District Court
Arapahoe County, State of Colorado
7325 S. Potomac Street
Centennial, CO 80112

DATE FILED: May 14, 2024 6:47 PM
FILING ID: 55453ABE48CCA
CASE NUMBER: 1983CV105

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.

▲ COURT USE ONLY ▲

Case Number:
1983CV105

Div.: 204 Ctrm:

Attorneys for Defendant:

Mark G. Grueskin, #14621
Nathan A. Bruggeman, #39621
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
(303) 573-1900
Fax: (303) 446-9400
mark@rklawpc.com
nate@rklawpc.com

DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)

Defendant A.J. Beckman, Designated Election Official ("DEO"), respectfully files this reply in support of his motion to dismiss:

INTRODUCTION

Plaintiffs' numerous complaints, restated in their response to the Motion to Dismiss, do not address the DEO's determination about the sufficiency of signatures on filed petitions seeking the recall of four of five Heather Gardens Metropolitan District directors. Recall is a fundamental constitutional right of electors, and Plaintiffs have not established that there is a factual or legal basis to reverse the DEO's sufficiency determination, given the very specific statutory constraints on the DEO's decision-making. Accordingly, the Court should dismiss the complaint and allow the voters to exercise the right to vote that the recall of any of the four District directors is—or isn't—warranted.

I. The Court should not consider Plaintiffs' new factual allegations.

Plaintiffs' response contains numerous factual allegations that do not appear in their complaint. It would consume an inordinate amount of limited briefing space to identify each new allegation. The Court should not consider any allegations outside those made in the complaint. "[W]hen reviewing a motion to dismiss a complaint, the court may only consider matters stated within the complaint itself, and may not consider information outside of the confines of that pleading." *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). While a court may convert a motion to dismiss to a motion for summary judgment to consider matters outside the complaint, *see* C.R.C.P. 12(b), Plaintiffs have not provided grounds here or even asked the Court to do so. The response is Plaintiffs' counsel's recitation of the alleged facts—they are not, in other words, competent evidence. *See, e.g., Hunter v. Mansell*, 240 P.3d 469, 476 (Colo. App. 2010) (noting counsel's argument is not summary judgment evidence).

II. This Court cannot engage in a rehearing of the proceedings before the DEO.

Plaintiffs largely ignore the standard of review. However this proceeding is framed, Plaintiffs are not entitled to cure the deficiencies of the case they presented during the protest process through this litigation. While a reviewing court may, of course, review interpretations of the statutes and legal issues *de novo, see, e.g., Jones v. Samora,* 2014 CO 4, ¶ 14, "administrative findings of fact supported by the record may not be overturned by a reviewing court in C.R.C.P. 106 proceedings," *Elec. Power Rsch. Inst., Inc. v. Denver*, 737 P.2d 822, 825 (Colo. 1987). Rule 106 emphasizes the limited nature of review, as relief is only available when the "officer… has exceeded its jurisdiction or abused its discretion." C.R.C.P. 106(a)(4)(I). An abuse of discretion occurs only where there was "no competent evidence in the record to support [the] decision" or the officer "misconstrued or misapplied the applicable law." *Bd. of Cnty. Comm'rs v. Conder,* 927 P.2d 1339, 1343 (Colo. 1996).

III. Although Plaintiffs have cured the overarching jurisdictional defect in their complaint, each individual claim still should be dismissed.

Following the DEO's motion to dismiss, Plaintiffs filed an amended complaint[1] to bring this action—as they must—under the judicial review provision of the Special Districts Act ("Act"). *See* C.R.S. § 32-1-910(3)(f). While that amendment addresses the complaint's underlying jurisdictional defect,[2] *see Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n,* 620

[1] Plaintiffs have filed two amended complaints. While Plaintiffs may have been entitled to file the first to cure the jurisdictional defect, *see Cloverleaf Kennel Club*, 620 P.2d at 1055, they filed the second without leave of the Court. *Cf.* C.R.C.P. 15(a) (allowing the plaintiff to "amend his pleading ***once*** as a matter of course at any time before a responsive pleading is filed" (emphasis added)). The second amended complaint Plaintiffs filed appears to have made only a handful of nonmaterial wording changes, and, therefore, it was not objected to.

The Designated Election Official will object to and move to strike any further complaints filed by Plaintiffs unless allowed by the Court upon a proper procedural basis.

[2] If any of Plaintiffs' claims survive the motion to dismiss, the Court need not follow Rule 106's procedures and may enter orders to govern the proceedings to resolve those remaining claim(s)

P.2d 1051, 1055 (Colo. 1980), Plaintiffs did ***not*** attempt to cure ***any*** of the specific defects in their claims identified by the DEO in his motion to dismiss. By addressing the jurisdictional defect in their complaint, Plaintiffs concede that the Act's limits necessarily frame the DEO's permitted consideration of their protest and must likewise provide the parameters of this Court's consideration of their appeal.

IV. The Colorado Constitution and the Special Districts Act prohibit review of the statement of grounds for recall and, therefore, the Court lacks jurisdiction over Plaintiffs' first and sixth claims.

Much of Plaintiffs' argument is dedicated to explaining that the Act provides that the statement of grounds for recall should not contain false or profane statements. (Pls.' Br. at 3-5, 7-10.) There is no dispute about what the Act says, *see* C.R.S. § 32-1-909(4)(c)—but it is ***not*** the issue here. Rather, the Court must decide whether there is actual legal authority for the DEO to have considered the alleged falsity of the statement of grounds for recall as a substantive basis for determining recall petition sufficiency. As the Constitution and the Act together expressly say ***multiple times***, consideration of the merits of the grounds for recall is not the basis for a protest to petition sufficiency. Neither the DEO nor this Court may inquire whether the reasons for recalling these directors were good enough to warrant the signatures of hundreds of electors who placed their names and other identifying information on these recall petitions.

The Colorado Constitution requires that a recall petition contain a statement of grounds for recall. The Constitution also precludes review of that statement by an election officer or a court (including this Court):

> …and such petition shall contain a general statement, in not more than two hundred words, of the ground or grounds on which such recall is sought, which statement is intended for the information of the registered electors, ***and the registered electors shall be the sole and exclusive judges of the legality, reasonableness and sufficiency of such ground or grounds assigned for such recall, and said ground or grounds shall not be open to review***.

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to ensure, as the Constitution requires, that the Court's "review shall be had and determined ***forthwith***." Colo. Const. art. XXI, sec. 2 (emphasis added).

Colo. Const. art. XXI, sec. 1. The Act then implements this constitutional structure for recalls of special district directors and likewise places the statement of grounds beyond review by any quasi-judicial official (such as the DEO) or by any court:

> (4) Each petition must:
>
> …
>
> (c) Contain a general statement, in not more than two hundred words, of the grounds on which the recall is sought, which statement is intended for the information of the electors of the special district. The statement must not include any profane or false statement. ***The electors of the special district are the sole and exclusive judges of the legality, reasonableness, and sufficiency of the grounds on which the recall is sought, and said grounds are not subject to a protest or to judicial review.***

C.R.S. § 32-1-909(4)(c).

When reviewing the recall petition prior to circulation, a designated election official is limited to reviewing the petition "as to ***form***." *Id.* § 32-1-909(3) (emphasis added). "As to" means "according to," and "form" means, in this context, "a prescribed and set order of words: formula." Merriam-Webster Online Dictionary (defining "as to" and "form"); *see also Guillen v. Pierce Cnty.*, 110 P.3d 1184, 1189 (Wash. App. 2005) ("Accordingly, 'approval as to form' means approval of the structure of something, as opposed to its substance."). Form is, in other words, "[t]he antithesis of substance; the appearance or superficial aspect rather than the substance or the essence." Ballantine's Law Dictionary (defining "form"). Whether a statement is "false" or "profane" is not an "appearance or superficial aspect" of the recall petition, it is the ***substance*** of the statement, and as such, it cannot be considered when the petition is reviewed "as to form." A deficiency in the "form" of a recall petition would be, for example, the omission of a box for petition signers' addresses or the omission of a place for circulators to place the date of signing on each circulator's affidavit.

Nor does the Act authorize the DEO to review the elected official's views about the statement of grounds for his recall as a basis for the sufficiency determination. The Act provides a narrowly circumscribed set of issues that can be reviewed:

> 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.

C.R.S. § 32-1-910(3)(c). Whether a statement is deemed to be true does not implicate the number of district electors who signed the petition, the timeliness of the circulation or filing of the petition, or whether circulator affidavits are attached. So long as those conditions are met, it is a designated election official's obligation to find a petition sufficient.

Of course, a protest may be lodged to establish that any of the specific statutory conditions were not met. Here, however, protestors focused their protests and the hearing on ancillary issues instead of matters set forth by statute as the reasons to invalidate signature lines or petitions deemed to be legally sufficient.

And if there is any question that this Court cannot review the statement of grounds of sufficiency as part of a petition to review a designated election official's sufficiency determination, the Constitution and the Act unambiguously dispel it. The Constitution provides:

> The finding as to the sufficiency of any petition may be reviewed by any state court of general jurisdiction in the county in which such petition is filed, upon application of the person or a majority of the persons representing the signers of such petition, but such review shall be had and determined forthwith. ***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). The Act imposes the same restriction:

> A determination that a recall petition is sufficient or not sufficient is subject to review by the court as defined in section 32-1-103(2) upon the written request of the director sought to be recalled, the director's representative, or a majority of

> the committee as defined in section 32-1-909 (4)(a); except 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. § 32-1-910(3)(f) (emphasis added). To be clear, Plaintiffs' ongoing claims that the statements of grounds for recall of these directors contain false statements "is not subject to such review" by this Court. *See also Groditsky v. Pinckney*, 661 P.2d 279, 284 (Colo. 1983) (in discussing recall of special district director, "It is not within the purview of courts to pass upon the sufficiency of the grounds in recall petitions."). The statute couldn't be more specific about that.

Were the Court to accept Plaintiffs' invitation to "inquir[e] into the sufficiency of the statement of the grounds for recall," it would "clearly infringe[] upon the powers reserved by the people" and be "error." *See Bernzen v. Boulder*, 525 P.2d 416, 420 (Colo. 1974). Accordingly, Plaintiffs' first and sixth claims for relief, which rely upon the alleged falsity of statements in the recall petitions, fail for lack of jurisdiction.

V. The DEO did not have jurisdiction to review the alleged intimidation of the recall opponents by the homeowners' association.

Plaintiffs' defenses of their second claim for relief do not save it. There are two fundamental problems with Plaintiffs' second claim: there is no jurisdiction to review it in this proceeding, and Plaintiffs lack standing to bring it.[3]

As to the first, Plaintiffs say that this Court must be able to review the claims in this action, or it will be "wear[ing] blinders" to alleged violations of the law. But Plaintiffs are asking this Court to exceed its statutory jurisdiction. Although "Colorado district courts are courts of general jurisdiction," they are "subject to express statutory limitations." *McClure v. JP Morgan Chase Bank NA*, 2015 COA 117, ¶ 7. There is an express statutory limitation under the Act of what may be reviewed in this proceeding. The Court may only review the determination "that a

[3] Plaintiffs' attempt to show that there was government action that could support a First Amendment claim (Pls.' Resp. at 11) relies on facts not alleged in the complaint.

recall petition is sufficient or not sufficient," which means the resolution of the three grounds for sufficiency the DEO may review under the statute. *See* C.R.S. § 32-1-910(3)(c) & -910(f). Thus, even if the "intimidation" allegations could support some legal claim (e.g., in a civil rights proceeding under federal law), that does not mean they can be heard in this narrow proceeding that addresses one issue and one issue only—petition sufficiency. As Plaintiffs do not allege that the purported intimidation affected even one signature on one section of any petition, or the timeliness of the petitions by a minute, or the presence of any circulator affidavits in the petition sections submitted, there are no grounds to reverse the DEO's sufficiency determination and, therefore, no jurisdiction for the Court to consider the claim in ***this*** proceeding.

Regarding standing, Plaintiffs' complaint rests on allegations of specific persons being "intimidated," none of whom are plaintiffs. (*See* Am. Compl. ¶¶ 36-40.) In their response, Plaintiffs try to recast the claim as "every elector" being affected by the alleged conduct—but that is ***not*** the claim they alleged, and they cannot change their claim now. Their only attempt to establish standing for the non-party injuries is to point to "organizational standing." (Pls.' Resp. at 12.) But there is no allegation in their complaint that there is an organization, the third parties are members of it, or that the individuals are not needed in this proceeding. *See Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 10 (requirements for organizational standing). Rather than allege there is an organization, Plaintiffs state only that they are "electors"—in other words, individuals whose sole unifying characteristic is their registration to vote. This does not allow them to step into the third parties' shoes to assert third party injury and pursue this claim.

Finally, Plaintiffs say they should not be required to prove the alleged intimidation affected the recall petitions—but that ignores the purpose of the protest proceeding and the limitations in the Act. The Supreme Court's decision in *Bickel v. City of Boulder* doesn't say otherwise. *Bickel* concerned a post-election challenge regarding whether ballot measures

complied with the Taxpayer's Bill of Right's requirements. 885 P.2d 215, 220 (Colo. 1994). The language quoted by Plaintiffs concerns challenges to ***election results*** in which "voters may not be compelled to disclose their vote or the reasons behind." *Id.* at 228. Here, by contrast, a limited number of identified people signed the recall petitions. No disclosure of their private political decisions is necessary to determine whether their signatures (which are not challenged here) are authentic, whether their voter registration information (which also are not challenged here) is accurate, or whether their signatures were placed on petitions in the presence of the circulators who complete the circulator's affidavits (which is also not challenged here). *Bickel*'s concerns for voter secrecy are thus not present.

VI. Plaintiffs failed to allege a jurisdictional prerequisite for the petition deficiency claims.

Plaintiffs appear to agree with the DEO's argument that a protest to a recall petition must specify the grounds of protest. Plaintiffs write, "Therefore, in *Brownlow*, the issue was that the protest did not contain enough information to ascertain the grounds of the protest." (Pls.' Resp. at 13.) In support of meeting this standard, Plaintiffs point to their attorney's protest (who happens to be one of the Directors being recalled), which protest they say states, "the validity of the circulator affidavit and their adherence to the requirements of C.R.S. §32-1-909 and C.R.S. §32-1-910 in the circulation of the recall petitions." (*Id.*)

First, this allegation does not appear in their complaint, and they did not attach Mr. Taylor's protest to the complaint. Mr. Taylor's protest was not so integral to the complaint that it can be considered incorporated, and the Court should not consider these new allegations now.[4]

[4] If the Court is going to consider Mr. Taylor's protest at this stage, it should also consider the DEO's order on the various protests (which is not attached to the complaint) that quotes Mr. Taylor's statements at hearing that he did not incorporate his petition deficiency claims in his protest, in part, because the Recall Committee would have been able to rebut them through testimony. But the Court may, and should, decide the Motion to Dismiss without considering documents other than those actually before it.

Second, the statement attributed to the Taylor protest falls far short of the specificity required by the Constitution and by the Act. The allegation of issues around the "validity of the circulator affidavit" does not state what alleged defect was to be litigated by the protest. And the Recall Committee's "adherence to the requirements of C.R.S. §32-1-909 and C.R.S. §32-1-910 in the circulation of the recall petitions" does not state what acts were done in violation of the law (and cites different statutes as underlying legal bases than are raised here). The specificity requirement plays a crucial role in a protest because the timeline for a protest is narrow and there is no pre-hearing discovery. *See* C.R.S. § 32-1-910(3)(d)(IV). "Specific" means "of a particular or exact sort" or "so clearly expressed as to leave no doubt about the meaning." Specific, Merriam-Webster Online Dictionary (https://www.merriam-webster.com/thesaurus/specific). That standard was not met by Plaintiffs' vague allegation about "circulator affidavit validity" or legal compliance "in the circulation of recall petitions." Neither the DEO nor this Court can or should read the specificity requirement out of the Constitution and the Act.

Plaintiffs did not provide notice to the DEO and the Recall Committee of specific claims to be adjudicated. The consequence is a jurisdictional one, and the DEO was prohibited from considering claims announced for the first time when the hearing was about to end, and this claim must be dismissed.

VII. Plaintiffs concede that the statutes upon which their notarization claims rely do not apply here.

Setting aside the jurisdictional defect in the Third Claim, Plaintiffs concede that the statutes upon which they base this claim ***do not apply***. They admit the "specific provisions of Title 32 take precedence over the general provision of Title 1 cited as the 'Uniform Election Code of 1992'." (Pls.' Resp. at 14.) The further acknowledge that "[n]either is C.R.S. §24-21-504(2)(a) recreated in Part 9 of Title 32." (*Id.* at 15.)

In other words, the circulator affidavits must meet the requirements of the Act, and specifically C.R.S. § 32-1-910(2)(c). Plaintiffs do not argue the requirements in C.R.S. § 1-4-905(2(III) and C.R.S. § 1-40-111(2)(b)(III) are part of, incorporated into, or apply to C.R.S. § 32-1-910(2)(c)—because, as explained in DEO's motion, they don't as a matter of law. All Plaintiffs can muster is that these other statute's requirements "should be persuasive." (Pls.' Resp. at 15.) But the Court cannot vary the statutory requirements under C.R.S. § 32-1-910(2)(c) to import requirements that the General Assembly determined not to apply to special district director recall petitions. The General Assembly, being aware of provisions of two election laws, decided not to incorporate those provisions in a third election law, the Act. That decision has to have meaning. The claim should be dismissed.

VIII. Plaintiffs offer no defense of their recall petition cost estimate claim.

The DEO explained that Plaintiffs' contention that the recall petitions were deficient for failure to include a cost estimate was wrong as a matter of law. Plaintiffs offer no defense of the claim in their response.

IX. Plaintiffs cannot invalidate all recall petition signatures based on the allegation some petition(s) were unattended at some point in time.

Plaintiffs' Fourth Claim contends that some unidentified recall petitions were left unattended. As the DEO explained, this claim fails because Plaintiffs do not allege which circulator affidavits this affects or which petitions were affected, and neither he nor this Court has the authority to void petition signatures *en masse* due only to an interested party's suspicion, never fleshed out with material evidence at hearing.

Plaintiffs subtly admit that is true, as they assert that "[t]estimony that petitions were left unattended in public on two occasions should void ***those petitions*** based upon the falsity of the circulator's affidavit." (Pls.' Resp. at 16 (emphasis added).) Plaintiffs had the opportunity to prove which petitions were "those petitions" at the protest hearing, which afforded them the right

to obtain subpoenas (documentary and witness) and elicit testimony "under oath." C.R.S. § 32-1-910(3)(d)(IV). Plaintiffs do not allege that they proved at hearing which petitions were "those petitions," or even if there were signatures appended to "those petitions." As such, they have not alleged the DEO erred in the resolution of this claim.

To the extent Plaintiffs contend instead they were not required to prove which petitions were affected, their claim fares no better. In the absence of demonstrating which petitions were affected, Plaintiffs are essentially saying the DEO should have voided all the petition signatures. The only support they offer for this position is the same comment in *Bickel*. However, as noted previously, *Bickel*'s discussion concerns an entirely different scenario—a ***post***-election challenge, in which it is impossible to determine who voted for what as a matter of the constitutional guarantee of secrecy of the ballot. *See* Colo. Const., art. VII, sec. 8. That is not the case here, where each signatory to a recall petition is known—each name appears on the face of a petition—is subject to challenge, and for which there was an evidentiary hearing. Plaintiffs had the opportunity to prove this claim at hearing and chose not to do so. Nothing in the Constitution or the Act authorizes the wholesale invalidation of a recall petition based on unreasonable doubt.

X. Plaintiffs Fifth Claim fails for the reasons given in the motion to dismiss.

Plaintiffs' response restates their factual allegations (albeit with some new allegations): that someone who circulated a petition, Martha Karnopp, misrepresented the grounds of recall during public meetings. (Pls. Resp. at 16.) Plaintiffs do not, however, respond to the DEO's explanation as to why this claim fails, and for the reasons given in the motion, the Court should dismiss the claim. Most notably, Plaintiffs never identified a single person who signed after hearing statements they question. As such, Plaintiffs never challenged the sufficiency of any recall petition on this ground.

XI. The Sixth Claim fails for additional reasons beyond the lack of jurisdiction to consider the falsity of the statement of grounds for recall.

Plaintiffs' Sixth Claim restates their claim about the alleged falsity statements as a due process claim. As explained *supra*, neither the DEO nor this Court have jurisdiction to consider these issues. The DEO noted additional reasons why this claim fails in the motion, and Plaintiffs' response does not rebut those arguments.

First, under Plaintiffs' own argument, their pre-election conduct claim is time-barred. Plaintiffs argue that if pre-circulation conduct is not reviewable as part of sufficiency protest, then they must be able to bring a Rule 106 claim. This contention clearly exceeds what the Act provides, but also problematic for Plaintiffs is the fact that the DEO approved recall petitions' form in December 2023. (Am. Compl. ¶¶ 5-8.) Plaintiffs filed their Rule 106 action in March 2024, which is more than "28 days after the final decision of the… officer." Accordingly, under their own theory, the pre-circulation claim is time-barred.

Second, the DEO explained that, to support a due process claim, a plaintiff must plead a right that can trigger due process protections. Plaintiffs have not done that; instead, in their response, they reference a protest they filed and its assertion of a due process right. Aside from whether it was pled adequately, it is not enough for Plaintiffs to say they have a right—the right at issue must be a ***legally cognizable*** right. *See Zwygart v. Bd. of Cnty. Comm'rs*, 483 F.3d 1086, 1093 (10th Cir. 2007) ("A person alleging that he 'has been deprived of his right to procedural due process' must prove… he possessed a constitutionally protected liberty or property interest such that the due process protections were applicable" (internal quotation marks and citation omitted)). The Act does not create the right to pre-circulation review that Plaintiffs claim, and they do not identify any provision of the U.S. or Colorado Constitution that creates it. In the absence of a right, there cannot be a due process violation.

XII. Plaintiffs have not alleged facts to support their Seventh Claim.

It appears now that Plaintiffs are alleging two grounds in support of their Seventh Claim for relief: pre-circulation issues and procedural deficiencies in the hearing process.

Their theory of pre-circulation due process violations fails for several reasons. First, as explained with the Sixth Claim for relief, the pre-circulation issues concern the alleged false statements. As explained above, there is no jurisdiction under the statute for the DEO or this Court to review those issues. Second, if they could challenge the pre-circulation conduct under Rule 106 (and they can't), the claim is time barred as explained above. Finally, on the merits of a due process claim, state law does not create any enforceable right in pre-circulation conduct.

Nor can they proceed on their allegations with respect to hearing deficiencies:

- Evidence of protest as to form and petition deficiencies. The Designated Election Official properly denied Plaintiffs' request to enter evidence on the alleged falsity of the statement of grounds for recall. Because he could not consider that as part of his sufficiency determination, it was irrelevant. Plaintiffs had no "right" to introduce evidence on an irrelevant issue.

- Admission of signed petitions. Plaintiffs' issue remains unintelligible. The petitions were admitted into evidence. To the extent they are unhappy with how the Designated Election Official drafted his order, they have not explained how that denied them notice or the opportunity to be heard at the hearing.

- Exhibit list. For the same reason as above, Plaintiffs may quibble with the form of the Designated Election Officials' written decision, but they have not articulated how they were denied notice or an opportunity to be heard during the hearing.

Plaintiffs also allege that the failure to timely serve them with isolated pleadings or orders below deprived them of due process, saying only, "Protesters were prejudiced by the failures of Supporters' attorney and the DEO to serve documents on Protesters violating Protesters of due process of law." (Compl., ¶ 77.) Plaintiff's response is no more illuminating: "Each of these delays caused prejudice to the Protesters and their ability to present their case." (Pls.' Resp. at 18.) These bald assertions do not make for a legally sustainable due process claim. A party to an administrative appeal is denied due process if he "was effectively denied the opportunity to be

heard on the central issues." *Ward v. Indus. Comm.*, 699 P.2d 960, 969 (Colo. 1985) (citations omitted). But if a party is "afforded full opportunity to rebut" the agency decision, *id*., there is no due process violation.

Here, Plaintiffs do not allege how they were denied the opportunity to "be heard on the central issues." They received a two-day evidentiary hearing in which they put on their witnesses and introduced evidence. That Plaintiffs did not call witnesses whose testimony was pertinent to grounds for invalidating recall petitions is not a due process violation. Their silence on how they were prejudiced reflects the fact that they received due process, and lacking more than the conclusory allegations they offer, the claim fails. *See Warne v. Hall*, 2016 CO 50, ¶ 27 (rejecting "bare, conclusory assertions" and explaining that are "incapable of supporting a plausible claim for relief"). Without detail, Plaintiff's non-specific due process complaint is without merit.

XIII. The Court must dismiss the non-Director Plaintiffs.

Plaintiffs only argument that the non-Director Plaintiffs can seek judicial review is the DEO does not have the power to remove the right of appeal and, if the General Assembly intended such a result, "it would have specifically said so." (Pls.' Resp. at 19.) The DEO is not removing any party's right to appeal; neither he nor this Court have that authority. Rather, it was the General Assembly that has restricted who can challenge a sufficiency determination and, contrary to Plaintiffs' argument, it has done so "specifically":

> A determination that a recall petition is sufficient or not sufficient is subject to review by the court as defined in section 32-1-103 (2) upon the written request of ***the director sought to be recalled, the director's representative, or a majority of the committee*** as defined in section 32-1-909 (4)(a)…

C.R.S. § 32-1-910(3)(f) (emphasis added).

Plaintiffs cannot use Rule 106 to expand the statutorily defined categories of people who can challenge the DEO's sufficiency determination. "C.R.C.P. 106(a)(4) says nothing about conferring standing upon persons or parties who would not otherwise have it." *State v. Colo.*

State Pers. Bd., 722 P.2d 1012, 1019 (Colo. 1986); *see also* C.R.C.P. 81(a) (providing that the rules of civil procedure "do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute"). Plaintiffs cannot use Rule 106 to "extend… the jurisdiction" of the court. C.R.C.P. 82.

CONCLUSION

Plaintiffs' concern with how the recall committee framed the grounds of recall is beyond the authority of the DEO or this Court to address. The electoral process is their remedy. "The limitation on judicial review of the grounds for recall set out above makes it clear that the recall intended by the framers of the Colorado Constitution is purely political in nature." *Bernzen, supra*, 525 P.2d at 418. Except upon the limited grounds provided in statute, the law "reserves the recall power to the will of the electorate." *Id.* at 419. The Court should dismiss this case as there are no valid grounds to contest the DEO's sufficiency determination, and this litigation is preventing the people from exercising their "fundamental rights." *Id.*

Respectfully submitted this 14th day of May, 2024,

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
Nathan A. Bruggeman, #39621
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2024,, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)** was served electronically via CCEF to:

Daniel Taylor
3900 E. Mexico Ave., Suite 610
Denver, CO 80210
DanielTaylor@CoTaxAtty.com

s/ Nathan Bruggeman