, the deadline to protest findings of sufficiency falls on the same date those findings are due.¹⁰

The Clerk issued a Certification of Initial Determination of Insufficiency on November 13, 2020, finding that there were not enough valid signatures to trigger a recall for any of the four officials. On November 18, 2020, instead of proceeding with the protest hearing, Plaintiffs exercised their right to withdraw and amend their submissions to cure defects the Clerk identified.¹¹ As a result, Plaintiffs had 15 days to resubmit their petitions, and the Clerk had five days to review. The amended petitions were timely provided to the Clerk on November 30, 2020.

After receiving the amended submissions, the Clerk issued a Certification of Insufficiency on December 7, 2020,¹² followed by an Amended Certification of Insufficiency on December 10, 2020.¹³ The Amended Certification is the operative determination.¹⁴ In it, she describes her process for reviewing the parties' amended submissions, and identifies signature lines that were cured. Ex. D, at D-2 to D-3. Scores of

¹⁰ State law does not create a similar problem, insofar as it gives a clerk five days to make the initial sufficiency determination, which in turn allows at least 10 days to submit a protest from a determination of insufficiency.

¹¹ Contrary to testimony at the Hearing, including the Clerk's admission that Plaintiffs withdrew the request for a protest hearing, the Amended Certification states the November 20 hearing was actually held, after which the hearing officer issued an order making no changes to the November 13 Certification. No order from a hearing officer has been provided to the Court.

¹² The deadline for the original petitions fell on a Saturday; October 31, 2020. Amended Certification, p. 1. Based on the November 30 submission of amended petitions, the Clerk's deadline for certification was December 5, 2020; also a Saturday. Defendant testified that when her deadline fell on a weekend, it carried over to the following Monday, but did not explain the basis for the inconsistent treatment of Saturday deadlines.

¹³ Defendant testified the amendment was necessary to correct errors on 10 individual records; the result of the amendment was to increase the number of valid signatures.

¹⁴ The Amended Certification was marked as Hearing Exhibit D and as Exhibit 3.

sections remained disqualified, however, due to the removal of cover sheets or the presence of cover sheets, and signatures obtained after the 60-day signature period were not accepted. *Id.* at D-4 to D-7. Specifically, the Clerk identified 66 sections that were disqualified due to the removal of cover sheets, and 14 sections that were disqualified due to the presence of an additional inserted page (which was the instruction sheet). *Id.* at D-5 and D-6, Figures 9 and 10.¹⁵

B. Circulator Process

Plaintiffs introduced testimony from approximately 16 witnesses, including Plaintiff Teter and 15 individuals who served as Circulators.

Some Circulators received petition sections in pre-printed form. Others printed their own sections from email attachments. The Circulators did not have a uniform approach in binding the petition sections or presenting them for signatures. Apart from the instruction sheet, they received guidance from different sources. Some received direction from Ms. True,¹⁶ others from Plaintiff Teter, others from Sandra Pospisil. For purposes of keeping the pages of each section together, most Circulators found staples to be impracticable and inadequate to keep all 20 pages of each section together.¹⁷ Heavy duty staples would have been necessary, and few Circulators had access to a heavy duty stapler. To comply with the requirement to keep entire petition sections together, most Circulators followed one of two approaches; folders or clipboards.¹⁸

Sandra Pospisil put the petitions into folders, designating a different folder color for each candidate; petitions for Mr. Atchison were in blue folders, petitions for Ms. Seitz were

¹⁵ Bruce Baker testified the instruction sheet was removed from completed petition sections if it was the first page, but if it was the second page in a completed petition section, it was not removed, because WCRG was afraid it would be deemed “disassembly” and would be rejected on that basis. On cross examination, he agreed one could interpret the removal of the first page of a petition as disassembly.

¹⁶ Kathleen Dodaro testified that based on her discussions with Ms. True, she was aware they had to be clear in screening electors and that the electors had to know what the recall was about.

¹⁷ There is no evidence stapled documents would have obscured warning pages. Joan Realino-Robinson testified she folded the instruction sheet back and tucked it behind the signature pages so electors could sign the document, leaving the warnings on the signature page viewable. Elyce Jarvis testified that if she had used staples, she would have flipped the first page over, and the warning on the signature page would be visible.

¹⁸ Few, like Kristine Ireland, used both methods.

in red, petitions for Mr. Voelz were in yellow, and petitions for Ms. Skulley were in green.¹⁹ She organized each folder so the signature page appeared on the right side of the folder. When a signature page was full, she would rotate it to the back of the papers on the right side, bringing a new signature pages to the front. On the left side of the folder, she displayed the page containing the warning language and statement of grounds for the recall, which was the first page of the originally-approved petition. She placed the unapproved instruction sheet underneath the warning page. She admits it was not hidden, but testified it was not shown. To keep the pages from getting out of order and to protect against wind, Ms. Pospisil used binder clips to hold the pages to the folder. Circulators working with her carried the petitions in the same way, based on her observations of approximately six Circulators followed the same process as Ms. Pospisil. Ms. Pospisil testified she did not specifically instruct others to follow her format.

Other Circulators used clipboards, with the current signature page on top and other pages stacked beneath it.²⁰ Some of these Circulators relied on staples to hold the pages of each petition section together, while others bound the pages by binder clips, in a similar fashion to that described by Ms. Pospisil. The Circulators who used this approach testified they removed the unauthorized instruction sheet, or that it was folded or bound behind the other pages without obscuring the warning language on the signature page.²¹

¹⁹ Ms. Pospisil does not recall receiving any instructions for circulating the petitions other than what is written in the instruction sheet, which is a tacit acknowledgment that no one from WCRG told Circulators *not* to show electors the instruction sheet. She admits her method is not the method reflected in the information sheet.

²⁰ Charles Landherr testified he did not have a printed copy of the instruction sheet and did not circulate it as part of his petition. When asked about an affidavit referring to a cover page, he credibly testified he was referring to the warning sheet that was numbered Page 2 of 20. Erin Tavenner testified she did not receive an instruction sheet, and that she never took the packet off the clipboard except to move a new signature sheet to the top. She recalls that a signature page was always the top page. She testified she would assume that if the instruction sheet was included in her petitions, it was folded to the back, and all that showed was the signature page. Coreen Engstrom testified she put the materials in a folder, but put the information sheet in the back of the petition documents because she recognized it was intended to serve as information for the Circulator, not the elector. Bobette Hunstad testified electors only saw the signature page. Elyce Jarvis testified she put the instruction sheet on the bottom of the clipboard to keep as a reference, and the first page electors saw was the warning page, marked as “Page 2 of 20.”

²¹ Kathleen Dodaro testified she kept the instruction sheet in the back of her clipboard, that no one asked to see it, and that there was “no way anyone could see it.” She spoke in extreme terms throughout her testimony (also testifying she was “absolutely thorough” in all regards). It may be naïve to think there was

The Circulators consistently testified that when they discussed the petition with electors, they would screen for eligibility, including that they were registered voters in Westminster municipal elections, that they had not signed the petition already, and that they understood the petitions were for recalls of four officials. Erin Tavenner testified some electors came to her thinking the petition would lower water rates, and she clarified that the petitions were to recall members of city council responsible for the rates. To the extent the Circulators had conversations with electors, all testified they informed electors that the petitions were to recall officials due to their position on water rates. Sharon Harrison, for example, testified she explained to electors that the petitions were for a recall based on the failure to lower water rates. Regardless of whether the electors read the instruction sheet (Ms. Harrison credibly testified she kept the instruction sheet folded back and out of elector view), Ms. Harrison notes they had to know they were signing for a recall because that is why they were asked to sign four different times.

Some Circulators testified they provided voters with additional information. Ms. Pospisil, Ms. Jarvis, and Ms. Realino-Robinson brought documentation regarding the water rates, including their own water bills. Defendant has not taken the position that this was improper in the petition process.

The Circulators testified most eligible voters agreed to sign the petitions, though some declined, indicating they did not believe in recalls. Some electors would sign fewer than all four petitions, because they were a friend or neighbor of one of the officials.

After obtaining signatures, most Circulators testified they put the pages from each section in order and stapled or bound them, then signed their petition sections before a notary. The Circulators delivered their sections to custodians within WCRG for submission to the Clerk.

“no way” anyone could have seen the instruction sheet that was present in her petition sections, but she observed the electors who signed her petitions, and her testimony, although couched in absolutes, was credible. Moreover, her role as a Circulator for this proceeding was limited. She testified she obtained signatures for all four candidates. But as it relates to the disqualified petition sections in dispute, and based on the parties’ Stipulated Facts Regarding Circulated Petition Sections, Ms. Dodaro was the Circulator for a single section of petitions associated with Mr. Atchison.

Some Circulators, including Ms. Pospisil, included the instruction sheet as page one, or placed it behind the warning page, when they delivered their petition sections. Ms. Pospisil specifically noted she wanted the Clerk to have her contact information so the Clerk could reach her with any questions.²² Some, including Ms. Hunstad, testified they did not recall whether they included the cover sheet with the petitions when they submitted them to WCRG. Others testified they did not include the instruction sheet at all upon submission because they viewed it as instructions for Circulators and not part of the petition.

Mr. Baker testified he served with others as custodians of petition sections submitted by other Circulators. These custodians (including Mr. Baker, Plaintiff Teter, and Ms. True), along with Mark Kizer, a notary, met the night before the petitions were submitted to the Clerk. According to Mr. Baker, Ms. True told the group that the instruction sheet was not part of the petition and should be removed. At that time, the page was removed.

The Court notes this was not a process in which people were paid to stand in a public location to seek signatures. The Circulators were volunteers who had personal interest in advocating for the recall. As a group, they are well informed and testified that they followed the same approach in speaking with voters, including making sure the voters were registered electors for municipal elections in Westminster, that they understood they were signing petitions for purposes of a recall, and that they had not already signed the petition. The Court has considered that the witnesses have an interest in the outcome of the case. This is particularly true of Mr. Baker, who candidly acknowledged he is a former council member and is currently an announced candidate for the Westminster City Council. With that in mind, the Court finds the Circulators' testimony regarding their process and communications with voters to be credible.

²² Other witnesses, including Ms. Ireland, were not surprised their name or number were requested, and thought the Clerk might need that information. Circulators who were asked about their communications with the Clerk testified they had not communicated with the Clerk or knew who she was until they testified at the Hearing.

C. Few Voters Saw the Unauthorized Cover Page

There was no testimony that any electors asked about the page numbering or about the instruction sheet itself. For most of the Circulators, there was no evidence suggesting the instruction sheet was shown to any electors.²³ The exceptions are as follows.

Ms. Pospisil testified most electors signed the signature page, and would have only seen the signature page and the warning page. On cross examination, she acknowledged electors were provided a table and chairs and could take their time reviewing the folder. She testified one voter read the entire pack, but that no one else saw the instruction sheet.

Joan Realino-Robinson candidly testified she left the instruction sheet out and anyone signing the petition could have seen it. She also testified that the petition was to recall, not to lower water rates, but that she did not believe it would be misconstruing the petition to read it as one designed to lower water rates. According to the Stipulated Facts Regarding Circulated Petition Sections, Ms. Realino-Robinson testified she obtained 21 signatures. However, the section she was responsible for, and that is included in the Stipulated Facts Regarding Circulated Petition Sections, contains 10 signatures, all on a petition for Mr. Atchison.

Bruce Baker testified he showed the instruction sheet to one elector who requested to see it, and to no one else.

It is not entirely clear whether Gordon East showed the instruction sheet to electors. He testified electors were only shown the signature page, but also testified he kept the petition in order, with the instruction sheet on the top of a stack of pages. According to the Stipulated Facts Regarding Circulated Petition Sections, Mr. East submitted two petition sections that were disqualified; one for Ms. Seitz (containing 61 signatures) and one for Mr. Voelz (containing 63 signatures).

Desirae Lewis Rose's testimony was similarly unclear. She testified she only showed the instruction sheet to voters if they asked to see it, and that she does not think

²³ Specifically, the testimony of Erin Tavenner, Kristine Ireland, Coreen Engstrom, Kathleen Dodaro, Bobette Hunstad, Elyce Jarvis, Christy Patrick, Sharon Harrison, Charles Landherr, and Joyce Bockman yielded no evidence or cause for concern that electors who signed their petitions ever saw the instruction sheet. The Court found these witnesses to be sincere and credible in their testimony.

anyone understood what it was. But she also testified she does not recall that anyone asked to see it. Electors she spoke with were mostly interested in the name of the council member subject to recall. On re-direct, she testified she never showed the instruction sheet to an elector. According to the Stipulated Facts Regarding Circulated Petition Sections, Ms. Rose submitted one petition section that was disqualified, for Mr. Voelz (containing 35 signatures).

D. Clerk Testimony

Defendant, Michelle Parker, is an experienced, well-credentialed city official. She has an extensive career in public service, including working in the elections division in San Antonio, Texas, and with the Travis County Clerk (Austin, Texas) for 13 years. She has been involved in scores of elections, and has trained and recruited poll workers. She is familiar with election-related laws and their implementation. She understands her obligation is to be objective, and to follow state and municipal law.

Ms. Parker is obligated to notify officials who are subject to a recall petition at the time they are circulated. But as Clerk, Ms. Parker reports to the city manager. Members of council have no authority to hire or fire the Clerk. Apart from providing notice to the officials, Ms. Parker does not interact with them regarding the petition process.

Regarding her interactions with parties seeking recall petitions, Ms. Parker facilitates the petition process and is tasked with ensuring the parties meet the requirements of the municipal codes and state law. She worked with Ms. True to ensure Plaintiffs' petitions included the required language. Apart from the mandatory warnings and charging language, Ms. Parker has no control over what the petition says.

Once petitions are submitted to the Clerk, they are reviewed by members of the Clerk's office. The Clerk and her team reviewed the petition sections in two lines of processing. First, each section is reviewed for compliance. Upon confirming compliance, the section moves on for signature review. That process begins with ensuring the signature count for each section matches the Circulator's count. Ms. Parker testified the signature count generally matched, but was sometimes off by one or two signatures from the

Circulator's count. Next, each signature is reviewed for compliance, including to ensure the elector is a registered voter and that the signature is legible.

As it relates to the Hearing, it was in the first step of this process that the Clerk's office disqualified dozens of sections as non-compliant. The Clerk's office was concerned that a 20-page petition was returned even though it approved a 19-page petition. Even though every petition indicated it was part of a 20-page document, the Clerk's office disqualified only those petitions that had evidence the instruction sheet was part of the submitted petition, or had been removed from an assembled petition. Ms. Parker testified her office only invalidated those sections with clear evidence the municipal code was violated.

The Clerk excluded petition sections that had evidence the unauthorized cover page had once been applied; specifically, where torn bits of paper were lodged under staples. Her testimony in this regard is corroborated by Hearing Exhibit M. She also excluded petition sections that contained the unauthorized cover page. She was aware that all petition sections were marked as 20-page documents, even though she only approved a 19-page document. The Clerk noted she only excluded those petitions with clear evidence of non-compliance.

Ms. Parker testified she was not provided with an explanation about the instruction sheet or the pagination change. The Circulators acknowledge that they did not provide the Clerk with detailed information about their process or protocols for obtaining signatures, or about the limited number of electors who saw the instruction sheet. Plaintiffs and the Circulators were critical of Ms. Parker for not reaching out to them for additional information. But to remain objective, Ms. Parker considers only the information that is provided to her. She did not specifically request information from Plaintiffs just as she did not seek information from the officials. Plaintiffs' and the Circulators' suspicions that Ms. Parker was actively antagonistic appear to be misplaced, likely resulting from their own strong feelings about the recall. The Court finds there is no evidence from the Hearing indicating Ms. Parker neglected her duty for objectivity.

The November 13 Certification provides thorough explanations for the Clerk’s review process and the determinations she reached. She noted that the instruction sheet itself stated Circulators were to include the instruction sheet with the petitions. *See, e.g.*, Hearing Ex. 4, at p. 1, ¶ 3. Until the Hearing, Ms. Parker received no information about the Circulators’ methodology, whether the instruction sheet was shown to electors, or whether the Circulators followed the instruction to include the instruction sheet with the completed petitions (and if not, why not).

When Plaintiffs submitted their amended petitions, the Clerk’s office reviewed the material to determine whether any sections had been cured. The Clerk reviewed and approved hundreds of additional signatures, having been cured. But the Clerk maintained the disqualification of the 80 petition sections now at issue, on the basis of the instruction sheet. Ms. Parker testified the problems with the instruction sheet were that it was not authorized for use with the petition and did not include the mandatory warning language – for those reasons, it did not meet the strict letter of the Westminster Municipal Code. At this time, Ms. Parker had no information indicating the instruction sheet was tucked away from electors’ sight, that it was not shown to electors, or that it did not obscure warnings. Affidavits submitted by the Circulators for the amendment process did not provide such information;²⁴ they only explained that the instruction sheets were provided for Circulators’ information and were removed prior to submission. Ms. Parker had to make her decision based on the information provided to her, she determined the affidavits did not cure problems with the instruction sheet.

²⁴ These affidavits were submitted after the November 13 Certification was issued. *See* Hearing Exhibit I. The intent was to inform the Clerk about the nature and use of the instruction sheet; according to Mr. Baker, the primary intent was to address concerns of disassembly. The affidavits indicate that the instruction sheet was designed to inform the Circulators, and that it was not used or intended to be used in the petitions, which is why it was removed, and that Circulators “ensured that each voter was able to read the warning attached to the top of each of the petition sheets, and the Circulators carefully ensured that every signer understood that he or she was signing a petition to recall a specific city official.” Ex. I, at I-6 ¶¶ 4-6, and at I-8 ¶¶ 4-6. But the affidavits did not address whether electors saw the instruction sheet.

By the time the Amended Certification was issued, at which point hundreds of signatures had been added to the petition count, all four petitions remained insufficient to trigger a recall.

Ms. Parker testified the purpose of the required warning language is for voters to know they have to sign the petition in their own name, be a registered elector in Westminster, and to confirm they read the proposed petition before signing. She agreed that the Circulators' testimony at the Hearing about their communications with electors satisfied the purpose of the warning. Ms. Parker also testified that, while she did not observe the circulation process and was able to make her determination based on information that was provided to her, she did not have evidence the petitioners engaged in an effort to mislead electors. She agreed it would have been important to have received information along the lines of the Circulators' testimony at the Hearing. She testified that if this information had been provided to her during the review process, it may have changed her determination, depending on the level of detail provided.²⁵

Ms. Parker testified that she considered, but did not apply, the substantial compliance test. Instead, she applied the municipal code as it is written.

IV. ANALYSIS

The Court considers the substantial compliance test in light of the legal standards and principles identified above. In particular, legal authority governing the right of recall, which is a fundamental right of the People, is to be liberally construed, and any limitation on the power must be strictly construed.²⁶

A. Extent of Noncompliance

Defendant contends the instruction sheet was noncompliant because it was not part of the approved petition and was incorporated into every petition section without the

²⁵ Ms. Parker agreed that if she had been informed about Ms. Pospisil's presentation of petitions in the form of the multi-colored binders, it is possible the Clerk's office would have cured those sections.

²⁶ Defendant contends the Court should not consider evidence that was not available to the Clerk at the time she made her decision. However, the Court finds Defendant did not apply the appropriate standard, regardless of evidence considered. Moreover, the Westminster City Code does not allow for a reasonable protest process, as provided for in state law, and is unduly restrictive in this regard. While the Clerk may have applied the law in the strict sense, she erred in relying on an inappropriate standard.

required warnings. It is undisputed that Defendant is correct; the instruction sheet was not approved, and it did not contain the required language. It was on that basis that the Clerk disqualified 80 petition sections. But the fact of noncompliance is not the end of the inquiry under the substantial compliance test. If it was, there would be no need to consider the *extent* of noncompliance.

The compliance concern relates to information shown to electors in the petition process as part of the approved petition. The Clerk has not identified a concern with the instruction sheet, standing alone. In fact, although she had reason to believe the instruction sheet was part of every petition section, she only disqualified those that appear to have had it attached to the completed petitions. Defendant's concern was not whether the Circulators were given an instruction sheet, but whether they included it in the petition for electors to see.

Based on credible testimony from the Circulators, the evidence reflects that very few electors saw the instruction sheet. With rare exception, it was not used as a "cover sheet" during the circulation process. Based on the evidence at the Hearing, the instruction sheet was shown to 12 electors signing petitions for Mr. Atchison, 63 for Ms. Seitz, 1 for Ms. Skulley, and 99 for Mr. Voelz.²⁷ Based on the Clerk's signature count as reflected in the November 13 Certificate, these signatures represent less than 1.5% of the total signatures collected for any one candidate.²⁸

Not all Circulators with disqualified petition sections testified. Those signatures included another 230 electors signing petitions for Mr. Atchison, 166 for Ms. Seitz, 86 for Ms. Skulley, and 141 for Mr. Voelz.²⁹ Assuming for Defendant's benefit that the

²⁷ One elector each who signed with Ms. Pospisil and with Mr. Baker saw the instruction sheet. Testimony from Ms. Realino-Robinson, Mr. East, and Ms. Rose indicated potentially all of their electors saw the instruction sheet. Among the disqualified signatures, Ms. Pospisil obtained signatures for all four officials, Mr. Baker obtained signatures for Mr. Atchison and Ms. Seitz, Ms. Realino-Robinson obtained 10 signatures for Mr. Atchison, Mr. East obtained 61 signatures for Ms. Seitz and 63 for Mr. Voelz, and Ms. Rose obtained 35 signatures for Mr. Voelz.

²⁸ Specifically, 0.179% for Mr. Atchison (12/6,690) 0.937% for Ms. Seitz (63/6,726), 0.015% for Ms. Skulley (1/6,714), and 1.464% for Mr. Voelz (99/6,763).

²⁹ Ynez Catbagan, section 26 for Ms. Seitz (28 signatures); Karen Fischer, sections 70, 72, and 73 for Mr. Atchison (220 signatures), sections 70 and 72 for Ms. Seitz (124 signatures), section 72 for Ms. Skulley (86 signatures) and sections 68 and 69 for Mr. Voelz (127 signatures); Nancy Hastings, section 105 for Ms.

instruction sheet was shown to each of these electors, they represent less than 4% of the signatures for any one candidate.³⁰

Although the unapproved instruction sheet was distributed with every petition section – and it was a needless mistake by Plaintiffs to include it – the extent of noncompliance was minimal.

Not only was the extent of technical noncompliance minimal, so was the practical extent of noncompliance. The approved language in the petitions states the purpose for the recall was based on the officials’ failure to support lower water rates in Westminster. Consistent with that charging statement, the instruction sheet states that the four recall petitions are for city council members who voted for high water rates, and that the ultimate objective was to lower water rates. The content of the instruction sheet does not materially modify the nature or purpose of the recall effort.

The Court finds that although the instruction sheet was not approved and was incorporated into each petition section, the extent of noncompliance is modest due to the small number of electors who saw it.

The Court also notes that to the extent the instruction sheet failed to include the required warnings, that fact alone would not render the petitions noncompliant as a matter of state law. *Mirandette*, 934 P.2d at 885. It is only under Westminster’s stricter standard, which requires the cover sheet to be at the top of each section of the petition, that the instruction sheet is potentially noncompliant based on the absence of warnings. Westminster City Code § 7-1-10(B). On this issue, too, the Court finds the extent of noncompliance was minimal. The approved petitions included the required warnings. The instruction sheet did not. But the Circulators did not treat the instruction sheet as a cover page for their petition sections; the evidence at the Hearing reflects that few ever showed it to electors as part of the petition, and some did not print it in the first place.

Seitz (4 signatures) and section 109 for Mr. Voelz (4 signatures); Tammy Jacobsen, section 40 for Mr. Atchison (10 signatures), section 40 for Ms. Seitz (10 signatures), and section 38 for Mr. Voelz (10 signatures).

³⁰ Specifically, 3.617% for Mr. Atchison (242/6,690) 3.405% for Ms. Seitz (229/6,726), 1.296% for Ms. Skulley (87/6,714), and 3.549% for Mr. Voelz (240/6,763).

B. Purpose of Applicable Provision; Whether Purpose is Substantially Achieved Despite Noncompliance

The Court next considers the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance.

The purpose of obtaining petition approval and to incorporate the warnings is to ensure the petition meets legal requirements, and in particular that it provides warnings for electors so they do not sign the same petition more than once, that they be a registered elector for Westminster municipal elections, and that they read the measure to understand its meaning.

The warning language was contained in the petitions and was included on every signature page. The Circulators consistently testified they verbally presented these warnings, as well. The evidence did not demonstrate that there was a significant or pervasive duplicate signature problem, that unqualified electors were signing petitions, or that electors did not understand the charging statement or the purpose of the recall. In fact, after hearing the Circulators' testimony, Defendant acknowledged that their communications with electors and method of approaching them (by ensuring they were aware of or read the warnings) accomplished the purpose of the warnings. The purpose of the warnings was substantially achieved.³¹

The purpose for clerk approval was also satisfied, or waived, as demonstrated by the fact the Clerk approved thousands of signatures even though there was evidence of an unauthorized page, and the Clerk's testimony that Circulators' testimony may properly cure the defects in the disqualified petitions.

³¹ Defendant further agreed that if she had the benefit of the Circulators' testimony during her original or cure review processes, it may have impacted her determination on disqualification. This acknowledgement demonstrates the fundamental problem with the absence of a meaningful protest process in the Westminster City Code. Defendant's certificates were due the same day any protest was due. As reflected in the Court's March 17 Order, Plaintiffs have not put this issue before the Court. But considering the number of times the Clerk pointed out that she can only make decisions based on the information presented to her, and the absence of realistic time for a meaningful protest process, it would serve the interests of the city clerk and future petitioners for Westminster to resolve this dilemma.

C. Good Faith Effort to Comply; Whether Noncompliance is Based on Conscious Decision to Mislead the Electorate

Finally, the Court considers whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate.

The Court does not find the noncompliance was based on a conscious decision to mislead the electorate. The instruction sheet is designed to ensure Circulators performed their tasks appropriately, including that they knew who was eligible to sign the petition, that they observed signatures, that signatures were made in ink, and that they properly notarized and submitted their petitions. The instruction sheet represents a good faith effort to ensure Circulators went about their tasks in compliance with legal requirements, and not to mislead the electorate.

Notifying electors of concern over water rates is not, itself, problematic or misleading. The instruction sheet refers to water rates, but so do the Clerk-approved pages of the petition. Moreover, the Clerk took no issue with other documents Circulators made available to electors while obtaining petitions, including water bills and water use data.

Moreover, with limited exception the Circulators acknowledged a successful recall petition will not result in an immediate change to water rates.³² They acknowledge there must first be a recall election in which the officials are removed from office, followed by an election to replace them. Then, water rate issues must come up before the new council, and that council must vote to lower rates.

There is no dispute that frustration with water rates is central to the recall effort. As acknowledged in every page of the approved petition, the officials' recall is sought based on his or her "failure to support lower water rates in Westminster." In this regard, the language in the cover page is not materially different from the language in the approved petition.

³² Charles Landherr testified he believed the purpose of the recall was to lower water rates and remove the four officials. After prompting from Plaintiffs' counsel, he agreed removal of the officials would not guarantee lower rates. He also seems to have misunderstood the process, insofar as he testified he told electors that signing the petition would impose a recall, and there would be an election for new officials.

There is no credible evidence electors believed or were led to believe a successful petition would result in an immediate reduction in water rates. The testimony reflects that, in the few instances where electors expressed the belief that their signature would lower water rates, the Circulators corrected them. The Court finds Ms. Harrison’s testimony on this point to be particularly compelling – it is not reasonable to conclude electors believed they were signing a petition to lower water rates when they were asked to sign four different petitions for four different officials.

In sum, the evidence does not support a claim that electors were misled about what they were being asked to sign.³³

V. ORDER

Municipalities have a right and obligation to regulate elections for fairness, honesty, and order. And the Court is conscientious of “slippery slope” concerns that parties may be inclined to add pages to a petition after approval to manipulate the process. But based on the facts and evidence of this case, the extent of noncompliance with state or municipal law is minimal, the purpose of the laws is met despite noncompliance, and the Circulators’ presentation of petitions did not mislead the electorate. The substantial compliance test requires Defendant to review petition sections that were disqualified due to the instruction sheet. This result best recognizes the fundamental right of recall, the obligation to liberally construe the statutes to support that right, and to strictly construe any limitations on the power of recall.

For the foregoing reasons, the Court finds that Defendant erred in rejecting petition sections based on the removal of the cover sheet or for containing the cover sheet as an additional inserted page. This applies to petition sections identified at Hearing Exhibit D, at pages D-4 through D-6, and summarized in Figures 9 and 10 on those pages.

³³ The instruction sheet is not misleading on its face. It states that the purpose of the recall is to remove four council members. Like the approved petition language, it notes that the reason for seeking the recall is based on the officials’ position on water rates, but it clearly states the purpose of the petition is to recall elected officials. The line that thanks Circulators “for helping to lower our water rates” is not reasonably misleading even if electors thought it was directed at them. That the recall is based on frustration with water rates is apparent from every page of the approved petition.

The Court orders that Defendant shall review signatures in those previously-disqualified petition sections and issue a revised Certification addressing whether the signature lines in those sections, together with previously-approved signature lines, are sufficient to trigger a recall election for any or all of the four elective officials. Counsel for Defendant shall file a copy of the revised Certification with the Court upon its completion.

Counsel for Defendant shall retrieve the original petitions that were retained by the Court as soon as possible, and by no later than April 21, 2021. Defendant shall have seven days from the date counsel retrieves the documents from the Court to complete the review and file her updated Certification. The updated Certification shall be filed no later than April 28, 2021.

SO ORDERED April 16, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Kyle Seedorf", is written over a light pink rectangular background.

Kyle Seedorf
District Court Judge