District Court Arapahoe County, State of Colorado 7325 S. Potomac Street Centennial, CO 80112	DATE FILED: April 25, 2024 5:57 PM FILING ID: BF39AA3DADB8E CASE NUMBER: 2024CV30677
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:** A.J. BECKMAN, as Designated Election Official.	▲ **COURT USE ONLY** ▲ Case Number: 2024CV030677 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 RESPONSE TO PLAINTIFFS' REQUEST FOR DESIGNATION OF RECORD AND AMENDED REQUEST FOR RESTRAINING ORDER

Defendant A.J. Beckman, in his capacity as the Designated Election Official, respectfully responds in opposition to Plaintiffs' "Request for Designation of Record and Amended Request for Restraining Order" and states as follows[1]:

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

1. On April 25, 2024, Plaintiffs filed a "Request for Designation of Record and Amended Request for Restraining Order." Plaintiffs seek two categories of relief in this "request":

a. Designation of the record pursuant to Rule 106(4)(a); and,

b. Entry of a temporary restraining order against a third party.

2. Both requests by Plaintiffs are meritless. Rule 106(4)(a) does not apply as matter of law to this action. With respect to the restraining order request, it is frivolous, as it lacks a legal and factual basis and is filed to interfere with this Court's designation of Defendant as the Designated Election Official for the District.

I. RULE 106(4)(a) DOES NOT APPLY AS A MATTER OF LAW.

3. Plaintiffs filed a Rule 106(4)(a) action but, in doing so, they ignored the exclusivity of the adequate statutory procedure for judicial review of the Designated Election Official's sufficiency determinations under C.R.S. § 32-1-910(f). Rule 106(4)(a) and its procedures do not apply as a matter of law, as set forth in the Designated Election Official's motion to dismiss.

4. Section 32-1-910(f), C.R.S., does not incorporate or utilize the procedures under Rule 106(4)(a), including the record compilation procedure, because, under the Constitution, any review by the Court "shall be had and determined ***forthwith***." Colo. Const. art. XXI, sec. 2 (emphasis added). The urgency attendant to this judicial review arises from the fact that recall is a "fundamental" right of the district's electors. *See Shroyer v. Sokol*, 550 P.2d 309, 311 (Colo. 1976).

5. Plaintiffs' attempt to invoke Rule 106(4)(a), including their current request to initiate the administrative record compilation process, violates C.R.S. § 32-1-910(f) and Colo. Const. art. XXI, sec. 2. It is not a procedure allowed under C.R.S. § 32-1-910(f), and the time-

consuming and lengthy procedure violates the constitutional directive that this matter be resolved on an expedited basis.

6. As set forth in the Designated Election Official's "Motion for Constitutionally Mandated Forthwith Hearing," the proper procedure is for the Court to schedule a hearing on this matter as soon as is practicably possible. Using this process, the Court will determine whether Plaintiffs have properly invoked the jurisdiction of the Court and, only then if they have, what issues and factual record, if any, the Court requires to resolve issues that can be judicially reviewed under the limitations in the Colorado Constitution and Colorado statute.

7. Accordingly, the Court should deny Plaintiffs' request to designate the record and, instead, grant the Designated Election Official's motion to set a forthwith hearing.

II. THE COURT SHOULD DENY THE TEMPORARY RESTRAINING ORDER REQUEST AS IT LACKS A LEGAL AND FACTUAL BASIS.

8. Plaintiffs' request for a temporary restraining order asks the Court to enjoin the District from holding the recall election. This request suffers several fatal flaws, and the Court should deny it on its face.

9. *First*, Plaintiffs' attorney did not confer with the Designated Election Official's counsel prior to filing this request. This is surprising because Defendant's counsel called and spoke with Plaintiff's counsel yesterday, April 24, to confer regarding the motion for a forthwith hearing. Under these circumstances, Rule 121 certainly required conferral, and Plaintiffs' request lacks an explanation as to why no conferral occurred.

10. *Second,* Plaintiffs are seeking a temporary restraining order against a ***non-party***. In this proceeding, Plaintiffs have only joined the Designated Election Official as a defendant. However, their request for a temporary restraining order is directed to the Heather Gardens Metropolitan District's Board of Directors: "plaintiffs request that the court issue a temporary restraining order ***prohibiting the HGMD Board of Directors*** from holding the meeting to set the

recall election date until within 30 days from the date this court issues its final order finding the petitions sufficient." (Pls.' Req. at 6 (emphasis added).) The present matter does not provide the Court with jurisdiction to enjoin the Board of Directors, who are third-parties. *See* C.R.C.P. 65(d) (temporary restraining order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys").

11. *Third*, even if the request can be construed as being directed to the Designated Election Official, there is no legal basis to enter a temporary restraining order against him. As required by the Special Districts Act, the Designated Election Official delivered his sufficiency determinations and certificates of petition sufficiency to the District's Board of Directors. *See* C.R.S. § 32-1-910(4)(a)(I). At that point, the Designated Election Official does ***not*** have any authority to call an election or set an election date. Rather, the statute places that authority solely in the hands of the District's Board of Directors. *Id.* § 32-1-910(4)(a)(II). Because the Designated Election Official has no authority to call the election or set the election date, there is no basis to enter a restraining order against the Designated Election Official.

12. Nor does the fact that the Designated Election Official presented the certificates of petition sufficiency to the Board of Directors create a hook to enter an injunction against him. (*See* Pls.' Req. at 5-6.) He had a statutory ***duty*** to present the recall "petition[s], together with []certificate[s] of [their] sufficiency, to the board of directors of the special district at a regular or special meeting of such board." C.R.S. § 32-1-910(4)(a)(I). And there was nothing untoward with the Designated Election Official advising the Board that, as to the two directors who did not seek judicial review, the Board needed to set the election date. Under the statute, the Designated Election Official "shall render all interpretations and shall make all initial decisions as to controversies or other matters arising out of the operation of a recall election." *Id.* § 32-1-914(1). The Designated Election Official providing a statutorily required opinion does not create grounds

to enjoin him, and, in any event, he lacks any authority to set the election himself as that authority rests solely in the Board of Directors (*see supra*).

13. *Fourth*, Plaintiffs have failed to provide the Court with critical information. This is likely because they know that providing the Court with the whole story would prove their request is meritless. The facts are these:

a. The District Board of Directors has five members.

b. Four of those members are subject to recall petitions, and the Designated Election Official found all four recall petitions sufficient.

c. The District Board of Directors met, as Plaintiffs note, and received the Designated Election Official's certificates of petition sufficiency.

d. During that meeting, the Board did ***not*** set an election for the recall. In fact, as to two of the Directors who are subject to recall but who did not seek judicial review of the Designated Election Official's sufficiency determination, the member of Board who is not subject to recall moved to set the election date for those two Directors. Her motion was ***not*** seconded, and the Board did ***not*** consider it or set an election date.

e. In short, Plaintiffs are seeking a temporary restraining order against something that is not occurring. Plaintiffs further know that there is currently no reasonable probability that an election will be set because the Directors subject to recall hold a ***clear majority on the Board.*** In fact, given that two of the Directors subject to recall are Plaintiffs, they are effectively asking the Court to enter a restraining order against them.

14. *Finally,* Plaintiffs have wholly failed to make the necessary showing to obtain a temporary restraining order. Plaintiffs were required to show "specific facts shown by affidavit

or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant." Colo. R. Civ. P. 65(b). Plaintiffs did not file an "affidavit" (and their Rule 106(4)(a) complaint was not verified). Nor do the allegations in their request establish any "immediate and irreparable injury" to a party to this lawsuit. "The purpose of a temporary restraining order ('TRO') is to prevent 'immediate and irreparable harm" to one of the parties in a lawsuit," and a TRO "may only be issued upon a ***strong showing that specific immediate and irreparable harm will occur absent the order***." *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004) (emphasis added). Plaintiffs do not allege the District Board of Directors has set a recall election, and they do not allege any facts showing there is even a possibility that will occur. There is no such probability since the Board of Directors, a majority of whom are subject to the recall petitions, already considered whether to set the election and refused to do so. Plaintiff's counsel knows this, as he is the President of the District's Board of Directors.

15. Plaintiffs cited the Designated Election Official's statements before the District Board as having "caused a highly volatile dispute within the community" and seek the Court's intervention "[t]o quell the dissention" in that same community. Plaintiffs look to avoid controversy in an environment where sufficient recall petitions were filed against four of the five district directors. Beyond that, the directors subject to recall are the individuals who control the Board of Directors, and to date, they have been unwilling to call any such election as to directors who are not party to this appeal. Seeking recall is a fundamental right of their constituents that is, with limited exception, committed to the political process. Denying access to a fundamental right creates its own controversy. The Court should deny these requests and set a forthwith hearing to resolve this case so that the District voters can exercise their fundamental constitutional rights.

WHEREFORE, the Designated Election Official respectfully requests that this Court deny Plaintiffs' request to designate the record and enter a temporary restraining order.

Respectfully submitted this 25th day of April, 2024.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2024, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR CONSTITUTIONALLY MANDATED FORTHWITH HEARING** was served electronically via CCEF to:

Daniel Taylor
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Denver, CO 80210
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s/ Nathan Bruggeman