

OFFICE OF THE SECRETARY OF STATE

STATE OF COLORADO

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**DECISION IN RE S. DOUGLAS McMILLAN PROTEST**

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I, Suzanne Staiert, Deputy Secretary of State and the designated election official in this matter, have reviewed the protest filed by S. Douglas McMillan, and have conducted a protest hearing in accordance with section 2 of article XXI of the Colorado Constitution and paragraph (a) of subsection (9) of section 1-12-108, Colorado Revised Statutes. I find the petition format meets the legal requirements. The Giron recall petition format meets all constitutional and statutory requirements; the petition format laws must be liberally construed in favor of allowing the recall exercise; and Representatives substantially complied with the law even if the constitution and election code are interpreted to require the statement demanding the election of a successor.

**Procedural Facts**

Senator Angela Giron is the current state senator for state senate district 3 in Pueblo County. On April 10, 2013, Victor Head, Adam Head, and Earnest Mascaneras (“Representatives”) submitted a recall petition format for Secretary of State approval, seeking to recall Senator Giron.

On April 11, 2013, the Secretary of State’s office approved Representatives’ petition format. After receiving approval, Representatives began circulating the petition to recall Senator Giron. To meet the requirements of the law, Representatives needed 11,285 signatures from registered electors in senate district 3. After gathering signatures for approximately two months, Representatives filed a recall petition with the Secretary of State’s office that contained 13,466 signatures. Upon receipt of the petition, Secretary of State staff began verifying the signatures on the petition. On June 24, 2013, the Secretary of State issued a statement of sufficiency declaring that the recall petition contains more valid signatures than required by law.

On July 3, 2013, S. Douglas McMillan (“Protestor”), a registered elector of Colorado and of state senate district 3, filed a protest with the Secretary of State’s office under section 2 of article XXI of the Colorado constitution. Among other things, Protestor challenged the form of the recall petition and the sufficiency of the signatures on the recall petition.

In accordance with state law, a hearing on the protest was conducted on July 3, 2013, and both the Protestor and Representatives submitted their arguments in writing.

**Analysis**

**1. The Giron recall petition format meets all constitutional and statutory requirements.**

Protestor alleges that the recall petition is deficient because the petition does not specifically demand the election of a successor. The Secretary of State finds that the form of the

recall petition is sufficient. The “demand” language cited by Protestor is not part of the form of the recall petition.

*a. The demand for the election of a successor is not contained in the sections of law that specify the petition format.*

The “demand” language that Protestor claims is necessary to the recall petition is not included in the constitutional or statutory sections that strictly specify what the petition must include. Rather, the provisions addressing the demand for the election of a successor are contained in section 1 of article XXI of that constitution, which contains the heading “**State officers may be recalled.**” and in section 1-12-103, C.R.S., which contains the heading “**Petition for recall - statement of grounds.**”<sup>1</sup> Immediately following the constitutional section is a separate section with the heading “**Form of recall petition.**”<sup>2</sup> Similarly, the election code contains a separate statutory section with the heading “**Petition requirements - approval as to form.**”<sup>3</sup>

Colorado courts have consistently held that headings may be properly used as an aid to construe a statute.<sup>4</sup> If the people, in adopting the constitution, and the legislature, in adopting article 12 of the election code, intended a statement demanding the election of a successor, they would have placed the “demand” provision in the sections governing the form and requirements of recall petitions. But the people and the legislature did not do so; rather, they placed the general “demand” language in the definitional recall sections that provide the legal authority for recalling state officers. Doing so shows that neither intended the inclusion of such a statement on the face of every petition section.

Also, section 1 of article XXI of the Colorado constitution contains no procedure for filing a protest that alleges noncompliance with the provisions in section 1. Rather, section 1 reserves the right of the people to recall state officials.<sup>5</sup> Neither the exercise of the recall power nor the power itself may be protested. Section 1 only provides the legal authority and general procedures for the recall of state officers.<sup>6</sup> Because section 1 does not contain any right to protest the provisions of section 1, the Secretary of State finds that the protest is barred.

*b. The constitution and election code specifically mandate petition language.*

As mentioned above, the Colorado constitution provides the procedure for recalling an elected state officer and states that a recall petition “signed by eligible electors ... demanding an election of the successor to the officer named in said petition, shall be filed in the office in which petition for nominations to office held by the incumbent sought to be recalled are required to be filed;”<sup>7</sup>

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<sup>1</sup> Section 1 of article XXI of the Colorado constitution and section 1-12-103, C.R.S.

<sup>2</sup> Section 2 of article XXI of the Colorado constitution.

<sup>3</sup> Section 1-12-108, C.R.S.

<sup>4</sup> *In re U.M. v. District Court*, 631 P.2d 165 (Colo. 1981).

<sup>5</sup> *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974).

<sup>6</sup> Section 1 of article XXI of the Colorado Constitution

<sup>7</sup> *Id.* (Emphasis added.)

Additionally, the Colorado election code states that “eligible electors of a political subdivision may initiate the recall of an elected official by signing a petition which demands the election of a successor to the officer named in the petition.”<sup>8</sup>

In contrast to these general filing instructions, other portions of the constitution and the election code state, in very specific language, what words and phrases must be included on the form of the petition. For instance, after the “demand” language in the constitution, section 1 of article XXI goes on to affirmatively state that the petition “*shall* contain a general statement...stating the ground or grounds for which the recall is sought.”<sup>9</sup> The same is true in the election code: after the “demand” language in section 1-12-103, C.R.S., the statute affirmatively states that the petition “*shall* contain a general statement...stating the ground or grounds for which the recall is sought.”<sup>10</sup>

Further, the statutory section that specifically governs the form of the petition sets out in bold text the language that must be included on every recall petition.<sup>11</sup> No such clear requirement or mandate exists for the procedural “demand” language anywhere in the constitution or the election code. If the legislature meant to affirmatively require the “demand” language on the face of the recall petition, it would have specifically required it as they did with other language that must be on the face of the petition. Because of the lack of an authoritative instruction like those found elsewhere in the petition laws, the fact that the petition lacks language demanding an election of a successor is not detrimental to the recall petition.

Further, the entire point of a recall petition is to demonstrate popular support for the removal and replacement of the current elected official with a successor. The constitutional and statutory process requires the designated election official or governor to call and conduct a recall election upon certification of a sufficient recall petition, regardless of whether the face of the petition demands the election of a successor. As such, it is inherent in the word “recall,” and in the act of filing a recall petition, that the eligible electors demand the election of a successor. The legislature, in interpreting the constitutional provisions, added to the constitutional framework, which shows that it deemed the election of a successor as part of the very definition of a recall. Thus, the absence or inclusion of such language on the face of the petition has no legal effect on the validity of the signatures or the sufficiency of the petition.

*c. Combs v. Nowak did not address the “demand” language, rather it addressed the application of the constitution to municipalities.*

Protestor points to *Combs v. Nowak* for the proposition that a recall petition lacking “demand” language is deficient. But that case did not ultimately decide whether such language is crucial to a recall petition.<sup>12</sup> In *Nowak*, a recall committee submitted a petition for the recall of two aldermen and the mayor of Central City. A citizen filed a protest to the petitions claiming that the recall committee failed to include a demand for an election of a successor as required by section 1 of article XXI of the constitution. The municipal hearing officer agreed and determined the petitions were insufficient. But the committee appealed the hearing officer’s decision to the trial court, which then reversed the hearing officer’s decision, and found that the hearing officer

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<sup>8</sup> Section 1-12-103, C.R.S.

<sup>9</sup> Section 1 of article XXI of the Colorado Constitution (Emphasis added.)

<sup>10</sup> Section 1-12-103, C.R.S. (Emphasis added.)

<sup>11</sup> Section 1-12-108 (3), C.R.S.

<sup>12</sup> *Combs v. Nowak*, 43 P.3d 743 (Colo. Ct. App. 2002).

misconstrued or misapplied the law. The trial court found, in essence, that section 1 only applies to state officers and not to a municipal recall election. The city appealed the trial court's ruling.

The appellate decision then, which Protestor relies on here, only opined on issues of mootness (because the city conducted the recall after the trial court's ruling) and the applicability of the constitutional recall provisions to a municipality. The appeals court never addressed the central issue of this hearing regarding the "demand" language. In fact, the appellate court makes no mention of the "demand" language on the municipal recall petition after its general recital of the original protest and hearing.

Also, the case does not state the legal standard applied by the hearing officer, the trial court, or the appellate court. Without knowing the standard, it is difficult to apply *Nowak* to this matter. Protestor, in his written brief, argues that "there is no suggestion by the Court in *Nowak* that strict compliance is the appropriate standard." But this is so only because *Nowak* makes no mention of any standard at all. While substantial compliance likely applies here, the Secretary of State cannot be certain whether it applied in *Nowak*, especially since that case was decided under municipal election statutes that don't require the substantial compliance standard. As such, *Combs v. Nowak* is not on point and therefore is not relevant to the Giron petition or the protest.

## **2. Petition format laws must be liberally construed in favor of allowing the recall exercise.**

### *a. Recall is a fundamental right.*

Colorado courts have long held that recall is a fundamental right that the people of Colorado reserved for themselves when they adopted the constitution.<sup>13</sup> Additionally, it is well-established that statutes governing the recall power must be liberally construed in favor of the ability to exercise the power, and any limitations on that power must be strictly construed.<sup>14</sup>

Protestor alleges that Representatives' failure to include a statement demanding the election of a successor invalidates the Secretary of State's sufficiency determination, despite the jurisprudence in this area.

As stated above, the fact that the election of a successor must take place after an officer is recalled is inherent in the recall process. In his brief, Protestor points to prior testimony given by Ben Schler, Ballot Access Manager for the Colorado Secretary of State's office, for the proposition that the recall of an officer creates a vacancy and that there are several procedures for filling a vacancy. But nowhere in the constitution or election code does it say that a recall creates a vacancy. Rather, "vacancy" is a specific term in Colorado election law; only certain events can create a vacancy and recall is not one of them. In fact, the only time a vacancy is created in a recall scenario is when the officer subject to a recall resigns.<sup>15</sup> Thus, only a resignation, death, or failure to take an oath can create vacancy; a recall always results in an election, and nothing in Mr. Schler's previous testimony states otherwise.<sup>16</sup>

Also, any requirement mandating this "demand" language is necessarily a limitation on the power of recall and, as such, must be liberally construed in favor of the Representatives' fundamental right to exercise the recall power.

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<sup>13</sup> *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974).

<sup>14</sup> *Hazelwood v. Saul*, 619 P.2d 499 (Colo. 1980).

<sup>15</sup> Section 3 of article XXI of the Colorado constitution and section 1-12-109, C.R.S.

<sup>16</sup> Section 1-12-203, C.R.S.

The people, in reserving the right of recall in the state constitution, could not have intended that the absence of a ten-word phrase on the face of a petition would invalidate the signatures of over 10,000 eligible electors, especially when that phrase calls for an event that would happen anyway.

*b. A strict construction makes the recall process impossible.*

A strict construction of the petition laws would make the recall process an impossibility. Both the constitution and election code dictate what exactly must be on the recall petition:

- The 200-word statement of grounds for the recall,<sup>17</sup> and;
- The warning to signers, for which the legislature provided specific text.<sup>18</sup>

These sections are so specific as to what may be on the petition that neither can include the “demand” language that Protestor alleges must be present. The “demand” language cannot be included in the general statement, as it has nothing to do with the grounds for the recall. Similarly, petitioners cannot include the “demand” language in the warning because doing so would directly violate that section.

Thus, an interpretation that gives all three provisions their full and literal effect would require petitioners to include a “demand” statement that can’t be a part of the other two statements on the petition. Under this scenario, no one could ever comply with the recall law. The legislature never intended this impossibility. For these reasons and in accordance with long-standing case law, the Secretary of State finds that the form of the recall petition is compliant.

### **3. Even if the constitution and election code are interpreted to require the statement demanding the election of a successor, Representatives substantially complied with the law.**

The Colorado Supreme Court has time and again applied a “substantial compliance” standard in voting rights cases.<sup>19</sup> In determining whether petition proponents have achieved substantial compliance, Colorado courts consider: 1. whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate, 2. the extent of the noncompliance, and 3. the purpose of the applicable provision and whether that purpose is substantially achieved.<sup>20</sup> For the reasons specified below, the Secretary of State finds Representatives substantially complied with the petition laws.

*a. Representatives made a good-faith effort to comply with the law and did not consciously attempt to mislead the electorate.*

When determining substantial compliance, courts first consider any bad-faith in determining whether petition proponents satisfy the substantial compliance standard.<sup>21</sup> Here,

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<sup>17</sup> Section 1 of article XXI of the Colorado constitution and section 1-12-103, C.R.S.

<sup>18</sup> Section 1-12-108, C.R.S.

<sup>19</sup> *Loonan v. Woodley*, 882 P.2d 1380 (Colo 1994).

<sup>20</sup> *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996).

<sup>21</sup> *Id.*

Protestor asserts that the “Giron Petition Proponents at best did not make a good faith effort to comply with the legal requirement...and at worst, they intentionally misled the electorate when they excluded [the “demand] language.”

First, it is worth noting that there is absolutely no evidence in the record that Representatives misled the electorate, either intentionally or otherwise. As such, this allegation is rejected. Second, the Representatives did make a good-faith effort to comply. Indeed, Representatives used the petition format approved by the Secretary of State’s office. All evidence leads to the conclusion that Representatives made a good-faith effort to comply with the law.

As a final note, Protestor argues against Representatives’ potential equitable estoppel argument based on Representatives’ reliance on the approved Secretary of State petition format. But Representatives make no such argument in their written brief. Thus, this decision does not address Protestor’s argument.

*b. Any potential noncompliance by the Representatives is minimal.*

Next, courts consider the extent of the petition proponents’ noncompliance.<sup>22</sup> Here, Representatives did not include on their petition a phrase demanding the election of a successor, an election that would happen whether Representatives specifically demanded it or not. The Secretary of State finds that any potential noncompliance is minimal.

*c. The purpose of demanding the election of a successor is achieved despite the alleged noncompliance.*

Finally, courts look to the purpose of the provision that was allegedly violated and whether that purpose was substantially achieved despite the alleged noncompliance.<sup>23</sup> Here, the provision’s purpose is somewhat unclear, given that the recall procedure already requires the governor to call an election. Conversely, other statutorily-required words and phrases on a petition serve distinct purposes. For instance, the warning language required by section 1-12-108 (3) (b), C.R.S., serves the specific purpose of informing potential petition signers about the law. Similarly, the statute requiring a 200-word statement stating the grounds for recall serves the specific purpose of informing potential signers of the reasons why the proponents are seeking to recall the elected official.<sup>24</sup> Unlike these two examples, demanding the election of a successor on the face of the petition does nothing to inform potential signers, and seems to be more of a formality than having any specific purpose.

At a previous hearing regarding a petition to recall Senator John Morse, Protestor introduced into evidence the results of a telephone poll that used registered electors of senate district 11 as its sample.<sup>25</sup> Protestor again refers to that poll in this protest. Among other things, the poll asked residents of senate district 11 whether they knew what happened next if an officer was recalled. Of those asked, the poll showed that 46 percent knew that electing a successor is the next step. Protestor offered the polling results to show that the “demand” language is crucial

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<sup>22</sup> *Loonan*, 882 P.2d at 1384.

<sup>23</sup> *Id.*

<sup>24</sup> Section 1-12-103, C.R.S.

<sup>25</sup> Protestor’s exhibit 9.

to the petition because, without it, residents of senate district 11 were unsure of the next step. But the poll only asked residents of senate district 11, not the petition signers themselves.

After the Morse hearing, the Secretary of State found the poll results shed little light on what actual petition signers believed was the next step in the recall process and that the Secretary of State cannot speculate as to what petition signers understood. But here, the poll has even less relevance. Protestor now asserts that the poll, conducted in senate district 11, has some insight as to what petitioner signers in senate district 3 knew and understood. The Secretary of State cannot make such a leap and therefore finds that the poll results have no bearing on this matter.

For the reasons stated above, the Secretary of State determines that Representatives meet all three prongs of the substantial compliance test. As such, the Secretary of State finds the Representatives substantially complied with the constitutional and statutory recall petition requirements and reaffirms the sufficiency determination.

### **Finding**

For the reasons stated above, the Secretary of State finds that the petition recalling Senator Angela Giron is sufficient.

Dated this 9<sup>th</sup> day of July, 2013.



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