

COURT OF APPEALS, STATE OF  
COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

DATE FILED: June 28, 2021 9:01 PM  
FILING ID: 6EA4BA3C910A4  
CASE NUMBER: 2021CA946

Appeal from:  
DISTRICT COURT, EAGLE COUNTY,  
COLORADO  
Case No. 2020 CV 30264, Division 3  
Honorable Russell H. Granger, District Court  
Judge

**Plaintiff-Appellant:**  
TOWN OF AVON, COLORADO, a  
Colorado home rule municipality

v.

**Defendant-Appellee:**  
AVON RECALL COMMITTEE

*Attorneys for Plaintiff-Appellant:*  
Christopher D. Bryan, A.R. #35522  
Andrea S. Bryan, A.R. #40223  
Paul F. Wisor, A.R. #36816  
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COURT USE ONLY

Case Number: 2021 CA \_\_\_\_\_

**NOTICE OF APPEAL**

Plaintiff-Appellant Town of Avon, Colorado, a Colorado home rule municipality (“Town”), by and through counsel, Garfield & Hecht, P.C., hereby submits this Notice of Appeal and states as follows:

## **I. NATURE OF THE CASE**

### **A. Nature of the Controversy**

This appeal concerns the number of signatures required to trigger a recall election of two Town Councilors who were elected in the Town’s November 6, 2018 general election. The dispute is one of statutory interpretation—specifically, the meaning of the term “entire vote cast” as that phrase is used in Title 31 of the Colorado Revised Statutes (“Recall Statute”) and in Article XXI of the Colorado Constitution. The Town asserts that “entire vote cast” means the number of electors who participated in a municipal election, which, pursuant to the Recall Statute and Article XXI, is calculated by the number of affirmative votes in favor of a candidate, as well as all votes withheld by the voters—i.e., “undervotes.” Defendant Avon Recall Committee (“Committee”) contends “entire vote cast” means “votes cast,” which comprises only the number of affirmative votes for a particular candidate.

The Town sought a declaratory judgment under C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.* that the Town correctly calculated the minimum number of signatures necessary to trigger a recall election under the Colorado Constitution

and Colorado statute; and, in the alternative, seeking a declaration that the signature requirements for a recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) violate the First and Fourteenth Amendments to the United States Constitution.

**B. Orders BeingAppealed and Basis for Appellate Court Jurisdiction**

This is an appeal from the trial court's June 23, 2021, Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross-Motion for Summary Judgment ("Order"). This Court has jurisdiction pursuant to C.R.S. § 13-4-102(1) and C.A.R. 1(a)(1).

**C. Resolution of All Issues Pending Before the Trial Court**

The Order resolved all issues before the trial court.

**D. Applicability of C.R.C.P. 54(b)**

The Order resolved all claims among the parties and was therefore a final judgment for purposes of C.R.C.P. 54(b).

**E. Date of Entry of Order and Mailing**

The Order was entered on June 23, 2021, and served electronically on counsel for all parties on June 23, 2021.

**F. Extensions of Time for Filing Motions for Post-Trial Relief**

Not applicable. No extensions of time to file motions for post-trial relief have been filed.

**G. Date of Filing of Motions for Post-Trial Relief**

Not applicable. No motions for post-trial relief have been filed.

**H. Date of Denial of Motions for Post-Trial Relief**

Not applicable. No motions for post-trial relief have been filed. *See* Parts I(F) & (G), *supra*.

**I. Requests for Extension of Time to File Notice of Appeal**

No requests for extensions of time to file a notice of appeal have been made or granted.

**J. C.A.R. 3(d)(5) Compliance**

The Order and all other orders subject to appellate review were issued by Judge Granger, a district court judge in the Fifth Judicial District. Neither the Order nor any orders subject to appellate review were issued by a magistrate where consent was necessary.

**II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL**

1. Whether the trial court erred in denying the Town's motion for summary judgment.
2. Whether the trial court erred in granting the Committee's cross-motion for summary judgment.

3. Whether the trial court erred in finding that the Town Clerk incorrectly calculated the number of signatures required to trigger a recall election of two Town Councilors (Councilor Tamra Underwood and Mayor Sarah Smith-Hymes) who were elected at the November 6, 2018, general election.

4. Whether the trial court erred in finding that the phrase “entire vote cast” as that phrase is used in Section 1 of the Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) means only those votes that are affirmatively cast in favor of a candidate.

5. Whether the trial court erred in ignoring the key components of the legislative history of C.R.S. § 31-4-502(1)(d).

6. Whether the trial court erred in failing to consider or address the Town’s argument that the signature requirements for a municipal recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) violate the First and Fourteenth Amendments to the United States Constitution.

7. Any other legal error adverse to the Town made by the trial court.

8. Any issue raised by any other appealing party in this matter.

## **V. PRE-ARGUMENT CONFERENCE**

The Town does not request a pre-argument conference at this time.

## **VI. NECESSITY OF TRANSCRIPT**

No evidentiary hearing occurred, and no transcript of the trial court

proceedings below is necessary to resolve the issues raised on appeal. The Court will need to review the record certified on appeal and the pleadings and briefs filed with the trial court as well as the Order.

## **VII. COUNSEL TO PARTIES IN THE PROCEEDINGS BELOW**

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Andrea S. Bryan, A.R. #40223

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*Counsel for Defendant-Appellee*

## **VIII. APPENDICES**

Appendix 1: Plaintiff's Complaint filed December 1, 2020.

Appendix 2: Defendant's Answer and Counterclaim filed January 11, 2021.

Appendix 3: Plaintiff's Motion for Summary Judgment filed February 25, 2021.

Appendix 4: Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment filed on April 16, 2021.

Appendix 5: Plaintiff's Reply in Support of Motion for Summary Judgment and Response to Defendant's Cross-Motion for Summary Judgment filed on May 7, 2021.

Appendix 6: Defendant's Reply in Support of Cross-Motion for Summary Judgment filed on May 25, 2021.

Appendix 7: The trial court's Order of June 23, 2021.

DATED this 28<sup>th</sup> day of June, 2021.

Respectfully submitted,

GARFIELD & HECHT, P.C.



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Christopher D. Bryan, A.R. #35522

Andrea S. Bryan, A.R. #40223

Paul F. Wisor, A.R. #36816

*Counsel for Plaintiff-Appellant*

## **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on June 28, 2021, a true and correct copy of the foregoing **NOTICE OF APPEAL** was filed and served via the Colorado Courts E-Filing System on the following:

Alan D. Sweetbaum, A.R. #13491  
Andrew Miller, A.R. #44219  
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Clerk of Eagle County District Court  
855 Chambers Avenue  
P.O. Box 597  
Eagle, Colorado 81631

*s/Rachael Pudlo*  
Rachael Pudlo

<p>DISTRICT COURT, EAGLE COUNTY, COLORADO  885 Chambers Avenue  P.O. Box 597  Eagle, Colorado 81631</p> <p><b>Plaintiff:</b>  TOWN OF AVON, COLORADO, a Colorado home rule municipality  v.  <b>Defendants:</b>  AVON RECALL COMMITTEE, DR. TODD JON ROEHR, TAMERA LAVINA STURGILL, ADRIENNE AVRIL PERER, MARIA LYNN BARRY, and PAUL W. JENICK, in their capacities as members of the Avon Recall Committee</p> <p><i>Attorneys for Plaintiff:</i>  Christopher D. Bryan, A.R. #35522  Andrea S. Bryan, A.R. #40223  Paul F. Wisor, A.R. #36816  GARFIELD &amp; HECHT, P.C.  0070 Benchmark Road, Unit 104  P.O. Box 5450  Avon, Colorado 81620  Telephone: (970) 925-1936  Facsimile: (970) 925-3008  E-mail: cbryan@garfieldhecht.com  E-mail: abryan@garfieldhecht.com  E-mail: pwisor@garfieldhecht.com</p>	<p>DATE FILED: June 28, 2020 10:51 AM  FILING NUMBER: 606A616DAR3C910A4  CASE NUMBER: 2020 CV 0016A946</p> <p>▲ COURT USE ONLY ▲</p> <p>Case Number: 2020 CV _____  Div.: _____  <b>This civil action is subject to Simplified Procedure under C.R.C.P. 16.1 because the damages sought by Plaintiff do not exceed \$100,000.00.</b></p>
<b>COMPLAINT</b>	

The Town of Avon (“Town”), by and through counsel, Garfield & Hecht, P.C., hereby states and alleges the following against Defendants Avon Recall Committee (“Committee”) and its members (collectively, “Defendants”):

#### **PARTIES, JURISDICTION, AND VENUE**

1. The Town is a Colorado home rule municipality organized pursuant to Article XX, Section 6 of the Colorado Constitution and located in Eagle County, Colorado.

**COMPLAINT**

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2. The Committee is a recall committee formed for the purpose of recalling three Town Council members.

3. Dr. Todd Jon Roehr is a member of the Committee, with an address of 228 W. Beaver Creek Blvd., Avon, Colorado 81620.

4. Tamera LaVina Sturgill is a member of the Committee, with an address of 228 W. Beaver Creek Blvd., Avon, Colorado 81620.

5. Adrienne Avril Perer is a member of the Committee, with an address of 211 Nottingham Rd. #D, Avon, Colorado 81620.

6. Maria Lynn Barry is a member of the Committee, with an address of 2520 Old Trail Rd. #A, Avon, Colorado 81620.

7. Paul W. Jenick is a member of the Committee, with an address of 2455 Old Trail Rd. #A, Avon, Colorado 81620.

8. Defendants Dr. Todd Jon Roehr, Tamera LaVina Sturgill, Adrienne Avril Perer, Maria Lynn Barry, and Paul W. Jenick, are and have been, at all relevant times, the members of the Committee.

9. The Court has jurisdiction over the parties to this civil action pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.*

10. Venue is proper pursuant to C.R.C.P. 98 because the Town and Committee at issue are located in Eagle County, Colorado, and because all acts relevant hereto occurred in Eagle County, Colorado, and because the declaratory relief requested herein affects control of the Town's political and governing body located in Eagle County, Colorado.

**GENERAL ALLEGATIONS**

11. On November 6, 2018, the Town held a general election in which eight candidates sought election to the position of Town Councilor. There were four vacant seats for the position of Town Councilor, and each elector was allowed to vote for up to four of the eight candidates.

12. In the Town's 2018 election, 1,984 Town electors chose to vote for Avon Town Council candidates. These electors allotted 5,276 total votes to the candidates for Town Council. There were 2,660 "undervotes."<sup>1</sup> Councilor Sarah Smith Hymes, Councilor Tamra Underwood,

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<sup>1</sup> An "undervote" is defined as "an instance where the voter marked votes for fewer than the maximum number of candidates or responses for a ballot measure." Colorado Secretary of State Election Rules, 8 C.C.R. 1505-1, Rule 1.1.44.

**COMPLAINT**

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Councilor Scott Prince, and Councilor Chico Thuon were elected to serve as members of the Town Council. Councilor Hymes was subsequently selected by the Town Council to serve as Mayor of the Town pursuant to Section 4.3 of the Town Charter.

13. On November 3, 2020, the Committee submitted refiled petitions as original petitions to recall Mayor Hymes and Councilor Underwood.<sup>2</sup> The Committee submitted 462 valid signatures to recall Mayor Hymes and 452 valid signatures to recall Councilor Underwood.

14. On November 9, 2020, the Town Clerk issued Certificates of Insufficiency with respect to both petitions as neither petition contained 496 valid signatures, the amount calculated by the Town Clerk deemed necessary to trigger a recall election pursuant to Article XXI of the Colorado Constitution<sup>3</sup> which has been adopted by Section 3.5 of the Town Charter, and pursuant to Section 31-4-502(d) of the Colorado Revised Statutes.<sup>4</sup> The following summarizes the calculation conducted by the Town clerk:

$$\begin{aligned} 5,276 \text{ votes submitted for candidates} + 2,660 \text{ "undervotes"} &= 7,936 \\ 7,936 \times .25 &= 1,984 \\ \text{Divided by the number of open seats} \\ 1,984/4 &= \mathbf{496 \text{ signatures}} \end{aligned}$$

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<sup>2</sup> Although the Committee was formed for the purpose of recalling three Town Council members—Mayor Hymes, Councilor Underwood, and Councilor Amy Phillips—Councilor Phillips was reelected at the November 3, 2020, municipal election, so the effort to recall Councilor Phillips is moot as a matter of law.

<sup>3</sup> Article XXI of the Colorado Constitution was added in 1913 to address the recall of elected officials. Article XXI provides, in relevant part, that “until otherwise provided by law, the legislative body of any such county, city and county, city and town may provide for the manner of exercising such recall powers in such counties, cities and counties, cities and towns.” Article XXI goes on to provide “if more than one person is required by law to be elected to fill the office of which the person sought to be recalled is an incumbent, then the said petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast at the last preceding general election for all candidates for the office, to which the incumbent sought to be recalled was elected as one of the officers thereof, said entire vote being divided by the number of all officers elected to such office, at the last preceding general election.”

<sup>4</sup> C.R.S. § 31-4-502(d) provides a recall petition “shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office to which the incumbent sought to be recalled was elected as one of the officers thereof, such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.”

**COMPLAINT**

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15. Although submitted after the five-day deadline established in Section 31-4-503(c) or the fifteen-day deadline in Section 2 of Article XXI, the Committee submitted a protest on November 24, 2020, claiming, among other things, that the Certificates of Insufficiency were issued in error. It is the Committee's contention that only 330 signatures, amounting to only 16.6% of the electors who voted in the Town's last general election, are required to recall those elected at the 2018 election. The Committee's calculation for the required number of signatures can be summarized as follows:

5,276 votes submitted in favor of candidates X .25 = 1,319  
Divided by the number of open seats  
1,319/4 = **329.75 (rounded to 330) signatures**

**FIRST CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

16. The Town restates the allegations set forth in the previous paragraphs as if set forth fully herein.

17. A real case and controversy has arisen between the Town and the Committee as to the number of valid signatures required to trigger a municipal recall election under Article XXI of the Colorado Constitution and Section 31-4-502(d) of the Colorado Revised Statutes.

18. Pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.*, the Town is entitled to a declaration by this Court that:

- (a) The proper method of determining the "entire vote cast," as that phrase is used in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(d), means that the minimum number of valid signatures to trigger a recall election of the 2018 election is 496 signatures, not 330;
- (b) The Town issued valid Certificates of Insufficiency regarding the Committee's recall election effort;
- (c) Alternatively, the signature requirements for recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(d), if construed as the Committee interprets those provisions, violate the First and Fourteenth Amendments to the United States Constitution because they require a Town elector to cast the maximum votes allowed in order to have their participation in the Town Council election equally and fully counted for purposes of a recall;
- (d) The protests filed by the Committee were not timely submitted and not viable; and

**COMPLAINT**

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(e) The Committee's efforts to initiate a recall election have failed under Colorado law.

**WHEREFORE**, the Town respectfully requests that the Court provide relief and enter declaratory judgment in their favor and against the Committee as follows:

- A. Declare that the proper method of determining the "entire vote cast," as that phrase is used in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(d), means that the minimum number of valid signatures to trigger a recall election of the 2018 election is 496 signatures, not 330;
- B. Decree that the Town has issued valid Certificates of Insufficiency to the Committee regarding the recall election effort;
- C. Alternatively, declare that the signature requirements for a recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(d) violate the First and Fourteenth Amendments to the United States Constitution;
- D. Declare that the Committee's protests were not timely submitted and not viable;
- E. Declare that the Committee's efforts to initiate a recall election have failed under Colorado law;
- F. Enter judgment in favor of the Town and against the Committee;
- G. Award the Town their attorneys' fees, costs and expenses incurred in this case as appropriate under Colorado law; and
- H. Award the Town such other and further relief as the Court deems just and proper.

**RESERVATION OF RIGHTS**

The Town reserves the right to amend or supplement this notice pleading as needed.

DATED: December 1, 2020.

Respectfully submitted,

GARFIELD & HECHT, P.C.



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Christopher D. Bryan, A.R. #35522

Andrea S. Bryan, A.R. #40223

Paul F. Wisor, A.R. #36816

*Attorneys for Plaintiff*

**COMPLAINT**

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Address for Plaintiff

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DISTRICT COURT, EAGLE COUNTY, STATE OF  
COLORADO

DATE FILED: January 12, 2021 5:00 PM  
FILING NO: 82D66820BAS6910A4  
CASE NUMBER: 200Y302046

Eagle County Justice Center  
885 Chambers Avenue  
P.O. Box 597  
Eagle, CO 81631-0597

**Plaintiffs:** TOWN OF AVON, COLORADO, a Colorado home rule municipality

v.

**Defendant:** AVON RECALL COMMITTEE

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▲ COURT USE ONLY ▲

Case No.: 2020CV30264

Division/Ctrm:

**DEFENDANT AVON RECALL COMMITTEE'S ANSWER AND COUNTERCLAIMS**

Defendant Avon Recall Committee (the "Committee"), by and through its counsel, Sweetbaum Sands Anderson PC, for its Answer to Plaintiff Town of Avon, Colorado's Complaint states:

**PARTIES, JURISDICTION AND VENUE**

1. The Committee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint and therefore denies the same.

2. The Committee admits the allegations contained in Paragraph 2 of the Complaint.

3. The Committee admits that Dr. Todd Jon Roehr is a current member of the Committee. The Committee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint and therefore denies the same.

4. The Committee admits that Tamera LaVina Sturgill is a current member of the Committee. The Committee is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 4 of the Complaint and therefore denies the same.

5. The Committee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and therefore denies the same.

6. The Committee denies that Maria Lynn Barry is a current member of the Committee. The Committee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Complaint and therefore denies the same.

7. The Committee admits that Paul W. Jenick is a current member of the Committee. The Committee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint and therefore denies the same.

8. The Committee denies the allegations contained in Paragraph 8 of the Complaint.

9. The Committee admits the allegations contained in Paragraph 9 of the Complaint.

10. The Committee admits the allegations contained in Paragraph 10 of the Complaint.

### **GENERAL ALLEGATIONS**

11. The Committee admits the allegations contained in Paragraph 11 of the Complaint.

12. The Committee admits the allegations contained in Paragraph 12 of the Complaint regarding the votes cast in the 2018 election and the results of the election. Defendants affirmatively state that the legal authority cited and quoted in Paragraph 12 of the Complaint and the footnote related thereto speaks for itself. Any allegations in Paragraph 12 of the Complaint that are inconsistent with the cited rules are denied.

13. The Committee affirmatively states that the petitions cited in Paragraph 13 of the Complaint speak for themselves. Any allegations in Paragraph 13 of the Complaint that are inconsistent with the cited petitions are denied. The footnote related to Paragraph 13 contains legal conclusions to which no response is required. The Committee denies the remaining allegations contained in Paragraph 13 of the Complaint.

14. The Committee affirmatively states that the Certificates of Insufficiency and legal authorities cited and quoted in Paragraph 14 of the Complaint and the footnote related thereto speak for themselves. Any allegations in Paragraph 14 of the Complaint that are inconsistent with the Certificates of Insufficiency, statute, and constitutional provision are denied. The Committee is without knowledge or information sufficient to form a belief as to the truth of the

allegations contained in Paragraph 14 of the Complaint related to how or if the Town Clerk calculated the number of votes necessary to trigger a recall election and therefore denies the same.

15. The Committee affirmatively states that the document cited in Paragraph 15 of the Complaint speaks for itself. Any allegations in Paragraph 15 of the Complaint that are inconsistent with the document are denied. The Committee denies that its protest was untimely.

**FIRST CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

16. The Committee incorporates its prior responses as if fully set forth herein.

17. The Committee admits the allegations contained in Paragraph 17 of the Complaint.

18. The Committee denies the allegations contained in Paragraph 18 (including all subparagraphs) of the Complaint.

**AFFIRMATIVE DEFENSES**

19. The Committee denies all allegations not specifically admitted herein.

20. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

21. Plaintiff's claims are barred by Colorado election and recall laws, including but not limited to the Constitution of the State of Colorado and C.R.S. §§ 31-4-501, *et seq.*

22. Plaintiff's claims are barred by its failure to join indispensable parties.

23. Plaintiff's claims are frivolous, groundless and vexatious, and the Committee is entitled to its costs and attorneys' fees under C.R.S. § 13-17-101, *et seq.*, and C.R.C.P. 11.

24. The Committee reserves the right to add additional defenses as facts are revealed through discovery.

WHEREFORE, having fully answered the Complaint and having offered affirmative defenses thereto, the Committee requests that the Complaint be dismissed with prejudice and that the Committee be awarded its attorneys' fees and costs incurred in defending this action. The Committee further requests such other relief as the Court deems just and proper in the circumstances.

## **COUNTERCLAIMS**

Defendant Avon Recall Committee (the “Committee”), for its Counterclaim against Plaintiff, states and alleges, as follows:

### **PARTIES, JURISDICTION AND VENUE**

1. Plaintiff Town of Avon is a municipality located in Eagle County, Colorado.
2. Defendant Avon Recall Committee (the “Committee”) was organized in 2020 for purposes of recalling Councilor Tamra Underwood and Mayor Sarah Smith Hymes, among others.

### **GENERAL ALLEGATIONS**

3. On November 6, 2018, the Town held a general election in which eight candidates sought election to Town Councilor positions.
4. There were four vacant Town Councilor positions for the Town of Avon on the 2018 general election ballot, each elector being permitted to vote for up to four of the eight candidates.
5. According to the Town’s records, 1,984 electors cast 5,276 total votes for the Town Councilor positions. *See* copy of the Town’s vote tally for the Town Councilor positions, attached as Exhibit A.
6. Chico Thuon, Scott Prince, Sarah Smith Hymes, and Russell J. Andrade were elected as Town Councilors in 2018. The Town Councilors subsequently elected Sarah Smith Hymes to serve as Mayor of the Town.

7. The Committee sought approval from the Town Clerk Brenda Torres (“Town Clerk”) of a form petition to recall Councilor Tamra Underwood (“Councilor Underwood”) and Mayor Sarah Smith Hymes (“Mayor Hymes”), among others.

8. On or about August 12, 2020, the Town Clerk approved the form petition to recall Councilor Underwood and Mayor Hymes. At that time, the Town Clerk informed the Committee that only 479 valid signatures were required to trigger a recall election.

9. On or about October 12, 2020, the Committee submitted petitions to recall Councilor Tamra Underwood and Mayor Sarah Smith Hymes to the Town Attorney, Paul Wisor.

10. The Committee withdrew the original petitions pursuant to Article XXI, Section 2 of the Colorado Constitution after Mr. Wisor informed the Committee that they did not have sufficient valid signatures to trigger a recall election. Mr. Wisor also represented to the Committee that the Town had previously misinformed the Committee of the number of valid

signatures required to trigger a recall election. The correct number of valid signatures the Committee was required to submit, according to Mr. Wisor, is 496.

11. The Town alleges that the Town Clerk calculated the required number of signatures as follows:

$$\begin{aligned} 5,276 \text{ votes submitted for candidates} + 2,660 \text{ "undervotes"} &= 7,936 \\ 7,936 \times .25 &= 1,984 \\ \text{Divided by the number of open seats} \\ 1,984/4 &= 496 \text{ signatures} \end{aligned}$$

12. On or about November 3, 2020, the Committee re-submitted the petitions to recall Councilor Tamra Underwood and Mayor Sarah Smith Hymes to the Town as original petitions pursuant to Article XXI, Section 2 of the Colorado Constitution (collectively, the "Petitions").

13. On November 9, 2020, the Town Clerk issued Certificates of Insufficiency concerning the Petitions, finding that neither Petition was supported by a sufficient number of valid signatures to trigger a recall election.

14. According to the Town Clerk, the Committee submitted 452 valid signatures of electors registered to vote in the Town in support of a recall election for Ms. Underwood.

15. According to the Town Clerk, the Committee submitted 462 valid signatures of electors registered to vote in the Town in support of a recall election for Ms. Smith Hymes.

16. The Town of Avon has adopted the provisions of Article XXI of the Constitution of the State of Colorado concerning election recalls. *See Town Charter, § 3.5.*

17. Article XXI of the Constitution of the State of Colorado provides that petitions to recall elected municipal officials, where more than one person is required to be elected, "shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast at the last preceding general election for all candidates for the office, to which the incumbent sought to be recalled was elected as one of the officers thereof, said entire vote being divided by the number of all officers elected to such office, at the last preceding general election." Colo. Const., Art. XXI, § 4; *see also* C.R.S. § 31-4-502(1)(d)(Providing that Petitions to recall elected municipal officials, where more than one person is required to be elected, "shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office to which the incumbent sought to be recalled was elected as one of the officers thereof, such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.").

18. The Town Clerk miscalculated the required number of valid signatures under Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) by adding undervotes to the total votes cast.

19. An “undervote” is defined as an “instance where the voter marked votes for fewer than the maximum number of candidates or responses for a ballot measure.” 8 C.C.R. § 1505-1:1, Rule 1.1.44.

20. According to the Town’s records, 1,984 electors voted for Town Councilors in the 2018 election. *See Ex. A.* Had each elector cast their maximum allowable votes for Town Councilor positions (i.e., four votes for four open candidate seats), there would have been 7,936 total votes cast (i.e., 1,984 electors x 4 votes each = 7,936) for the Town Councilor candidates. Under that scenario, there would have been no undervotes. However, the Town contends there were undervotes, which necessarily eliminates the possibility that there were 7,936 total votes cast in the 2018 election for the Town Councilor positions. Yet, the Town contends that 7,936 total votes were cast for purposes of determining the number of signatures sufficient to trigger a recall election under Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d).

21. The Town Clerk’s miscalculation improperly increased the number of signatures the Town claimed were required to trigger a recall election by virtue of the Petitions under Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d).

22. The proper calculation to determine the number of signatures required to trigger a recall election under Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) Constitution is as follows:

$$\begin{aligned} 5,276 \text{ votes cast for the Town Councilor position} \times .25 &= 1,319 \\ 1319 \text{ divided by 4 (the number of open Town Councilor seats)} &= 330 \text{ (rounded)} \end{aligned}$$

23. Only 330 valid elector signatures were required to trigger a recall election pursuant to Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d).

24. Under the requirements of Article XXI, Section 4 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) (i.e., 330 signatures), the Petitions were signed by a sufficient number of electors so as to trigger a recall election.

25. Article XXI of the Constitution of the State of Colorado provides that “[t]he 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.” Colo. Const., Art. XXI, § 2.

**CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

26. The Committee incorporates all allegations and statements above as though fully set forth herein.

27. Genuine controversies between the respective parties exist with regard to the required number of valid signatures to trigger a recall election under Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) and whether a sufficient number of valid signatures were submitted with the Petition so as to trigger such recall.

28. Declarations are needed in order to terminate the controversies surrounding the Petitions and Certificates of Insufficiency.

29. This Court has the power to declare rights, status, and other legal relations between the parties with respect to the Petitions and Certificates of Insufficiency, whether or not further relief is or could be claimed pursuant to C.R.S. §§ 13-51-101, *et seq.* and C.R.C.P. 57.

30. Pursuant to C.R.S. §§ 13-51-101, *et seq.* and C.R.C.P. 57, the Committee seeks a declaration that:

- a. The Petitions were signed by a sufficient number of valid elector signatures to trigger a recall election under Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) based on the “entire vote cast” for Town Councilors (and excluding the votes not cast that are characterized as “undervotes” by the Town), requiring only 330 valid elector signatures to trigger a recall election;
- b. The Committee’s Petitions are sufficient;
- c. The Town’s Certificates of Insufficiency regarding the Committee’s recall efforts are invalid, non-binding and have no legal force or effect;
- d. The Town Clerk shall prepare and submit Certificates of Sufficiency concerning the Petitions pursuant to Article XXI of the Colorado Constitution; and
- e. The Town shall conduct a recall election for two Town Councilor positions pursuant to Article XXI of the Colorado Constitution.

WHEREFORE, Defendant Avon Recall Committee respectfully prays for the following relief:

A. For a declaration that:

- a. The Petitions were signed by a sufficient number of valid elector signatures to trigger a recall election under Article XXI of the Colorado Constitution and

C.R.S. § 31-4-502(1)(d) based on the “entire vote cast” for Town Councilors (and excluding the votes not cast that are characterized as “undervotes” by the Town), requiring only 330 valid elector signatures to trigger a recall election;

- b. The Committee’s Petitions are sufficient;
- c. The Town’s Certificates of Insufficiency regarding the Committee’s recall efforts are invalid, non-binding and have no legal force or effect;
- d. The Town Clerk shall prepare and submit Certificates of Sufficiency concerning the Petitions pursuant to Article XXI of the Colorado Constitution; and
- e. The Town shall conduct a recall election for two Town Councilor positions pursuant to Article XXI of the Colorado Constitution.

B. For attorneys’ fees and costs pursuant to C.R.S. § 13-17-101, *et seq.*, C.R.C.P. 11 and/or otherwise allowable under Colorado law; and

C. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 11th day of January, 2021.

SWEETBAUM SANDS ANDERSON PC

By: *s/Alan D. Sweetbaum*  
Alan D. Sweetbaum, #13491  
Reagan Larkin, #42309  
*Attorneys for Defendants Avon Recall  
Committee*

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of January, 2021, a copy of the foregoing was served via the Court authorized electronic service upon the following:

Christopher D. Bryan  
Andrea S. Bryan  
Paul F. Wisor  
GARFIELD & HECHT, P.C.  
0070 Benchmark Road, Unit 104  
P.O. Box 5450  
Avon, CO 81620

*s/Lisa Esquibel*

---

Lisa Esquibel

## Candidates for Town Council (Vote for 4)

Total		
Times Cast	1,984 / 3,621	54.79%
Undervotes	2,660	
Overtvotes	0	
Candidate Party Total		
Chico Thuon	999	18.93%
Tom Ruemmler	398	7.54%
Scott Prince	780	14.78%
Sarah Smith Hymes	774	14.67%
Tamra Nottingham	824	15.62%
Underwood		
Adrienne Perer	543	10.29%
Russell J. Andrade	626	11.87%
Mick Van Slyke	332	6.29%
Total Votes	5,276	
Total		
Unresolved Write-In	0	

DATE FILED: January 11, 2021 5:00 PM  
 FILING ID: 82D1682043565  
 CASE NUMBER: 2020CV30264

## Colorado Supreme Court Justice - Gabriel (Vote for 1)

Total		
Times Cast	22,692 / 36,367	62.40%
Undervotes	5,680	
Overtvotes	3	
Candidate Party Total		
YES	13,763	80.92%
NO	3,246	19.08%
Total Votes	17,009	
Total		
Unresolved Write-In	0	

## Colorado Court of Appeals Judge - Dailey (Vote for 1)

Total		
Times Cast	22,692 / 36,367	62.40%
Undervotes	5,876	
Overtvotes	1	
Candidate Party Total		
YES	13,308	79.14%
NO	3,507	20.86%
Total Votes	16,815	
Total		
Unresolved Write-In	0	

DISTRICT COURT, EAGLE COUNTY,  
COLORADO  
885 Chambers Avenue  
PO Box 597  
Eagle, Colorado 81631

DATID: 2021-02-16  
FILED: 2021-02-16 10:44:46  
CASE NUMBER: 21-CV-00001

**Plaintiff:**

TOWN OF AVON, COLORADO, a Colorado home rule municipality

V.

COURT USE ONLY

## Defendants:

## AVON RECALL COMMITTEE

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*Attorneys for Plaintiff:*

Christopher D. Bryan, A.R. #35522

Andrea S. Bryan, A.R. #4022

Paul F. Wisor, A.R. #368

GARFIELD & HECHT, P.C.

0070 Benchma

P.O. Box 5450

Avon, Colorado 81620

Telephone: (970) 925-1936

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E-mail: cbryan@garfi...

Case Number: 2020 CV 30264  
Div: 3

**This civil action is subject to Simplified Procedure under C.R.C.P. 16.1 because the damages sought by Plaintiff do not exceed \$100,000.00.**

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Town of Avon, Colorado (“Town”), by and through legal counsel, Garfield & Hecht, P.C., respectfully moves for summary judgment pursuant to C.R.C.P. 56(a) in the above-captioned matter and, as grounds therefor, states as follows:

## I. CERTIFICATE OF CONFERRAL

Pursuant to C.R.C.P. 121 § 1-15(8), on February 25, 2021, undersigned counsel conferred via e-mail with opposing counsel, who objects to the relief requested in this dispositive motion.

## **II. INTRODUCTION**

The sole issue in this case is the number of signatures required to trigger a recall election of two Town Councilors elected in the Town's November 6, 2018, general election. There are no material facts in dispute. Rather, the dispute, which is entirely legal in nature, is one of statutory interpretation—specifically, the meaning of the term “entire vote cast” as that phrase is used in Title 31 of the Colorado Revised Statutes (“Recall Statute”) and in Article XXI of the Colorado Constitution.

The Town asserts that “entire vote cast” means the number of electors who participated in a municipal election, which, pursuant to the Recall Statute and Article XXI, is calculated by the number of affirmative votes in favor of a candidate, as well as all votes strategically withheld by the voters, i.e. “undervotes.” Defendant Avon Recall Committee (“Committee”) contends “entire vote cast” means “votes cast,” which comprises only the number of affirmative votes for a particular candidate. The Town’s interpretation consistently results in a signature requirement equal to 25% of the electorate who participated in the 2018 election whereas the Committee’s interpretation results in an inconsistent signature requirement, which in the current election requires signatures of only 16% of the electorate.

As set forth below, the Town’s reading of the applicable law is the only interpretation consistent with the plain meaning of the words used, overall construction of Article XXI, the legislative history of the Recall Statute, case law, and the Colorado and United States Constitutions. The Committee’s interpretation, if accepted, would require this Court to declare the applicable provisions of the Recall Statute and Article XXI unconstitutional.

### **III. BACKGROUND & PROCEDURAL POSTURE**

On or about October 12, 2020, the Committee submitted petitions to recall two Town elected officials: Mayor Sarah Smith Hymes (“Hymes”) and Councilor Tamra Underwood (“Underwood”). After being informed that the recall petitions did not contain the required number of signatures to trigger a recall election, on or about November 3, 2020, the Committee resubmitted petitions to recall Hymes and Underwood as original petitions (collectively, the “Petitions”).

On November 9, 2020, the Town Clerk issued Certificates of Insufficiency regarding the Petitions to recall Hymes and Underwood on the basis that the Petitions lacked the sufficient number of required signatures to trigger a recall election. The Committee submitted a protest on November 24, 2020, contending that the Petitions contained a sufficient number of signatures.

The Town filed its Complaint on December 1, 2020, seeking declaratory judgment that the Town correctly calculated the minimum number of signatures necessary to trigger a recall election under the Colorado Constitution and Colorado statute; and, in the alternative, seeking a declaration that the signature requirements for a recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) violate the First and Fourteenth Amendments to the United States Constitution. The Town promptly notified the Attorney General’s Office of its constitutional challenge (in the alternative) on December 2, 2020, as required by C.R.C.P. 57(j).

The Committee filed its Answer and Counterclaim on January 11, 2021. The Committee’s sole counterclaim is essentially a mirror image of the Town’s Complaint and seeks declaratory judgment regarding the method for calculating the minimum signatures necessary to trigger a recall election. The Town replied to the Counterclaim. All pleadings have been filed, and the case has

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Page 4 of 29

been “at issue” per C.R.C.P. 16(b)(1) since January 19, 2021. C.R.C.P. 56 provides that a summary judgment motion can be filed 21 days after a civil action commences. This Motion is therefore timely. C.R.C.P. 57(m) provides, “The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.” The Court should do so.

**IV. STATEMENT OF UNDISPUTED MATERIAL FACTS**

The following material facts are not in dispute:

1. The Town is a Colorado home rule municipality organized pursuant to Article XX, Section 6 of the Colorado Constitution and located in Eagle County, Colorado. *See* Compl. at ¶1; Countercl. at p. 4 ¶ 1. *See* Town Charter at Sec 1.1, 2.1, 2.2 & COLO. CONST. Art XX § 6.
2. The Committee is a recall committee formed for the purpose of recalling three Town Council members: Hymes, Underwood, and Councilor Amy Phillips.<sup>1</sup> *See* Compl. at ¶ 2; Answer at ¶ 2.
3. The Court has jurisdiction over the parties to this civil action pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.* *See* Compl. at ¶ 9; Answer at ¶ 9.
4. Venue is proper pursuant to C.R.C.P. 98 because the Town and Committee are both located in Eagle County, Colorado, and because all acts relevant hereto occurred in Eagle County, Colorado. Compl. at ¶ 10; Answer at ¶ 10.
5. On November 6, 2018, the Town held a general election in which eight candidates sought election to the position of Town Councilor. There were four vacant seats for the position of Town

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<sup>1</sup> Although the Committee was formed for the purpose of recalling three Town Council members—Underwood, Hymes, and Phillips—Phillips was reelected at the November 3, 2020, municipal election, so the effort to recall Phillips is moot as a matter of law.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Councilor, and each elector was allowed to vote for up to four of the eight candidates. *See* Compl. at ¶ 11; Answer at ¶ 11; Affidavit of Brenda Torres (“Town Clerk”), **Exhibit A** at ¶ 6.

6. In the Town’s 2018 election, 1,984 Town electors voted for Town Council candidates. These electors allotted 5,276 total votes to the candidates. There were 2,660 “undervotes,” meaning individuals voted for at least one candidate but did not use all four votes allotted to them. *See* Exs. A at ¶ 7 and “A.1”; Compl. at ¶ 12; Answer at ¶ 12.

7. Underwood, Hymes, Scott Prince, and Chico Thuon were elected to serve as members of the Town Council at the November 6, 2018, election.<sup>2</sup> *See* Exs. A & A.1. Hymes was subsequently selected by the Town Council to serve as mayor pursuant to Section 4.3 of the Town Charter. *See* Compl. at ¶ 12; Answer at ¶ 12; Ex. A at ¶ 8.

8. On or about October 12, 2020, the Committee submitted to the Town petitions to recall Hymes and Underwood. *See* Ex. A at ¶ 11; Countercl. at ¶ 9; Reply to Countercl. at ¶ 9. The Town Clerk verified that the petition to recall Hymes contained 425 valid signatures and that the petition to recall Councilor Underwood contained 445 valid signatures. *See* Ex. A at ¶ 11.

9. The Committee subsequently withdrew the original petitions pursuant to Article XXI, Section 2 of the Colorado Constitution after being informed that they did not have sufficient valid signatures to trigger a recall election. *See* Countercl. at ¶ 10; Reply to Countercl. at ¶ 10; Ex. A at ¶ 13. The Town Attorney, Paul Wisor, informed the Committee that the correct number of valid signatures the Committee was required to submit is 496. *See* Countercl. at ¶ 10; Reply to Countercl. at ¶ 10.

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<sup>2</sup> Tom Ruemmler, registered agent for the Committee, and Adrienne Perer, a Committee member, lost their bids for election as Town Councilors at the November 6, 2019 election. *See* Ex. A and A.1.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

10. On November 3, 2020, the Committee submitted the Petitions. *See* Ex. A at ¶ 13. The Committee submitted 462 valid signatures to recall Hymes and 452 valid signatures to recall Underwood. *See id.*; Compl. at ¶13; Answer at ¶ 13; Countercl. at ¶¶ 14-15; Reply to Countercl. at ¶¶ 14-15.

11. On November 9, 2020, the Town Clerk issued Certificates of Insufficiency with respect to the Petitions submitted by the Committee, as neither contained 496 valid signatures, the amount calculated by the Town Clerk as required to trigger a recall election pursuant to Article XXI of the Colorado Constitution, which has been adopted by Section 3.5 of the Town Charter, and pursuant to § 31-4-502(1)(d) of the Colorado Revised Statutes. *See* Compl. at ¶ 14; Answer at ¶ 14; Countercl. at ¶13; Reply to Countercl. at ¶ 13.

12. It is the Committee's contention that only 330 signatures are required to recall those elected at the 2018 election. *See* Compl. at ¶ 15; Answer at ¶ 15; Countercl. at ¶¶ 22-23.

**V. LEGAL ARGUMENT**

The Town is entitled to summary judgment on its declaratory judgment claim against the Committee because the Town correctly calculated the number of signatures required to trigger a recall election under Colorado law. Any other interpretation of the meaning of the applicable statutory and constitutional provisions for recalls would render those provisions unconstitutional.

**A. LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT**

Summary judgment promptly disposes of actions where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* C.R.C.P. 56(c). The rule is designed to avoid unnecessary trials to further the prompt administration of justice. *Ruscitti v. Sackheim*, 817 P.2d 1046, 1048 (Colo. App. 1991). Summary judgment is warranted if the

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

pleadings, depositions, and other documents on file, together with affidavits show no genuine issue of material fact. *Happy Canyon Inv. Co. v. Title Ins. Co.*, 560 P.2d 839, 842 (Colo. 1976).

Once the movant makes a showing that there are no genuine issues of material fact, the burden shifts to the opposing party, who must demonstrate, with specific facts, that a real controversy exists. *Lane v. Arkansas Valley Publ'g Co.*, 675 P.2d 747, 749 (Colo. App. 1983). The opposing party may not rest upon mere allegations or denials in its pleadings but must provide specific facts proving a genuine issue exists necessitating trial. *Westerman v. Rogers*, 1 P.3d 228, 230 (Colo. App. 1999). If the opposing party fails to show a true factual controversy, summary judgment should enter. *People v. Cobb*, 944 P.2d 574, 576 (Colo. App. 1996).

**B. COLORADO CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR RECALLS**

Several sources of law govern recall elections in Colorado. Article XXI of the Colorado Constitution was added in 1913 to address the recall of elected officials, including the number of signatures required to trigger a recall election.

As relevant here, Section 1 of Article XXI of the Colorado Constitution ("Section 1"), provides a recall petition for an elected official who is the only official selected for a particular seat, such as a Mayor or a Town Council member elected to serve a ward 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 at the last preceding election for all candidates for the position which the incumbent sought to be recalled occupies***,

Section 1 further provides that where, as here, candidates are selected to fill multiple seats of the same type of office, such as town council members elected at large, then "the said petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to ***twenty-five percent of the entire vote cast at the last preceding general***

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

*election for all candidates for the office, to which the incumbent sought to be recalled was elected as one of the officers thereof, said entire vote being divided by the number of all officers elected to such office, at the last preceding general election.”*

(Emphases added.)

Section 4 of Article XXI of the Colorado Constitution (“Section 4”), delegates the recall power to all subordinate levels of government so long as procedural and substantive matters are not in conflict with the Constitution. *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974).

The Colorado General Assembly has adopted procedures for the recall of municipal officers, contained in the Recall Statute. Section 31-4-502(1)(d) of the Recall Statute, like Section 1, provides that the recall of an elected official selected to fill a single office shall only be subject to a recall if the petition is 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.*” (Emphasis added.)

Section 31-4-502(1)(d) also mimics the requirements of Section 1 with respect to the recall of officers who are selected to occupy multiple seats of the same type of office. Specifically, the Recall Statute provides:

If more than one person is required by law to be elected to fill the office of which the person sought to be recalled is an incumbent, then the recall petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled *equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office to which the incumbent sought to be recalled was elected as one of the officers thereof, such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.* (Emphases added.)

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Given that Article XXI and the Recall Statute set forth the same signature threshold requirements, the only issue in this case is the meaning of the term “entire vote cast” as that phrase is used in Article XXI and in the Recall Statute.

**C. THE TOWN CORRECTLY INTERPRETED THE TERM “ENTIRE VOTE CAST” AS INCLUDING BOTH AFFIRMATIVE VOTES IN FAVOR OF CANDIDATES AS WELL AS THOSE VOTES THAT WERE WITHHELD.**

The Town contends the phrase “entire vote cast” refers to the number of electors who participated in a given election, which is calculated by the affirmative votes in favor of a candidate, as well as all votes withheld by the voters, i.e. “undervotes.”<sup>3</sup> Specifically, the Town calculated the number of signatures required to trigger a recall as follows:

5,276 votes submitted for candidates + 2,660 “undervotes” = 7,936

7,936 X .25 = 1,984

Divided by the number of open seats

1,984/4 = **496 signatures**

496/1,984 = 25%

*See Ex. A at ¶ 15.*

In contrast, the Committee asserts “entire vote cast” actually means “votes cast” and that only votes affirmatively allotted in favor of a candidate as those which should be included in the calculation. The Committee’s computation of the number of signatures required to trigger a recall election was as follows:

5,276 votes submitted affirmatively in favor of candidates X .25 = 1,319

Divided by the number of open seats

1,319/4 = **329.75 (rounded to 330) signatures**

330/1,984 = 16.6%

---

<sup>3</sup> An undervote is “an instance where the voter marked votes for fewer than the maximum number of candidates or responses for a ballot measure.” *See* Colorado Secretary of State Election Rules, 8 C.C.R. 1505-1, Rule 1.1.44. Sometimes voters intentionally and strategically cast undervotes—a voting tactic that is referred to as “bullet voting” or “single-shot voting” or “plump voting.”

*See Ex. A.5; Countercl. at ¶ 22.*

The Town's interpretation of "entire vote cast" as including the number of affirmative votes in favor of a candidate as well as all votes withheld by voters is consistent with the plain meaning of those terms, the construction of Article XXI, the legislative history of the Recall Statute, and the United States Constitution. It also results in a uniform outcome across elections. The Committee's interpretation, conversely, does not conform to the provisions of Article XXI or the Recall Statute, results in diluting the votes and treating unequally those electors who voted for fewer than the maximum number of votes allowed—in violation of the First and Fourteenth Amendments to the United States Constitution—and provides for an inconsistent standard for recall of Town council members.

### **1. Plain Meaning**

When construing a constitutional amendment, courts seek to ascertain and give effect to the intent of the electorate adopting the amendment. *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). The same rules of construction apply to both constitutional provisions and statutes. *See Lobato v. State*, 304 P.3d 1132, 1138 (Colo. 2013). As always, courts begin with the plain language. *Id.* Terms should be given their ordinary and popular meaning. *Bolt v. Arapahoe Cty. Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo. 1995). Words used in constitutions are to be given their natural and popular meaning by which they are generally understood by the people who adopted them. *In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6*, 31 P.2d 325, 330 (Colo. 1933). Courts must read applicable provisions as a whole, harmonizing them if possible, and should avoid an unreasonable interpretation or one producing absurd results. *People v. Fioco*, 342 P.3d 530, 534 (Colo. App. 2014) (internal quotations omitted). Neither the

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

terms “vote” nor “cast” are defined in Article XXI, or anywhere else in Colorado’s electoral regulatory framework. Nor is there any Colorado case specifically interpreting the phrase “entire vote cast.” Therefore, it is necessary to look first to the plain and accepted dictionary definition of such words in the context of both Section 1 and the Recall Statute. *See Lobato*, 304 P.3d at 1139; *People v. Forney*, 770 P.2d 781, 783 (Colo. 1989) (when construing statutory terms, “[w]e have frequently looked to the dictionary for assistance in determining the plain and ordinary meaning of words”).

“Vote” means “to express an opinion,” “an expression of opinion or preference,” “a formal expression of a wish, will or choice voted.” WEBSTER’S THIRD NEW INT’L DICTIONARY <https://www.merriam-webster.com/dictionary/vote>; *see also* BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “vote” to mean “[t]he expression of one’s preference or opinion in a meeting or election by ballot, show of hands, or other type of communication”). “Cast” means “to make (a vote) formally.” *See* <https://www.merriam-webster.com/dictionary/cast>. The leading legal dictionary defines “cast” to mean “[t]o formally deposit (a ballot) or signal one’s choice (in a vote).” BLACK’S LAW DICTIONARY (11th ed. 2019). Finally, “entire” means “having no element or part left out: whole.” *See* <https://www.merriam-webster.com/dictionary/entire>.

Thus, the phrase “entire vote cast,” using the phrase’s constituent words in their natural sense, means the total expression of opinions of those formally expressing such opinions. The 2018 Avon electorate expressed their opinions in some instances by signifying a preference for four candidates. Other voters expressed their opinion by selecting fewer than four candidates but still expressed their opinion with respect to all candidates on the ballot—whether those opinions were strong for one candidate or rejection of seven.

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The plain meaning of “entire vote cast” leads to the conclusion that all opinions—expressed either affirmatively, in opposition, or strategically—should be counted for purposes of Section 1 and the Recall Statute. In this case, the “entire vote cast” (i.e., the total expression of *all* opinions in the 2018 election) was 5,276 votes affirmatively for candidates and 2,660 votes not in favor of up to four candidates for an entire vote cast of 7,936. Multiplying this number by 25% and dividing by the four candidates selected, the result is a signature requirement of 496 registered electors to trigger a recall. Significantly, taking the total amount of votes for candidates plus “undervotes” (7,936) and dividing by the number of candidates (4) yields 1,984—the exact number the Eagle County Clerk and Recorder notes as “Total Cast.” *See Ex. A.* When multiplied by 25%, one reaches 496 required signatures. The Town’s interpretation of “entire vote cast” leads to a signature requirement that equates to 25% of the electorate who voted in the last preceding election in which the candidates sought to be recalled were elected while the Committee’s interpretation leads to a signature requirement of 16% of the electorate. Notably, if the 1,984 electors elected the mayor, rather than Town Council’s appointing the mayor after being elected as a Town Councilor, the threshold for recall of such mayor under Article XXI and the Recall Statute would also be 496, not 330 as the Committee contends. It is illogical that that threshold for recalling the mayor would be different if the mayor were selected by the voters instead of being selected by the Town Council after being elected as a Town Councilor, and yet that is the absurd result that the Committee’s interpretation leads to.

**2. Colorado Supreme Court Precedent**

In *Bernzen, supra*, the Colorado Supreme Court expressed the view that the signature threshold required to trigger a recall under Section 1 equals 25% of the voting electorate. There,

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

the Colorado Supreme Court explained with respect to the recall of elected officials:

The framers, by requiring that a recall petition contain the signatures of at least 25% of all votes cast in the last election for all candidates for the position which the person sought to be recalled occupies, assured that a recall election *will not be held in response to the wishes of a small and unrepresentative minority*. However, once *at least 25% of the electorate* have expressed their dissatisfaction, the constitution reserves the recall power to the will of the *electorate*. Courts of law are not to intercede into the reasons expressed by the majority.”

525 P.2d at 418 (emphases added).

The Colorado Supreme Court has established that the 25% signature threshold for recalls relates to the electorate (i.e., the number of people participating in the preceding election) rather than the number of votes affirmatively allocated to a candidate. The Town’s interpretation of “entire vote cast” consistently accounts for 25% of the electorate. To adopt the view of the Committee that “entire vote cast” means “votes cast” would permit a mere 16% of the electorate to circumvent the normal electoral process to trigger a recall. The 330 “votes cast” approach advocated by the Committee is a full 33% less than the 496 threshold required by the Colorado Supreme Court.

The Colorado Supreme Court’s view that “entire vote cast” is synonymous with electors is also supported by other states’ supreme court precedents. *See, e.g. Lodoen v. City Council of Warren*, 136 N.W. 1031, 1032 (Minn. 1912) (holding that the phrase “a majority of the votes cast” means a majority of the whole number of *electors* voting at the election, and that ballots upon which there was no choice indicated, either for or against, must be still be counted); *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 93 (Haw. 1997) (“[b]ecause a ballot is ‘cast’ without regard to whether the ballot indicates the choice of the voter, the phrase ‘ballots cast,’ in its natural sense, refers to the total number of ballots deposited in the ballot box, including blank ballots and over

votes").

The holdings of *Bernzen*, *Warren*, and *Yoshina* recognize the importance of including the participation of all electors at a particular election equally. As evidenced by the 2,660 "undervotes," some Avon voters with a strong preference for fewer than four candidates strategically withheld some of their votes, as such votes only hinder their preferred candidates' chances of success, since allocating additional votes improves the vote count for their candidates' opponents. To only count those votes allocated to candidates would partially disenfranchise a portion of the electorate who made the choice to strategically place, or weight, their votes or who do not believe the candidates are worthy of such vote.

Given the precedent established in *Bernzen*, several Colorado municipalities of varying sizes, geographic locations, and ideological leanings have adopted municipal charter or code provisions that fully count the participation of the electorate.<sup>4</sup>

### **3. Statutory Construction**

Constitutional and statutory provisions are to be read as a whole, in context, and, if possible, a court is to give effect to every word contained therein. *Board of County Comm'r's v. Vail Assocs.*, 19 P.3d 1263, 1273 (Colo. 2001). The Court is bound to give consistent, harmonious,

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<sup>4</sup> See Town of Akron Mun. Code Sec. 1-8A-2 (25% of all ballots cast); City of Arvada Home Rule Charter, Article 3.6 (25% of registered electors); City of Boulder Home Rule Charter, Article IV, Sec. 56 (25% of the average number of registered electors voting in the previous two elections); City of Colorado Springs Charter, Art. 12-30(c) (25% of total ballots cast); City of Dacono Home Rule Charter, Article V, Sec. 5-3(b) (25% of ballots cast); City of Englewood Home Rule Charter Art. IV, Sec. 34 (25% of registered electors); Town of Frisco Home Rule Charter, Art. V, Sec. 5-3(b) (25% of ballots cast); City of Greenwood Village Mun. Code Sec. 2-8-20 (25% of all ballots cast); City of Littleton, Home Rule Charter, Art. IV, Sec. 34 (25% of registered voters in last election); Town of Mountain Village Home Rule Charter, Art. II, Sec. 2.7 (25% of registered electors who voted in last election).

and sensible effect to all parts of a constitutional provision, to the extent possible. *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006)

Two separate provisions of Section 4 of Article XXI reinforce the Colorado Supreme Court's view in *Bernzen* and the Town's view that the threshold signature requirement for recalls should always equal 25% of the electorate, rather than the mere 16% of "votes cast" approach that the Committee advocates for.

**a. "Entire Vote Cast" Must Equal 25% of the Electorate**

Section 4 addresses the maximum signature thresholds a municipality may set in establishing its own recall provisions. Section 4 provides a municipality "shall not require any such recall to be signed by registered electors ***more in number than twenty-five percent*** of the entire vote cast at the last preceding election, ***as in section 1 hereof more particularly set forth***, for all the candidates for office which the incumbent sought to be recalled occupies, as herein above defined." (Emphases added.)

As noted above, Section 1 makes abundantly clear that elected officials running in single seat elections, such as mayors, are subject to a recall threshold of 25% of the "entire vote cast." Although the Section 1 language related to multi-seat contests varies from the single seat language in that it requires the "entire vote cast" be divided by the number of candidates elected, Section 4 demonstrates that both provisions of Section 1 (election of a single officer or where multiple officers are selected) require that the 25% threshold be met.

As the 2018 election results show, the 25% threshold can only be met if *full participation*, including votes and undervotes, is taken into account. Simply taking the "votes cast," as the Committee argues, can only achieve a very rough approximation of the 25% threshold

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requirement, and—except in those rare circumstances where the entire electorate votes all votes allotted to them—leaves the actual count far short of the 25% threshold. While undervotes may not have always been available to municipalities, the reality of elections in the 21st century is that such information is readily available immediately upon the tabulation of ballots, and the Town's counting undervotes generates a result that precisely calculates the 25% threshold requirement while still using the formula set forth in Article XXI and the Recall Statute.

Moreover, adopting the Committee's interpretation would lead to the absurd result whereby some town council members in Colorado representing wards are subject to a signature threshold of 25% whereas others, such as town council members elected in multi-seat races, are subject to a different threshold that could vary from election to election. Surely that was not the intent of the voters in ratifying Section 1, nor could it have been the intent of the General Assembly in drafting the Recall Statute.

**b. The “Votes Cast” Approach Only Applies to Second Recalls**

Section 4 separately provides “after one recall petition and election, no further petition shall be filed against the same officer during the term for which he was elected, unless the petitioners signing said petition shall equal fifty percent of the *votes cast* at the last preceding general election for all of the candidates for the office held by such officer as herein above defined.” (Emphasis added.)

As a general matter, “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Gloria Rodriguez, aka Carmen Santiago v. United States*, 480 U.S. 522, 525 (1987) (internal quotations omitted).

Throughout Section 1, the term “entire vote cast” is used to establish the number of signatures necessary to trigger a recall election. It is only for a second recall effort that the framers of Article XXI utilized the standard of “votes cast” in setting the signature threshold. As discussed below, “votes cast” is a unique standard unto itself in the recall context. If the framers of Article XXI had intended for “votes cast” to apply to initial recall efforts, they would have used that term throughout. Instead, the Colorado Supreme Court in *Bernzen* noted, the framers focused on the entire electorate and set forth a standard of 25% of all affirmative votes and undervotes, taken together, as the standard required for an initial recall effort.

#### **4. Legislative History of the Recall Statute**

The legislative history of the Recall Statute examined below further demonstrates that the Colorado General Assembly, which is subject to the constraints of Article XXI, has always interpreted the signature threshold needed to trigger a municipal officer recall election to equate to exactly 25% of the voters participating in the last election.

Where statutory language is ambiguous,<sup>5</sup> courts rely on other factors such as legislative history, the consequences of a given construction, and the end to be achieved by the statute. *Klinger v. Adams Cty. Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). Here, the legislative history of the Recall Statute shows that the General Assembly always intended the signature requirement necessary to trigger a recall election would never be less than 25% of the voters who participated in the preceding election.

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<sup>5</sup> To the extent that the Committee tries to assert that the language in the Recall Statute or Section 1 are not ambiguous, the Town would have this Court take note of the comments of a member of the Committee in the “Business Briefs” periodical, attached as **Exhibit B**, p. 11 (Bates label Plaintiff 1134).

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The General Assembly enacted Senate Bill (S.B.) 47-322 in 1947 to establish procedures for municipal recall elections. Under S.B. 47-322, a recall petition sufficient to trigger a recall election required signatures “equal in number to forty per centum of all ballots cast at the last preceding municipal election . . .” (emphasis added). *See* S.B. 322, 36<sup>th</sup> Gen. Assemb., Reg. Sess. (Colo. 1947), attached as **Exhibit C**. S.B. 47-322 remained largely unchanged until 1991. During the intervening 44 years, municipal recall petitions were subject to a 40%, and, later, 25%,<sup>6</sup> signature threshold of all “ballots cast.”

In 1991, the Colorado Municipal League ran two bills related to recalls, S.B. 91-68 and S.B. 91-69. Senate Bill 91-68 was drafted and passed to make the recall of county officers consistent with the procedure for the recall of school district officers. Senate Bill 91-69 was a general “clean-up bill” addressing a wide array of issues from appointment and compensation of municipal judges, the powers of municipal courts, public improvements with the boundaries of a municipality, anticipation warrants, the procedures for the selection of a mayor pro-tempore, and other general election issues. *See* S.B. 91-69 58th Gen. Assemb., Reg. Sess. (Colo. 1991), attached as **Exhibit D**. S.B. 91-69 also addressed the recall procedures for municipalities to “provide clarity to municipal clerks” and to avoid confusion by conforming the recall procedures to those used by counties and school districts. *See* Hearing on S.B. 91-69 Before the H. Local Gov. Comm., 58<sup>th</sup>

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<sup>6</sup> It is notable the General Assembly changed the standard from 40% of ballots cast to 25% of ballots cast in 1985. This change brought the Recall Statute in line with the requirements of Article XXI. *See* S.B. 85-102, 55<sup>th</sup> General Assemb., Reg. Sess. (Colo. 1985). Had the General Assembly believed that further changes were needed to ensure the Recall Statute complied with the Article XXI, they would have made those changes.

Gen. Assemb., Reg Sess., February 25, 1991.<sup>7</sup>

As relevant here, S.B. 91-69 amended C.R.S. § 31-4-502 which provided that a sufficient recall petition must 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 all ballots cast for all the candidates for that particular office and the last preceding regular election in said municipality.” *See Ex. D.* S.B. 91-69 deleted that language and added § 31-4-502(d) as well as language regarding the signature requirements for offices for which more than one person is elected, such as a town council. S.B. 91-69 amended C.R.S. § 31-4-502 to provide that

the recall petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office to which the incumbent sought to be recalled was elected as one of the officers thereof, such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.

*See Ex. D* (emphases added).

As a general matter, courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). However, if a legislative body intended to make a dramatic change in the meaning of a term, it would have spoken unambiguously. Where statutory language is changed in codification, and such “change was effected without substantive comment...absent such comment, it is generally held

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<sup>7</sup> The link to recordings of committee hearings for S.B. 91-69 per the Colorado State Archives is: <https://drive.google.com/drive/folders/1WoO9b9n6NRG9VYtGFpYRSEnksabUY2Gp?usp=sharing>

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that a change during codification is not intended to alter the statute's scope." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (citing *Muniz v. Hoffman*, 422 U.S. 454, 467-74 (1975)); *see also Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276 (11th Cir. 2000).

A review of the S.B. 91-69 hearings reveal precisely zero discussion about the change in language from "ballots cast" to "entire vote cast." At no time did any member of the General Assembly note, or anyone from the public testify, that the change in the method of calculation would dramatically reduce the threshold number of signatures required to trigger a recall of a municipal officer—in the present case, by as much as 33%.

The United States Supreme Court's canon of construction in *Walters* compels the conclusion that the lack of substantive comment on the replacement of the term "ballots cast" with "entire vote cast," along with the formula for calculating town council races, was not meant to lead to a change in the signature requirements for a recall in any way—the two formulations were, and continue to be, exactly the same, and they both equate to a signature requirement equal to 25% of the electorate, consistent with the holding in *Bernzen, supra*.<sup>8</sup>

It is inconceivable the elected officials, themselves subject to recall at any time, would have reduced the threshold for a recall of their elected counterparts in municipal government by as much as 33% and not uttered a substantive comment about it. Based on the legislative history

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<sup>8</sup> Indeed, here, the required number of signatures for the recall is the same whether one uses the pre-1991 "ballots cast" method or the entire vote cast, and then dividing by the number of candidates. Under the "ballots cast" formula, the 2018 election had 1,984 ballots cast for Town Council. Multiplying this number by 0.25, one reaches a recall threshold of 496. Taking the "entire vote cast" formula for the 2018 election, if one starts with the 5,276 affirmative votes cast for a candidate and adds in the 2,660 votes that were strategically withheld, the entire vote equals 7,936. Dividing that figure by the four council seats subject to the election and multiplying by 0.25 again reaches a recall threshold of 496.

cited above, it is apparent that the General Assembly believed the term “ballots cast” and “entire vote cast” were synonymous, and that the signature requirements under both methods would be the same—i.e., 25% of the *electorate*.

### **5. Other States’ Recall Statutes**

A survey of other states’ recall statutes is instructive and further supports the Town’s position that the number of signatures required to trigger a recall should always be the same percentage of the electorate, as the Colorado Supreme Court stated in *Bernzen*.

The majority of states that have addressed recalls have sought to take steps to ensure that all people who participated, or likely participated, in the election process during which the officer to be recalled was elected be included when establishing the threshold for the recall itself. These states establish the signature threshold by using standards such as “ballots cast,” “voters,” “persons,” or “electors.” A summary of other states’ approaches to recall signature thresholds is attached as **Exhibit E**.

As Exhibit E demonstrates, using the term “votes cast” is not simple matter of phrasing, it is a unique standard of measurement unto itself. If the drafters of Article XXI and the Recall Statute had intended for the threshold to be 25% of the “votes cast,” as opposed to “entire vote cast,” they would have so stated, just as six other states have done. *See Ex. E.* In fact, as discussed above, the framers did so state, but only when it came to the 50% threshold for second efforts to recall elected officials.

The Town’s interpretation is the only interpretation that is consistent with legislative intent and the only interpretation that leads to the same percentage (25%) of the electorate’s being required in each recall election.

**D. AN INTERPRETATION OF ARTICLE XXI THAT EFFECTIVELY COMPELS VOTERS TO CAST THEIR MAXIMUM NUMBER OF ALLOWED VOTES FOR THEIR PARTICIPATION IN THE ELECTORAL PROCESS TO BE FULLY AND EQUALLY COUNTED FOR PURPOSES OF A RECALL VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

An interpretation of Article XXI and the Recall Statute that requires voters to cast their votes for all candidates in an Avon election in order for their participation in the electoral process to be fully and equally counted for purposes of a recall violates the First Amendment and Fourteenth Amendments of the United States Constitution.

In interpreting a statute, courts “are guided by the rubric that the legislature intends a statute to be constitutional and we should construe it in a manner avoiding constitutional infirmity, if possible.” *People v. M.B.*, 90 P.3d 880, 881 (Colo. 2004) (“If a statute can be construed in a manner that adheres to constitutional requirements, we must adopt that construction.”). *See also Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 656 (Colo. 2005); *In re Adoption of C.A.*, 137 P.3d 318, 326 (Colo. 2006).

“The right to vote freely for the candidate of one’s choice is the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). “And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* The United States Supreme Court has crafted a flexible balancing test for considering the propriety of a state election law in light of citizens’ First and Fourteenth Amendment rights under which the court must weigh the character and magnitude of the injury to the rights protected by the First and Fourteenth Amendments. *See In re Interrogatory Propounded by Governor John Hickenlooper*, 312 P.3d 153, 158 (Colo. 2013) (internal quotations omitted).

Here, interpreting the phrase “entire vote cast” as the Committee wishes to do—such that only affirmative votes in favor of a candidate are included in the calculation of the required number of signatures to trigger a recall—infringes on citizens’ First Amendment rights by unconstitutionally compelling voters to vote for the maximum number of candidates on the ballot. Such an interpretation would also effectuate a restriction on citizens’ fundamental right to vote, protected by the Fourteenth Amendment, by diluting the votes of, and thus partially disenfranchising, those voters who choose not to vote for the maximum number of candidates. Such restrictions serve no compelling state or government interest.

### **1. First Amendment**

The First Amendment of the United States Constitution provides “Congress shall make no law ... abridging the freedom of speech.” This protection necessarily extends to a citizen’s decision to not speak: “The citizen is entitled to ... reject certain ideas or influences without Government interference or control.” *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817, 120 (2000)).

In the context of elections and voting, the First Amendment protects voters’ “right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal citation omitted). And “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.*

As such, interpreting Article XXI to require an Avon voter to cast the maximum votes allowed in order to have their participation in the Town Council election equally and fully counted for purposes of a recall is plainly unconstitutional. “A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to

foster such concepts.” *Id.* The Committee’s interpretation of Section 1 and the Recall Statute undeniably dilutes and diminishes the participation, for purposes of a recall, of Town voters who choose to vote for fewer than the maximum number of candidates on the ballot. To have her vote count equally for purposes of a recall, a voter is forced to vote for the maximum number of candidates. This cannot be reconciled with the First Amendment. Associated “with the right to cast a vote is the right to have that vote counted without undue interference with the exercise of that right.” *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993).

The conclusion that only counting votes allocated to candidates is a violation of the First Amendment is supported by the Colorado Supreme Court’s decision in *In re Hickenlooper*. There, the Colorado Supreme Court analyzed whether a provision of the Colorado Constitution—i.e., requiring an elector who desired to vote for a successor candidate in a recall election meant that the elector must also vote on the recall issue itself—was constitutional. 312 P.3d at 155. The Court held that this “prior participation” requirement violated the First and Fourteenth Amendments to the United States Constitution. *Id.* at 158-160.

The *Hickenlooper* Court reasoned that the prior participation requirement infringed upon a voter’s right to refrain from speaking, noting that “[a] citizen who wants to refrain from opining on the recall question, but who still wants to express an opinion about which successor candidate should be elected, is forced to forfeit her vote entirely for that successor candidate. The provision thus compels voters, if they wish for their vote to matter, to take a position on the recall where they may have no opinion on—or even categorically oppose—such elections.” *Id.* at 158.

As with the prior participation requirement, requiring voters to allocate their votes to have their participation in the Town Council election fully and equally counted for purposes of a recall

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election impermissibly violates their First Amendment rights. The 2018 Town Council election served two purposes. First, it served to select four candidates to become members of the Avon Town Council. Second, although less well-known to the voters, it set the threshold for signatures to recall those new members of Avon Town Council. As noted above, 1,984 voters participated in Avon's 2018 election. Fully one-third of the Town electors who voted did so in a manner to maximize their preferences for Town Council. Requiring a third of the Avon electorate to allocate additional votes to individual candidates who, for whatever reason, they did not support so that their participation in the election can be accounted for purposes of a future recall effort violates the First Amendment, as articulated in *In re Hickenlooper*.

**2. Fourteenth Amendment**

“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society and any restrictions on that right strike at the heart of a representative government.” *Reynolds*, 377 U.S. at 555. As such, the Fourteenth Amendment’s equal protection clause protects citizens’ right to vote because the “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Id.* at 560 (internal quotation omitted). Citizens’ First Amendment rights implicate the same pressing concerns: “The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.” *Id.*

Equal protection guarantees that persons who are similarly situated will receive like treatment under the law. *Harris v. The Ark*, 810 P. 2d 229 (Colo. 1991). To that end, state courts have “an obligation avoid arbitrary and disparate treatment of the members of its electorate.” *Bush v. Gore*, 531 U.S. 98, 105 (2000).

The Colorado Supreme Court also considered whether the prior participation requirement violated the Equal Protection Clause in *In re Hickenlooper*. In finding such a violation, the *Hickenlooper* Court noted the requirement “completely invalidates a voter's otherwise legal ballot for a successor candidate where that voter simply fails—or chooses not—to vote on the wholly distinct recall issue.” 312 P.3d at 159. The court noted the example where “a voter could wish to express an opinion about the propriety of the recall elections without also wishing to choose a successor candidate. Conversely, a voter could wish to affirmatively refrain from answering the recall question due to philosophical or political objections to (or disinterest regarding) the recall of the incumbent official but nevertheless wish to cast a vote for a replacement candidate in the event that the incumbent is ousted.” *Id.* Therefore, the court concluded, the prior participation requirement would penalize “the latter set of voters who, for whatever reason, do not wish to participate on the recall question without offering the State any practical or administrative gain. No compelling (or even rational) justification exists to nullify a voter's entire ballot simply because he or she refrains from answering the initial recall question.” *Id.*

Likewise, here, once an Avon voter allocates a vote in a Town Council election, there is no basis—compelling, rational, or otherwise—for the Town or the State to require Avon voters to allocate the maximum number of votes for their participation in the democratic process to be equally counted for purposes of a recall election. “[R]easonable regulation of elections *does not* require voters to espouse positions that they do not support.” *Id.* at 159 (quoting *Burdick*, 504 U.S. at 438) (emphasis in original)). Those voters who participated in the 2018 Avon Town Council election in a strategic manner should have the right to have such participation counted on an equal basis as those who, in some cases, blindly allocated the maximum number of votes without

consideration as to the consequences of such allocation for purposes of the present election or a future recall election.

The Town's interpretation of "entire vote cast" is the only interpretation that does not effectively compel speech by diluting the votes of those electors who choose to vote for fewer than the maximum number of candidates and the only interpretation that results in equal treatment of all electors. This Court should therefore adopt the Town's interpretation of "entire vote cast" to avoid constitutional infirmity.

**E. IF THE COURT ACCEPTS THE COMMITTEE'S INTERPRETATION OF THE PHRASE "ENTIRE VOTE CAST," THE COURT MUST DECLARE THE RELEVANT PROVISIONS OF SECTION 1 AND THE RECALL STATUTE UNCONSTITUTIONAL.**

If the Court does not agree with the Town that the phrase "entire vote cast" as that term is used in Section 1 and the Recall Statute includes both affirmative votes in favor of a candidate as well as undervotes, then the Court must declare both of those provisions unconstitutional, in violation of the First and Fourteenth Amendments to the United States Constitution.

Legislative enactments are presumed to be constitutional; overcoming this presumption requires a showing of unconstitutionality beyond reasonable doubt. *Huberv. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011); *see also People v. Graves*, 2016 CO 15, ¶ 9, 368 P.3d 317, 322.

Declaring a statute unconstitutional is "one of the gravest duties impressed upon the courts," *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). But the Colorado Supreme Court, in *In re Hickenlooper*, emphasized, "The United States Supreme Court's precedent (and common sense) make clear that virtually no regulation that compels voters to take a position can pass constitutional muster." 312 P.3d at 159 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983) and *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In

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decision after decision, [the United States Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”).

As articulated in Section V.D., above, an interpretation of “entire vote cast” that does not include both affirmative votes in favor of a candidate as well as votes that were withheld cannot be squared with the First and Fourteenth Amendments to the United States Constitution, as it unconstitutionally compels voters to vote for candidates they do not necessarily support for their participation to count equally for purposes of triggering a recall election.

Thus, if this Court adopts the Committee’s interpretation of “entire vote cast,” then it must declare the provisions of Section 1 and C.R.S. § 31-4-502(1)(d) regarding the calculations of required recall signatures for officers who occupy one seat among multiple seats unconstitutional.

**VI. CONCLUSION**

As set forth above, the Town correctly interpreted and applied Article XXI and the Recall Statute in calculating the number of signatures required to trigger a recall election of two of the Town’s Council members. The Town’s interpretation of “entire vote cast” as that phrase is used in both Section 1 and the Recall Statute is the only interpretation by which all voters’ participation is treated equally and the only interpretation that will guarantee that, before a municipal elected official can be subject to recall, 25% of the electorate must agree. This is the only interpretation consistent with Colorado Supreme Court case law, the statutory construction of Article XXI, the legislative history of the Recall Statute, and other states’ approaches to the recall. The Committee’s interpretation, on the other hand, would lead to the absurd result where the required percentage of voters’ signatures to trigger a recall could vary depending on the election. Such an interpretation

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not only contradicts plain meaning and legislative history; but would also render Section 1 and the relevant portion of the Recall Statute unconstitutional in violation of the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE, for the reasons set forth above, the Town asks that this Court grant summary judgment in favor of the Town and against the Committee on all claims in this case and declare that the phrase “entire vote cast” includes both affirmative votes in favor of a political candidate as well as “undervotes,” or, in the alternative, declare Article XXI, Section 1 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

Dated: February 25, 2021.

Respectfully submitted,

GARFIELD & HECHT, P.C.



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Andrea S. Bryan, A.R. #40223

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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that on February 25, 2021, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was filed and served via CCS on the following:

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Reagan Larkin, A.R. #42309

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s/Rachael Pudlo

Rachael Pudlo

DATE FILED: February 25, 2021 3:52 PM

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CASE NUMBER: 2020CV30264

DISTRICT COURT, EAGLE COUNTY,  
COLORADO  
885 Chambers Avenue  
PO Box 597  
Eagle, Colorado 81631

**Plaintiff:**

TOWN OF AVON, COLORADO, a Colorado home  
rule municipality

v.

**Defendant:**

AVON RECALL COMMITTEE

*Attorneys for Plaintiff:*

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▲ COURT USE ONLY ▲

Case Number: 2020 CV 30264

Div: 3

**AFFIDAVIT OF BRENDA TORRES**

STATE OF COLORADO      )  
                                    ) ss.  
COUNTY OF EAGLE      )

I, Brenda Torres, being duly sworn, state as follows:

1. I am the Clerk for the Town of Avon, Colorado ("Town"). I am over the age of eighteen.
2. This Affidavit is made in support of the Motion to Summary Judgment filed by the Town.

3. I have personal knowledge of the facts set forth herein and believe them to be true and accurate to the best of my recollection, knowledge, and ability. I would testify consistently with this Affidavit if called upon to do so.

4. The Town is a Colorado home rule municipality located in Eagle County, Colorado, organized pursuant to Article XX, Section 6 of the Colorado Constitution.

5. I have been employed as the Clerk for the Town since March 25, 2019. Prior to that, I served as a Deputy Clerk for the Town, beginning on May 2, 2016. As Town Clerk, I am the custodian of all official records of the Town. I am also responsible for overseeing and implementing the procedures for the Town's portion of coordinated general elections with Eagle County as well as overseeing and implementing the procedures for recalls of elected municipal officers.

6. On November 6, 2018, the County and Town held a coordinated general election ("Election"). There were four open seats for the position of Town Councilor at the Election and there were eight candidates on the ballot for the position of Town Councilor. The candidates for Town Councilor at the Election were: Chico Thuon, Tom Ruemmler, Scott Prince, Sarah Smith Hymes, Tamra Nottingham Underwood, Adrienne Perer, Russell Andrade, and Mick Van Slyke. Each voter was allowed to vote for up to four of the eight candidates on the ballot.

7. The official results of the November 6, 2018 Election for the position of Town Councilor are contained on the attached **Exhibit A.1**. Exhibit A.1 is an accurate copy of the official Election results for the position of Town Councilor provided to me by the Eagle County Clerk and Recorder. Exhibit A.1 contains the data regarding the total number of voters who participated in the Election (1,984), the number of votes received by each candidate for the position of Town Councilor (reflected in the "Total" column next to each candidate's name), and the total number of affirmative votes received by all of the candidates for Town Councilor (5,276). Exhibit A.1 also shows that there were 2,660 "undervotes" for the position of Town Councilor at the Election, meaning votes that could have, but were not, allocated to a particular candidate by a voter.

8. The following candidates were elected to the position of Town Councilor at the Election: Chico Thuon, Tamra Nottingham Underwood, Sarah Smith Hymes, and Scott Prince. Sarah Smith Hymes was subsequently chosen by the Town Council to serve as Mayor of the Town. Town Council members serve four year terms in office pursuant to the Town's Charter.

9. On August 12, 2020, I approved petitions as to form that were submitted by the Avon Recall Committee ("Committee") to recall Councilor Tamra Underwood ("Councilor Underwood") and Mayor Sarah Smith Hymes ("Mayor Hymes"). The form recall petitions provided that the following individuals are members of the Avon Recall Committee: Dr. Todd Jon Roehr, Tamera LaVina Sturgill, Adrienne Perer, Maria Barry, and Paul "PJ" Jenick. I verified that each of the members of the Avon Recall Committee is a registered elector of the Town.

10. On or about August 26, 2020, I received a Committee Registration Form for the Committee, attached as **Exhibit A.2**. The Registered Agent for the Committee is Tom Ruemmler.

11. On October 12, 2020, the Committee submitted petitions to recall Councilor Underwood and Mayor Hymes. I reviewed the names and signatures on the submitted petitions to recall Councilor Underwood and Mayor Hymes and compared them to a registered voter list provided to the Town by the Eagle County Clerk and Recorder. Based on my review, I verified that the petition to recall Mayor Hymes contained 425 valid signatures and the petition to recall Councilor Underwood contained 445 valid signatures.

12. On October 19, 2020, I issued Certificates of Insufficiency with respect to the petitions to recall Council Underwood and Mayor Hymes that had been submitted on October 12, 2020, as neither petition contained the requisite number of signatures I had calculated as required to trigger a recall election in the Town pursuant to Colorado Law. A copy of the Certificates of Insufficiency issued on October 19, 2020 are attached hereto as **Exhibits A.3 and A.4**. The Committee withdrew its petitions on October 19, 2020.

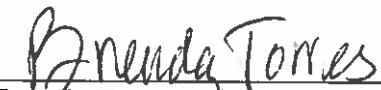
13. On November 3, 2020, the Committee submitted refiled petitions as original petitions to recall Councilor Underwood and Mayor Hymes (collectively, the "Petitions"). I reviewed the names and signatures on the Petitions and compared them to a registered voter list provided to the Town by the Eagle County Clerk and Recorder. Based on my review, I verified that the Committee submitted 462 valid signatures to recall Mayor Hymes and 452 valid signatures to recall Councilor Underwood.

14. On November 9, 2020, I issued Certificates of Insufficiency with respect to the Petitions submitted by the Committee, as neither petition contained 496 valid signatures, the amount I calculated as required to trigger a recall election pursuant to Article XXI of the Colorado Constitution which has been adopted by Section 3.5 of the Town Charter. A copy of the Certificates of Insufficiency issued on November 9, 2020 are attached hereto as **Exhibits A.5 and A.6**.

15. My calculation of the threshold number of signatures required to trigger a recall election of Mayor Hymes and Councilor Underwood was based off of the official Election results (Exhibit A.1) from the Election, which was the last preceding general election for Mayor Hymes and Councilor Underwood. I calculated the number of "entire votes cast" at the Election for all candidates for the office of Town Council to be 7,936, which is the total number of votes that were affirmatively cast in favor of Town Council candidates (5,276), plus the number of undervotes (2,660). Pursuant to the Colorado Constitution and state statute, to come up with the required number of signatures to trigger a recall election, I then multiplied the entire votes cast (7,936) by 0.25 and then divided that by 4 (the number of candidates elected as Town Councilors at the Election). Therefore, I calculated the required minimum number of signatures required to trigger a recall election of Mayor Hymes and Councilor Underwood to be 496 signatures.

16. On November 25, 2020 the Town received a written "protest" with respect to the

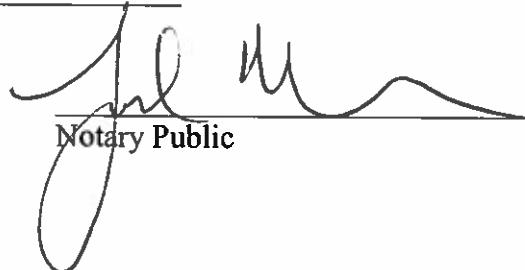
petitions, signed by PJ Jenick, Douglas Patton, and Tom Ruemmler. I issued a Denial of Request for Protest Hearing on November 30, 2020, finding that the protest was not timely submitted. A copy of my Denial of Request for Protest Hearing along with the protest is attached as **Exhibit A.7.**

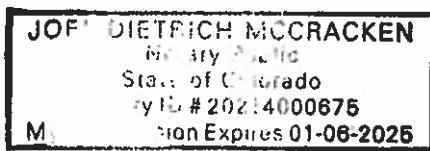
  
Brenda Torres

Subscribed and sworn to this 24<sup>th</sup> day of February, 2021, by Brenda Torres.

Witness my hand and official seal.

My commission expires: 1-6-2025

  
Notary Public



## Candidates for Town Council (Vote for 4)

		Total	
Times Cast		1,984 / 3,621	54.79%
Undervotes		2,660	
Overvotes		0	
Candidate		Party	
Chico Thuon		999	18.93%
Tom Ruemmler		398	7.54%
Scott Prince		780	14.78%
Sarah Smith Hymes		774	14.67%
Tamra Nottingham Underwood		824	15.62%
Adrienne Perer		543	10.29%
Russell J. Andrade		626	11.87%
Mick Van Slyke		332	6.29%
Total Votes		5,276	
		Total	
Unresolved Write-In		0	

DATE FILED: February 25, 2021 3:52 PM  
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 CASE NUMBER: 2020CV30264

## Colorado Supreme Court Justice - Gabriel (Vote for 1)

		Total	
Times Cast		22,692 / 36,367	62.40%
Undervotes		5,680	
Overvotes		3	
Candidate		Party	
YES		13,763	80.92%
NO		3,246	19.08%
Total Votes		17,009	
		Total	
Unresolved Write-In		0	

## Colorado Court of Appeals Judge - Dailey (Vote for 1)

		Total	
Times Cast		22,692 / 36,367	62.40%
Undervotes		5,876	
Overvotes		1	
Candidate		Party	
YES		13,308	79.14%
NO		3,507	20.86%
Total Votes		16,815	
		Total	
Unresolved Write-In		0	



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CASE NUMBER: 2020CV30264

### Committee Registration Form

Committee Name: Avon Recall

Purpose/Office Supported: Recalling 3 Avon town council members

Committee Type (circle one): Candidate Committee Political Committee Issue Committee

Registered Agent: Tom Riemmler

Contact Phone Number: 719 293-0655

Physical Address: 2011 Beaver Creek Point Avon CO

Mailing Address: BOK 2726 Avon CO 81620

Affiliated Candidate or Committee (if applicable): \_\_\_\_\_

Authorization:

Registered Agent's Name: Tom Riemmler

Registered Agent's Signature Tom Riemmler Date: 8-26-2020

Candidate's Name (if applicable): \_\_\_\_\_

Candidate's Mailing Address (if applicable): \_\_\_\_\_

Candidate's Signature (if applicable): \_\_\_\_\_ Date: \_\_\_\_\_



## Campaign Finance Report of Contributions and Expenditures

Full Name of Committee/Committee Representative: Avon Recall

Contact Phone Number: 719 293-0655

Name of Candidate/Issue: Recalling 3 town council members

Physical Address: 2011 Beaver Creek Point

Name of Financial Institution:

Type of Report (select one)	21 days before	14 days before	Friday before Election	30 days after	Annual
Regular Filing Schedule	<input checked="" type="radio"/>	<u>200.00</u>	—		
Amended Filing					

Report Period Covered: August 2020 through 10-8-2020.

### Report for Current Reporting Period

1	Funds on hand at beginning of reporting period	\$ <u>0</u>
2	Total monetary contributions	\$ <u>200.00</u>
3	Total monetary contributions and beginning funds on report	\$ <u>0</u>
4	Total monetary expenditures	\$ <u>195</u>
5	Funds on hand at end of reporting period	\$ <u>5</u>

**Any person who knowingly violates or fails to comply with the provisions of Chapter 1.14 of the Avon Municipal Code is subject to criminal and civil penalties.**

I hereby certify and declare that to the best of my knowledge and belief that this is a true and correct filing. I understand the submission of false, erroneous or incomplete information may be subject to sanctions in accordance with the Avon Municipal Code Section 1.14.

Printed Name: Tom Riemer

Title: Communication Representative

Signature: Tom Riemer

Date: 10-8-2020

## Monetary Contributions

Contributor	Occupation/ Employer	Address(include City/State/Zip)	Loan	Date contribution accepted	Amount of Contribution
Michael John Reid	Self	5037 UTC Lane		10-1-2020	200
		Vail, CO 81657			
		Box 3511			



DATE FILED: February 25, 2021 3:52 PM  
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### Certificate of Insufficiency

WHEREAS, pursuant to § 3.5 of the Town of Avon (the "Town") Home Rule Charter, any elected official of the Town may be recalled by the electors entitled to vote for a successor of such incumbent through the procedure in the manner provided for in Article XXI of the State Constitution; and

WHEREAS, Article XXI of the Colorado Constitution provides a recall may also be exercised by the registered electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law; and

WHEREAS, Section 31-4-501, et seq., C.R.S. governs the recall of elected municipal officials; and

WHEREAS, on August 12, 2020 the Town Clerk approved a petition as to form filed by the Avon Recall Committee (the "Committee") to recall Councilor Tamra Underwood; and

WHEREAS, the Committee returned a petition for recall on October 12, 2020, (the "Petition"); and

WHEREAS, the Town Clerk has reviewed the registered voter list provided to the Town by the Eagle County Clerk and Recorder as well as the signatures contained in the Petition to determine the number of registered voters who signed the Petition; and

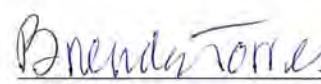
WHEREAS, the Eagle County Clerk and Recorder has provided the Town Clerk with a copy of the abstract of votes for the 2018 Avon Town Council election, which abstract is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, the Town Clerk reviewed the affidavits attached to the Petition.

NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. The Petition was timely filed with the Town Clerk.
2. The affidavits required pursuant to § 31-4-503(2)(c), C.R.S. are properly attached to the Petition.
3. The Petition contains 445 valid signatures of electors registered to vote in the Town, which is 51 fewer valid signatures than required pursuant to § 31-4-502(1)(d), C.R.S.

Pursuant to the foregoing, the Town Clerk hereby determines the Petition is insufficient. As required by § 31-4-503(3)(a), C.R.S., the Town Clerk has identified those signatures that are insufficient and the reason for such insufficiency in the Identification of Insufficiency attached hereto and incorporated herein as Exhibit B.

  
Brenda Torres  
Town of Avon Municipal Clerk





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### Certificate of Insufficiency

WHEREAS, pursuant to § 3.5 of the Town of Avon (the “Town”) Home Rule Charter, any elected official of the Town may be recalled by the electors entitled to vote for a successor of such incumbent through the procedure in the manner provided for in Article XXI of the State Constitution; and

WHEREAS, Article XXI of the Colorado Constitution provides a recall may also be exercised by the registered electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law; and

WHEREAS, Section 31-4-501, et seq., C.R.S. governs the recall of elected municipal officials; and

WHEREAS, on August 12, 2020 the Town Clerk approved a petition as to form filed by the Avon Recall Committee (the “Committee”) to recall Mayor Sarah Smith Hymes; and

WHEREAS, the Committee returned a petition for recall on October 12, 2020, (the “Petition”); and

WHEREAS, the Town Clerk has reviewed the registered voter list provided to the Town by the Eagle County Clerk and Recorder as well as the signatures contained in the Petition to determine the number of registered voters who signed the Petition; and

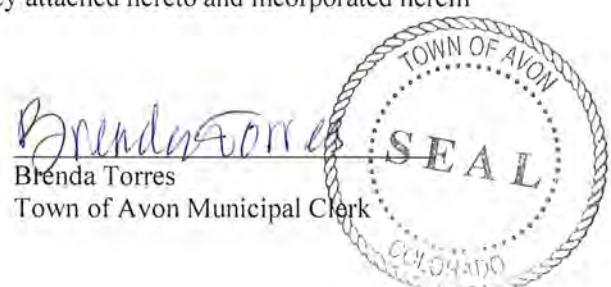
WHEREAS, the Eagle County Clerk and Recorder has provided the Town Clerk with a copy of the abstract of votes for the 2018 Avon Town Council election, which abstract is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, the Town Clerk reviewed the affidavits attached to the Petition.

NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. The Petition was timely filed with the Town Clerk.
2. The affidavits required pursuant to § 31-4-503(2)(c), C.R.S. are properly attached to the Petition.
3. The Petition contains 425 valid signatures of electors registered to vote in the Town, which is 71 fewer valid signatures than required pursuant to § 31-4-502(1)(d), C.R.S.

Pursuant to the foregoing, the Town Clerk hereby determines the Petition is insufficient. As required by § 31-4-503(3)(a), C.R.S., the Town Clerk has identified those signatures that are insufficient and the reason for such insufficiency in the Identification of Insufficiency attached hereto and incorporated herein as Exhibit B.





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### Certificate of Insufficiency

WHEREAS, pursuant to § 3.5 of the Town of Avon (the "Town") Home Rule Charter, any elected official of the Town may be recalled by the electors entitled to vote for a successor of such incumbent through the procedure in the manner provided for in Article XXI of the State Constitution; and

WHEREAS, Article XXI of the Colorado Constitution provides a recall may also be exercised by the registered electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law; and

WHEREAS, on November 3, 2020 the Avon Recall Committee (the "Committee") submitted a petition to recall Councilor Tamra Underwood (the "Petition"); and

WHEREAS, the Town Clerk has reviewed the registered voter list provided to the Town by the Eagle County Clerk and Recorder as well as the signatures contained in the Petition to determine the number of voters registered to vote in the Town of Avon who signed the Petition; and

WHEREAS, the Eagle County Clerk and Recorder has provided the Town Clerk with a copy of the abstract of votes for the 2018 Avon Town Council election, which abstract is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, the Town Clerk reviewed the affidavits attached to the Petition.

### NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. The Petition was timely filed with the Town Clerk.
2. The Petition contains 452 valid signatures of electors registered to vote in the Town, which is 44 fewer valid signatures than required pursuant to Section 4 of Article XXI of the Colorado Constitution.

Pursuant to the foregoing, the Town Clerk hereby determines the Petition is insufficient. The Town Clerk has identified those signatures that are insufficient and the reason for such insufficiency in the Identification of Insufficiency attached hereto and incorporated herein as Exhibit B.





DATE FILED: February 25, 2021 3:52 PM  
FILING ID: 6010D7DE3B9B3  
CASE NUMBER: 2020CV30264

### Certificate of Insufficiency

WHEREAS, pursuant to § 3.5 of the Town of Avon (the "Town") Home Rule Charter, any elected official of the Town may be recalled by the electors entitled to vote for a successor of such incumbent through the procedure in the manner provided for in Article XXI of the State Constitution; and

WHEREAS, Article XXI of the Colorado Constitution provides a recall may also be exercised by the registered electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law; and

WHEREAS, on November 3, 2020 the Avon Recall Committee (the "Committee") submitted a petition to recall Councilor Sarah Smith Hymes (the "Petition"); and

WHEREAS, the Town Clerk has reviewed the registered voter list provided to the Town by the Eagle County Clerk and Recorder as well as the signatures contained in the Petition to determine the number of voters registered to vote in the Town of Avon who signed the Petition; and

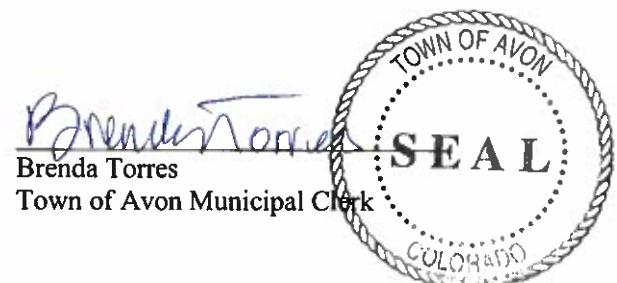
WHEREAS, the Eagle County Clerk and Recorder has provided the Town Clerk with a copy of the abstract of votes for the 2018 Avon Town Council election, which abstract is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, the Town Clerk reviewed the affidavits attached to the Petition.

NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. The Petition was timely filed with the Town Clerk.
2. The Petition contains 462 valid signatures of electors registered to vote in the Town, which is 34 fewer valid signatures than required pursuant to Section 4 of Article XXI of the Colorado Constitution.

Pursuant to the foregoing, the Town Clerk hereby determines the Petition is insufficient. The Town Clerk has identified those signatures that are insufficient and the reason for such insufficiency in the Identification of Insufficiency attached hereto and incorporated herein as Exhibit B.





DATE FILED: February 25, 2021 3:52 PM  
FILING ID: 6010D7DE3B9B3  
CASE NUMBER: 2020CV30264

### **Denial of Request for Protest Hearing**

WHEREAS, on October 12, 2020 the Avon Recall Committee (the “Committee”) filed petitions with the Avon Town Clerk to Recall Mayor Sarah Smith Hymes, Councilor Tamra Underwood and Councilor Amy Phillips; and

WHEREAS, the Committee withdrew its petition on October 19, 2020; and

WHEREAS, on November 3, 2020, the Avon Recall Committee (the “Committee”) refiled petitions as original petitions with the Avon Town Clerk to recall Mayor Sarah Smith Hymes, Councilor Tamra Underwood and Councilor Amy Phillips; and

WHEREAS, on November 9, 2020, the Avon Town Clerk issued Certificates of Insufficiency with respect to each of the petitions on the basis that each petition lacked the requisite number of signatures; and

WHEREAS, on November 24, 2020, PJ Jenick, Douglas Patton, and Tom Ruemmler filed a protest (the ‘Protest), attached hereto as Exhibit A, with respect each of the Certificates of Insufficiency; and

WHEREAS, the Town Clerk has reviewed the Protest.

NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. Section 31-4-503(c), C.R.S. provides any protest filed by a registered elector with respect to a “refiled petition shall be filed within five business days of the date on which such petition was refiled.”
2. Section 2 of Article XII provides registered electors of the Town of Avon may file a protest “within fifteen days after such petition is filed.”

Pursuant to the foregoing, the Town Clerk hereby determines, even under the more lenient standard provided under Section 2 of Article XXI, the Protest was not timely filed, and the Town Clerk lacks jurisdiction to hear the matters to be considered under the Protest.

A handwritten signature in blue ink that reads "Brenda Torres".  
Digitally signed by Brenda Torres  
DN: cn=Brenda Torres, o=Town of Avon,  
ou=General Government,  
email=btorres@avonco.org, c=US  
Date: 2020.11.30 15:08:19 -07'00'

---

Brenda Torres  
Town of Avon Municipal Clerk  
November 30, 2020

**Exhibit A**  
*Filed Protest*

**PLAINTIFF 000008**

We Douglas Patton, Todd Roehr, PJ Jenick, Tom Ruemmler and Does 1-570 are registered voters in Avon, Colorado. We do hereby file with the Designated Election Official (DEO), who is Avon's own municipal town clerk, this protest in writing and request an independent, impartial (DOE). The grounds for the protest include but are not limited to the following:

1. Initially the Avon town clerk and the Avon Recall committee were told by Avon town attorney, Paul Wisor, that 479 recall signatures were required; but after approximately 620 recall signatures were delivered to the Avon town clerk on October 12, 2020 Paul Wisor alleged that the number was actually 496.
2. The Avon town clerk rejected approximately 159 signatures of which approximately 60 are valid.
3. On October 19, 2020 the Avon town clerk verified over 450 recall signatures but alleged that the recall petitions did not have the adequate number of signatures required by Colorado Statute § 31- 4- 502( 1)( d), C. R.S.
4. However, Statute § 31- 4- 502( 1)( d), C. R.S., which dictates the number of required signatures, establishes a maximum of 330 signatures for multiple elected seats which is the case with the Avon recall. Additionally, the Colorado Secretary of State Election Department's Policy and Procedures Manual, Chapter 15, clearly states that 300 recall signatures are required for a non-partisan election. Both the Colorado State Constitution and Statute § 31- 4- 502( 1)( d), C. R.S require signatures needed for recalls be based on the total number of votes cast, not the total number of voters. Statute § 31- 4- 502( 1)( d), C. R.S states that when multiple seats are elected the total number of votes cast is first divided the number of seats elected and then multiplied by 25%. There were 5276 total votes cast in 2018 for 4 seats. Thus  $(5276/4) \times 25\% = 330$ .
5. Avon appointed its own town clerk as the Designated Election Official (DEO) and Avon town attorney. Paul Wisor, who represents the Town Council provided instructions to her. The DOE is not independent. Her job and income are dependent on Avon officials above her and her following the advice of the town attorney. Therefore, an out of area (out of the county) DEO should be appointed whom the Avon Recall committee recommends and is acceptable to Avon.
6. Avon officials and the public have suppressed the recall petition and recall election in violation of recall election Statute § 31- 4- 503( 5), C. R.S. and thus committed a misdemeanor. The various methods used to suppress the petition and recall election include but are not limited to: (1) presenting false and misleading information to the public, (2) harassing, intimidating and inhibiting petition circulators, (3) aggressively attempting to use Avon's own police department to arrest petition circulators, (4) making personal attacks on the circulators that had nothing to do with the reasons for the recall and (5) the DOE requiring 496 recall signatures even though Statute § 31- 4- 502( 1)( d), C. R.S. dictates and requires a maximum of 330 signatures for multiple elected seats such as the Avon recall and despite the Colorado Secretary of State Election Department's Policy and Procedures Manual, Chapter 15, that clearly says 300 signatures are required to recall an elected person in a non-partisan election.
7. Furthermore, the list of registered voters delivered by the Eagle County Clerk and Recorder to Avon was found to have many errors. The Avon town clerk did not contact the Avon Recall committee even though the committee said they could provide the town with voter id numbers for approximately 50 of the rejected signers.
8. Note that Avon Town representatives' false allegation that 496 signatures were required is an abuse of power that can result in unnecessary expenses while also lining the pocket the town attorney. All town representatives who have suppressed the Avon Recall should do the right ethical thing and resign. This will save the tax payers unnecessary expenses.

The Town of Avon Acknowledged on 10-19-2020 the following

**PLAINTIFF 000009**

WHEREAS, pursuant to § 3. 5 of the Town of Avon (the " Town") Home Rule Charter, any elected official of the Town may be recalled by the electors entitled to vote for a successor of such incumbent through the procedure in the manner provided for in Article XXI of the State Constitution; and

WHEREAS, Article XXI of the Colorado Constitution provides a recall may also be exercised by the registered electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law; and

WHEREAS, Section 31- 4- 501, et seq., C.R.S. governs the recall of elected municipal officials; and

WHEREAS, on August 12, 2020 the Town Clerk approved a petition as to form filed by the Avon Recall Committee (the " Committee") to recall Councilor Tamra Underwood, Sarah Smith Hymes and Amy Phillips; and

WHEREAS, the Committee returned a petition for recall on October 12, 2020, the (" Petition"); and

WHEREAS, the Town Clerk has reviewed the registered voter list provided to the Town by the Eagle County Clerk and Recorder as well as the signatures contained in the Petition to determine the number of registered voters who signed the Petition; and

WHEREAS, the Eagle County Clerk and Recorder has provided the Town Clerk with a copy of the abstract of votes for the 2018 Avon Town Council election, which abstract is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, the Town Clerk reviewed the affidavits attached to the Petition.

NOW THEREFORE, THE TOWN CLERK FINDS AS FOLLOWS:

1. The Petition was timely filed with the Town Clerk.
2. The affidavits required pursuant to § 31- 4- 503( 2)( c), C.R.S. are properly attached to the Petition.
3. The Petition contains 445 valid signatures of electors registered to vote in the Town, which is 51 fewer valid signatures than required pursuant to § 31- 4- 502( 1)( d), C. R.S.

Pursuant to the foregoing, the Town Clerk determining the Petition is insufficient. As required by § 31- 4- 503( 3)( a), C.R.S., the Town Clerk has identified those signatures that are insufficient and the reason for such insufficiency in the Identification of Insufficiency attached hereto and incorporated hermit' as Exhibit B.

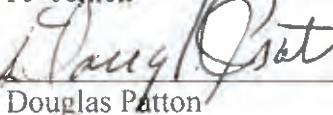
We file this Avon Recall protest that we believe to be true, under oath, under the penalty of perjury under the laws of Colorado.

  
PJ Jenck

11/20/20  
Date

  
Tom Ruemmler

11/23/2020  
Date

  
Douglas Patton

11/21/20  
Date

  
Dr. Todd Roehr

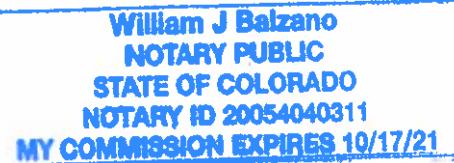
\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

State of Colorado  
County of Eagle

The foregoing instrument was acknowledged before  
me on this 23 day of November 2020  
by Thomas Rummel  
who is personally known to me or has produced  
Driver's license K029078 as identification  
William J. Balzano  
Notary's Signature



# BUSINESS BRIEFS

- Call Academy Mortgage in Eagle Ranch for home loans!
- **Letter: Reader rips Eagle County Commissioner Matt Sherr!**
- The Biden Watch!: The Good, The Bad, The Ugly!
- **Let Precision Construction West build for you!**
- Pamela Chapman column: Sustainability red flags!
- **Joy Overbeck column: What Republicans should do now!**
- Jackie Cartier column: The 2020 Playbook for new Presidents!

DATE AND TIME: FEBRUARY 28, 2021 19:00 PM  
FILING ID: 00124946

CASE NUMBER: 2020-CR-00124946

EXHIBIT B

Business Briefs – [www.BusinessBriefs.net](http://www.BusinessBriefs.net) – Volume 15, Number 4 – Feb 11 thru Mar 10, 2021

Distributed free, 1 per person, and free online, to about 900 locations in Vail & Eagle County, Colorado. 970-280-5555.

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ActionJacksonAuto.com  
(970) 949-5800

Action Jackson Auto  
41000 Hwy 6  
Avon, Colorado 81620

  
**PORTOFINO JEWELRY**  
We are open - come in and see us!  
Chapel Square in Avon  
240 Chapel Place  
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**APPENDIX 3 PART 2**

## The questionable 2020 presidential election!

## Gypsum's Kent Funeral Home in sued over cremation!

## Questioning Avon's lawsuit against 5 innocent people?

### The Good, The Bad, The Ugly!

- The *Vail Daily* ends Reader Comments & some censorship.
- Government requires \$15.00 per hour, Kroger closes 2 stores!
- The heck with QANON and White Supremacists!
- The very sad passing of 4 locals to 2 avalanches!

#### *Business Briefs'* Opinion

- The Good: The *Vail Daily* has decided to end "Reader Comments" below their stories and columns,

We are glad they did that because it means that they will no longer be able to censor conservative comments, like they often did to Ye Olde Publisher. (YOP)

YOP was asked to monitor the online drive by liberal trolls in these columns, and far left liberal *Daily* editor couldn't stand the rea-

sonable debate responses from conservatives like YOP. So, after a while of YOP winning debates, Peterson, to use his words, just "86'd" YOP.

But, Peterson had no problem with the personal attacks against YOP, who used his real name, while most of the liberal trolls attacked anonymously, using pen names.

This is a victory for conservatives!

- The Stupid: The City of Long Beach, California just learned

the hard way that legislating a \$15.00 per hour wage for employees just doesn't work, and backfires on elected officials who refuse to learn reality.

The Kroger grocery brand immediately closed two grocery stores in the city, including a Ralph's store and a Food4Less store.

Duh! Government should have no role in dictating pay wages for private business employees. Instead of raising the income by government edict, the

Continued on Page 3

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Thursday, April 8th, 2021  
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Thursday, June 24th, 2021  
Thursday, July 29th, 2021  
Thursday, August 26th, 2021  
Thursday, September 23rd, 2021  
Thursday, October 21st, 2021  
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Thursday, November 18th, 2021  
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# The questionable 2020 presidential election!

## Editorial

If you are a Trump hater, you probably won't want to read this editorial. Nothing we say is going to change your belief that the 2020 election was not stolen.

But, if we look at all the evidence garnered from the 6 states that didn't deliver decisions on election night, a reasonable person can conclude that there were a lot of issues counting votes, and potentially, a lot of questions regarding the possibility of machine corruption.

Recently, we were able to watch a documentary called "Absolute Proof" produced by Mike Lindell of My Pillow company fame.

The evidence that was presented was very convincing to Ye Olde

Publisher that Trump may have actually received around 79 million votes, not 74 million votes, and that Trump may have actually won the election.

Business Briefs is extremely disappointed with our court systems, and in particular, the U.S. Supreme Court when they refused to hear multiple cases, citing so-called lack of standing by those suing. We find that decision outrageous.

If Colorado can count all legal votes, but say, Pennsylvania counts illegal votes, then we in Colorado should have standing to challenge the alleged illegal actions of Pennsylvania. To deny standing to any citizen of the United States to sue anywhere in our country on this issue is a denial of

our rights to guarantee a fair election.

We find those courts' actions cowardly and fearful that Democrats will actually pack the Supreme Court and dilute the power of the present court, if they decided to hear this most important case.

The American voter deserves to know if there is credible evidence to see if Trump was or was not cheated.

17 Pennsylvania lawmakers are reportedly ON THE RECORD saying that 202,377 more votes were cast than there were registered voters. While we know this is disputed, fair-minded people would rather see the evidence about this in a courtroom, than take the word of a self-proclaimed "fact checker.

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# Kent Funeral Home is sued for alleged combining of 2 bodies for cremation!

## Staff Report

**Eagle** - A lawsuit filed July 8, 2020 by Plaintiffs David Roemer and Elizabeth Witthoeft against Kent Funeral Homes, whose trade name is Bailey-Kent Funeral Home, L.L.C., alleges that by "chemical and other scientific analysis, the cremains of Plaintiffs' son were co-mingled with at least one other person;" and that "the analysis of the cremains revealed fragments of bone from a larger adult together with surgical material, jewelry, and other metal."

The lawsuit says that, upon information and belief, Bailey-Kent Funeral Home, operates in several counties across Colorado, including but not limited to the counties of Eagle, Summit, Lake, and Chaffee.

According to the suit, "Plaintiffs were the parents to a baby boy named Donovan

Jeffrey Roemer, who passed away on December 8, 2019 and who was still born on December 9, 2019 at approximately 11:23pm.

"On December 10, 2019, while Donovan was being held in the holding room of the Summit Medical Center, Plaintiffs contacted Defendant to inquire into a cremation and service for their son."

"On December 12, 2019, Plaintiffs met with Defendant who agreed to cremate Donovan for the price of \$200.00.

According to the lawsuit, "Defendant cremated the human remains of more than one person within the same cremation chamber and/or otherwise co-mingled the remains of multiple human remains."

The lawsuit further alleges that "Plaintiffs did not authorize the cremation of their son with another person and did not

authorize in writing the co-mingling of ashes."

Further, "Defendant did not mark the cremains with the decedent's identity and the name of the crematory."

Further, "Defendant did not retain all documents and records concerning the final disposition of human remains."

Further, the lawsuit alleges that "Defendant did not provide a receipt, which should have been signed by both the crematory's representative and the person who delivered the human remains."

The lawsuit alleges that "Defendant apologized and offered to waive the cremation charge."

At a hearing during February of 2021, lawyers argued over the discovery process, while Judge Paul Dunkleman spoke of the right of the Defendant to use 5th

Amendment Rights to not have to answer questions in discovery which otherwise might lead to potential criminal charges also being filed, if credible evidence is found to verify the allegations.

The lawsuit alleges that "Due to the negligent and careless conduct of Kent Funeral Homes in the operation of the cremation of Plaintiffs' son, Defendant violated several state laws including but not limited to C.R.S. § 12-54-103, C.R.S. § 12-54-305, and C.R.S. 12-54-307.

The judge ruled that the Discovery process of potentially other witnesses could continue, and the hearing was extended until that discovery process was completed.

Shannon Kent reportedly signed an agreement with state regulators recently which requires him to exit the funeral home and cremation business in Colorado.

## Good, Bad & Ugly!

### The heck with QAnon and White Supremacists!

From Page 1 stupid government cost all the employees of those two stores their jobs and reduced their income to ZERO!

When will liberals learn?

• The Repetitive Nonsense: **Conservatives are tiring of hearing about a supposed organization known as QAnon. This online operation is headed by ... oh, no one seems to know who it's headed by.**

**This supposed organization is supposedly a right-wing group that is supposedly horrible for our country. The problem is, Ye Olde Publisher,**

**a staunch conservative, had never heard of them, nor have any of YOP's friends heard of them.**

But, if you listen to liberals, all conservatives are members of this organization that most of us know nothing about.

One more thing: YOP and the conservatives I know have nothing to do with far-right so-called White Supremacists!

YOP doesn't know any conservatives who fit this category.

We believe what is written in the Declaration of Independence - "All men (and Continued on Page 5

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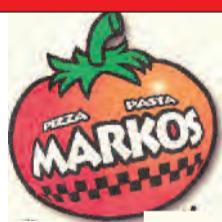
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**Steven** is a Colorado native where he lives with his wife and two boys.

In his free time he enjoys snowmobiling, mountain biking, skiing, rafting and attending concerts.



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**Steven** began his career in the mortgage industry in 2004. He specializes in FHA, VA, USDA, Conventional and Jumbo loans programs.

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## The Good, The Bad & The Ugly!

**Poland bans most abortions • H.R. 1 will endorse more illegal voting! • The very sad passing of 4 locals**

**From Page 3 women**) are created equal - PERIOD!"

**"abortions due to fetal defects are unconstitutional."**

**Amen!**

**In the United States, former Denver Bronco star Tim Tebow could have been aborted for allegations encouraging his mother to abort him, but she refused to do it and Tebow later produced miracle finishes to football games that took the Broncos to the Playoffs a few years ago.**

Poland now has a near total ban on baby

terminations, and has some of the strictest abortion laws in Europe, allowing abortions only for rape, incest or when the mother's life is in danger.

**• The Ugly: Democrats want to pass House Bill 1, which effectively endorses cheating in our presidential elections. Ridiculous.**

For example, instead of having signature verification of voter ballots like we have in

Colorado, Ye Olde Publisher (YOP) could "mine" extra ballots at Post Offices and pick up discarded ballots from the trash cans thrown away because these ballots were mailed to people who no longer rented their previous post office box.

So, the 8 ballots that a friend gave YOP could now be voted, without the signature verification required, and YOP would be guilty of 8 felonies, **HAD THEY**

**BEEN VOTED, WHICH THEY WERE NOT**, and those ballots would have counted.

**Even if you are a liberal, are you really for this?**

**• The Very Sad: We are all saddened at the loss of 4 locals, due to two avalanches recently. Our hearts go out to their families. May Adam Palmer, Andy Jessen, Seth Bossung and John Kuo rest in peace.**

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# Questioning Avon's lawsuit against 5 innocent people?

**Opinion by a member of the Avon Recall Committee, who were sued by the Town of Avon for simply following their 1st Amendment Right to petition their government to try to get a recall election to hold Mayor Sarah Smith Hymes, Mayor Pro Tem Amy Cramer Phillips and Avon Councilwoman Tamra Nottingham Underwood accountable. This opinion is by one member and does not necessarily represent the views of the other 4 members.**

**Avon** - Acting with honor, and respectfully declining the invitation to be subjected under unlawful proceedings- in defiance of dishonorable civil servants and government employees- I, hereby claim my reservation of rights, without prejudice for honorable rebuttal to invalid summons.

• Sherar v. Cullen, 481 F. 2d 946 (1973) "There can be no sanction or penalty imposed upon one because of his exercise of constitutional rights."

Accusations brought against the living being, are fictitious allegations and without the consent or jurisdiction over the living person and therefore give rise to further questions and requests for validation of legality and merit.

Do the Courts of Eagle County Colorado act under Common Law or Maritime Law? Are they a court of record?

**I hereby ask the Court of Eagle County, Colorado;**

1. When did it become legal for a corporation, the Town of Avon to sue individuals?

2. Would it not be true that a corporation may only sue another corporation and therefore individuals are protected from such egregious actions from a corporate entity?

3. What gives the Plaintiffs standing?

US v. Minker, 350 US 179 at 187 (1956) Supreme court of the United States 1795 "Inasmuch as every government is an artificial

person, an abstraction, and a creature of the mind only, a government can interface only with other artificial persons. The imaginary, having neither actuality nor substance, is foreclosed from creating and attaining parity with the tangible. The legal manifestation of this is that no government, as well as any law, agency, aspect, court, etc. can concern itself with anything other than corporate, artificial persons and the contracts between them."

**I hereby ask the Court of Eagle County, Colorado;**

1. When the suit names a committee as well as individually identifying all supposed members of such committee separately, would that not in fact be a redundancy and violate proper legal procedure?

2. Where is the contract binding the Town of Avon and the Avon Committee or the named defendants, duly signed and accepted as evidence to commence legal proceedings for violation of such a contract?

**I hereby ask the Court of Eagle County, Colorado;**

1. By what authority is the judicial system of Eagle county granted jurisdiction over the named persons and committee? To my knowledge, and without prejudice I, have never consented to, nor granted any such authority over my persons to any branch of government, to any civil servant, to any corporation or to any other living being. I reserve all inherent rights of autonomy granted by my creator and protected by the Bill of Rights of the Constitution of the United States of America, and will

not waive any inherent rights whatsoever to anyone or anything, for any reason whatsoever. (Statutory Jurisdiction is invalid and will not be tolerated as it only applies to Admiralty / Maritime Jurisdiction)

Hagan v. Lavine 415 U.S. 533. "A judgment rendered by a court without personal jurisdiction over the defendant is void. It is a nullity."

Main v. Thiboutot, 100 S Ct. 2502 (1980) "Jurisdiction can be challenged at any time," and "Jurisdiction, once challenged, cannot be assumed and must be decided."

Basso v. Utah Power & Light Co. 395 F 2d 906, 910 "Once challenged, jurisdiction cannot be assumed, it must be proved to exist."

**I hereby ask the Court of Eagle County, Colorado;**

1. When did it become legal and acceptable for a Town (not a living, breathing entity), to invoke Constitutional Rights of protection?

2. Is the Constitution not in place for the exact opposite purpose? To protect the people from the overreaching, unregulated corruption and abuse of elected officials?

3. Is it not true that elected servants may not hide under protection of the Bill of Rights, but must act according to their oath of office to protect individual rights as directed by the Bill of Rights? In fact, would it not be true that the sole purpose of the Amendments, particularly the I and XIV, as listed in the invalid claims, are to protect the people from the government?

**4. Then how is it possible and ethical for the "Town of Avon" to claim to have these rights, and further to say that said rights were violated by "We the People?"**

Davis v. Wechsler, 263 US 22, 24. "The assertion of federal rights [Bill of Rights], when plainly and reasonably made, is not to be defeated under the name of local practice."

**I hereby ask the Court of Eagle County, Colorado; and appointed employees?**

2. Why would such dishonorable tactics be entertained as legitimate excuses for aggressively attacking citizens for acting honorably in the legal exercise of creating a recall ballot measure?

3. **When did exercising your civic duties and responsibilities become an offense?**

4. What precedent is set if the exercise of the First Amendment is grounds for legal action against those invoking the protected exercise of the redress of grievances?

"Whenever any form of Government becomes destructive to our rights, it is the Right of the people to alter government, and institute new servants." - Preamble Declaration of Independence

**I hereby ask the Court of Eagle County, Colorado;**

1. **When did it become legal for private executive meetings, held in a public capacity and building, bound by limited delegated duties, to decide on legal actions against citizens, without any form of vote or oversight?**

2. **Why was an elected servant banned from such a meeting, while another servant (who was named in the original recall) with a direct conflict of interest was allowed to participate?**

3. Would this not be another example of a grotesque abuse of power and injustice and a direct violation to the oath of council office?

4. **Has the court ordered that the audio recording of such a meeting must be preserved and placed into evidence of the court?**

"The people have an indubitable, undeniable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purpose of its institutions." - James A. Madison

I hereby ask the Court of the county of Eagle, Colorado;

1. **Why is a blatant attempt to deny the voters of the Town of Avon, the inherent right to petition the Government for a redress of grievances, by exercising the voter's right to a ballot measure, being thwarted by local elected public servants and condoned by the Town's attorney, clerk, manager and other elected civil servants**

5. Are the elected council members who have defiled their oath of office still collecting their salary, when it is evident that they have over stepped their limited delegated duty, rendering their position null and void?

**PLAINTIFF 001129**

Continued on Page 11



# Letters and Commentary - Opinion!

## Reader very upset with Eagle County Commissioner Matt Sherr!

**Write a Letter to the Publisher. All opinions MUST be emailed, and may be edited for space, etc.**  
Email to [info@BusinessBriefs.net](mailto:info@BusinessBriefs.net).

**Reader upset with Commissioner Matt Sherr!**

Dear Publisher,

In response to the letter Matt Sherr wrote to Nancy Pelosi and Kevin McCarthy, regarding an abundance of untruths and strong condemnation about Lauren Boebert, my duly elected Congressional representative in Washington DC., you Matt, are just a County Commissioner, and not a very good one at that.

The "attack" on our democracy is being done by you, Mr. Sherr.

You don't have your facts straight, as usual.

(Our new Congresswoman) Lauren Boebert did NOT orchestrate the "mob," but Nancy Pelosi and her ilk are surely responsible for condoning bad behavior, burning and looting.

You didn't seem to have any problem with all that happening for months in Seattle and Portland (during) those trying times?

I am deeply upset about you writing such a scathing letter about someone you don't know, nor anything you know about.

Hopefully, she sues you for defamation of character.

Your dedication to serving "all those in our region," I am one of your constituents' and find your letter to be unprofessional, irresponsible,



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**Your letter is a great example of what's wrong in this Country and is "Hate Speech." Your irresponsible behavior must not be tolerated!**

**Reader to Commissioner Matt Sherr!**

ignorant, inciting of violence and extremely offensive.

I am a mature, tax-paying, law abiding AMERICAN citizen that you feel compelled to label as part of a "radical minority of extremists."

So much for unity!

Congresswoman Boebert was elected for her belief in the Constitution and her willingness to fight for our rights. She is willing to step up and do her job, unlike you Matt.

(Acting like a Sanctuary county), and rendering yourself a pay increase are not considered achievements.

The oppressive fashion in which you have placed your boot on my neck for a year in Eagle County, removing my rights, reminds me of lessons I've learned about Nazi Germany.

That's why I write this letter anonymously to avoid being put on a "list."

My concern is that we have people like you in public office, (supposed-

ly representing us?) with such hate, anger and disinformation, unchecked.

Your letter is a great example of what's wrong in this Country and is "Hate Speech."

Your irresponsible behavior must not be tolerated! This causes me to wonder if you are mentally capable of fairly representing us, or if we should be considering your immediate removal for our own safety.

**Name withheld by request**

**Publisher's response:**  
While Ye Olde Publisher personally likes Commissioner Sherr, as we wrote in the January 14th, 2020 issue, "We think Commissioner Sherr owes Congresswoman Boebert an apology!"

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ing down. As said to YOP's son, "I haven't worked 90-hours-a-week since the first 7 years I was in business, many decades ago!"

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**PLAINTIFF 001130**

# The Biden Watch! - The Good, The Bad, The Ugly!

## Opinion

• **The Outrageous: New Democrat President Joe Biden, with the stroke of a pen, just put 11,000 people out of work by shutting down the Keystone Pipeline with an Executive Order during his first week in office.**

This is inexcusable!

• **The Outrageous: Fox News announced a Biden executive order will spend American taxpayers dollars to provide abortions in other countries.**

This is no joke, people!

• **The Outrageous: Biden issued another Executive Order requiring males to be allowed**

to compete in female athletic events.

How is that fair to women?

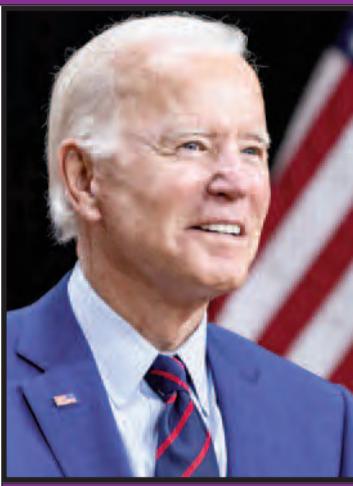
• **The Expected: Biden's approval rating by Rasmussen is 49%.**

• **The Ugly: Biden said in his election campaign that he opposed issuing Executive Orders and that "only dictator's do this."**

Then Biden issued approximately 29 Executive Orders during his first 60 days in office, compared to President Trump's meager 7.

What a liar!

• **The Ugly: Biden's Executive Order to roll back immigration enforcement will allow certain criminal immi-**



President Joe Biden

grants, some who have killed Americans, to escape justice under the program known as "Catch and Release."

This is insanity!

• **The Ugly: Biden undoes Trump's immigration policy whereby, under Trump, only 1,200 illegal immigrants were turned away per day.**

Now, under Biden, approximately 3,000 illegal immigrants are coming each day.

This is very risky to Americans.

• **The Ugly: Biden is promising a Pathway to Citizenship for illegals already in the country.**

This will continue to encourage and enable illegals to crash our borders.

This is crazy!

• **The Ugly: As Jacqueline Cartier wrote on social media, "Biden will once again, empower Iran, destroying developing peace, and causing their usual reign of terror, creating instability across the region and spreading it, once again, across the globe.**

How crazy is this?

• **The Ridiculous: As conservative Rob Smith said, "The Left wants your tax dollars to pay for up to \$50,000.00 (per student) in student debt."**

As Michael Dixon wrote, "Instead of donating his salary (like Trump did), Joe Biden is going to donate mine and yours."

• **The Bad: Biden's family is using President Joe Biden's new position in the Oval Office for their own benefit.**

Biden's brother, Frank Biden, is advertising his connection to the President Joe Biden in an advertisement for his law firm.

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**Phone: 970.328.0403**

**PLAINTIFF 001131**

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# The Vista Project: Already in a Small Town Near You

## Opinion By Pamela Chapman

According to the online resource called Investopedia, sustainability focuses on meeting the needs of the present without compromising the ability of future generations to meet their needs.

The concept of sustainability is composed of three pillars: economic, environmental, and social-also known informally as profits, planet, and people.

### RED FLAG!

On January 29, an astute young woman from our county sent me an article from the *Vail Daily*. It was titled, "Vista project to enhance public participation in local policies now seeking Stewardship Team."

The piece went on to read, "Eagle County is leading the soon-to-be launched Community Vision and Strategy Project, Vista, by inviting community members to help identify solutions to challenges created by COVID-19, and design a future for Eagle County with health, equity, and resilience in mind."

Sounds great! Yes? **RED FLAG! RED FLAG!**

We decided to do some research only to find out the "Vista Project" is alive and well being funded by our tax dollars with paid government staff and departments in place. Copy this link into your browser and check it out for yourself, [www.eaglecounty.us/sustainable-communities](http://www.eaglecounty.us/sustainable-communities).

Who created this leg of bureaucracy?

Our Eagle County town manager? Our Commissioners?

Continuing our

research, we also found Eagle County has defined the Sustainable Communities mission. "Sustainable Communities works to implement the Eagle County Environmental Policy and Climate Action Plan in county operations and within the larger community.

Our shared community goal is to reduce greenhouse gas emissions 25% percent by 2025."

### RED FLAG ON STEROIDS!

While we are making fun of liberal Congresswoman Alexandria Ocasio Cortez (AOC) and her farting cows at the federal level, the **Green New Deal** or the Agenda 2030 playbook is here! Pushed back from 2021, I believe, due to President Trump.

Now I know some of y'all reading this will ask, "What's wrong with a sustainable community?" We must save the planet for the children. Yes?

I mean we have sustainable foods. And sustainable communities are already in place in large cities like California.

People do not realize sustainability by the government's standard means more paperwork also known as red tape, increased costs, restricted liberty, government overreach, and tax increases mostly for the middle class.

There is no pressure on corporations or bureaucracies because they write in policy protecting and giving them increased powers.

It will mean the government deciding how and when we can water (farmers and ranchers beware). When and where we can go hiking or hunting. And, whether



Pamela Chapman

we can step out of our home to shop or travel freely with or without a jab in the arm.

I am reminded of the day we held a Trump Train in our county. It was reported in the *Daily*, shortly after, how a woman was appalled at the actions of those who dared drive their vehicles down Hwy 6 waving U.S. flags, and signs for their candidates.

Well, I am now wondering if anyone is appalled at finding out that the liberals' Agenda has infiltrated this little sleepy, playful county while we were doing just that - sleeping.

We already have clean air and clean water in our county. Yes?

We take care of our wilderness. Yes?

Some of us stop and pick-up others' trash from the wilderness roads. Yes?

We take pride in our communities. Yes?

You want to sustain our county? Keep Denver and big, liberal-city ideals out of our backyard.

We were once a sustainable community. We were a thriving community. People gathering for live events, supporting their local restaurants, throwing parties and celebrations with families and friends in the parks and forests.

We were not afraid to visit our sick and care for

those who took ill facilitating care from our churches that were open and serving.

We looked each other in the eyes saying good morning. We did not snitch each other out nor call government agencies to report our neighbors for not taking care of their dogs because it apparently was not good enough care for the passerby.

We did not call the Sheriff's office or Police department because there were too many cars parked in someone's yard. We would drop in on a neighbor, in a heartbeat, not afraid of the body count.

A sustainable community sounds perfect. But, just like sustainable foods where only the small family farmer or food vendor pays through the nose to keep you 'safe' it sounds better than it is. It is not perfect by any means. I dare to call it totalitarian and dangerous.

Our Constitution tells us the only duty of our government is to protect us from foreign and domestic enemies.

Making sure the planet is sustainable is not their duty. If we really want a sustainable planet, let us stop the fear mongering allowing our children to return to their schools, playing sports, and experiencing the usual teenage growing pains.

Let us help stave off depression saving them from isolation while reshaping their brains from sitting in front of a computer screen 15 hours a day. (Big techs' kids don't have computers or smart phones.)

Stop government overspending putting the burden of debt on our

children's backs.

Allow businesses to open and all of us to experience life as usual. And don't tell me we need a government plan to do so safely. We are actually smarter than governments believe.

What good will a beautiful planet do our children, anyone, if they are traumatized, psychologically impaired, and deformed for life due to long-term exposure to fear.

**We cannot afford to be uninvolved anymore. We cannot go along to get along any longer.**

**We must support conservative newspapers like the Business Briefs.**

Remember Policy over Personalities. Our voices must be heard. We must serve on the "Project Vista Sustainability Committee."

We must hold all politicians, local, state, and federal, accountable. Most importantly at the local level. I was warned early in life, by a local politician, most corruption occurs at the local level.

**You know why? No one is paying attention.**

On January 29th, 2021, I sent an email to the county asking when this 'Stewardship committee' convenes and how many members are they seeking?

At the time of writing this piece, there has been no response.

**Publisher's Note: Ye Olde Publisher is nauseated every time I hear the word "Sustainability."**

**Liberals use it today as an excuse to tax us more, raise our cost of living, and control our lives.**

**PLAINTIFF 001132**

# What should Republicans do now!

## Opinion By Joy Overbeck

Here's former Republican Majority Leader McConnell on the floor of the Senate proclaiming, "The mob was fed lies. They were provoked by the president and other powerful people."

And then comes Republican House leader Kevin McCarthy on the House floor: "The president bears responsibility for Wednesday's attack on Congress by mob rioters." Then he suggested censure of Trump instead of a second impeachment.

**The Democrats never turn on their own. For decades they praised as "the lion of the Senate" a drunk who abandoned a young woman to drown at the bottom of a pond.**

How to fathom these Quisling moves by GOP "leaders" in the last few days of Trump when everyone heard the president admonish well over a half million supporters to go "peaceably and patriotically" to the Capitol "to make your voices heard" exactly as the First Amendment says?

Deserting their party's president and bloodying him with false accusations, a president who won the loyalty of 90 plus percent of their party, who is justly celebrated for his achievements by over 74 million who voted for him, who has won more Black and Hispanic votes than any Republican president in history, isn't only disloyal. It's staggeringly stupid.

Because predictably, now many Republicans, independents, and even Democrats who spent the summer and fall rocking the nation with joyful

MAGA car parades and rallies, Trump flags flying and horns blaring (and that doesn't count the hundreds of thousands reveling at official Trump rallies) are walking away from the GOP. The traitors at the top, including Wyoming Rep. Liz Cheney, have managed by their treachery to deflate a boisterous crop of newly-minted citizen activists who have never before been involved in politics. Trump turned them into the bold new vanguard of Republicans who elected 14-plus new Republicans, mostly women, to the House in the 2020 elections.

And now the #NeverTrumpers who have been revealed as collaborators with the Trump-hating Democrats have turned many of them into doubters and dropouts.

### So what do we do?

We don't leave the party, we take it over by wielding our voting power. **We primary the RINO Trump-trashers and oust them from the party. We lead the grassroots takeover of the Republican Party.** It's already happening. Liz Cheney has a strong challenger and she may decide not to run again, given the uproar over her impeachment vote. Even now grassroots stalwarts like Randy Corporon, activist chair of Colorado's largest Tea Party and recently elected state Republican Committeeman, are moving into powerful national party positions.

**We fight as Republicans, not unaffiliated, because the Republican Party has the decades-strong structure and the organizational reach to win elections against the Democrats.** The unaffili-



**Joy Overbeck**

ated have none. Third parties, even a Trump third party, never have a chance but always split the vote.

Taking power starts locally and builds from the ground up. In your neighborhood, the party is composed of your neighbors. First, sign up at your county's GOP website and start attending meetings. Find out who your precinct leader is.

**If your precinct lacks a leader, volunteer for the job.** Get your MAGA friends to join the party and get yourselves elected into leadership and policy committees. You'll be able to help guide your local party's direction and make the America First agenda work for your community. As a party official you'll be able to vote in the party's internal primaries (prior to the general primaries) to select the best Republican candidates to carry the conservative message in your local and state offices such as district attorney, county commissioner, and the House and Senate in your statehouse.

**We must run for school board to protect our kids from the onslaught of leftist propaganda teaching them to be ashamed, not**

**proud, of our America. We must go in numbers as parents and grandparents to school board meetings and fight the evil curriculum created by the New York Times and the America-last haters that slavery, not freedom, is the foundational idea of our nation. We must fight the "sex ed" classes sold by Planned Parenthood to school districts nationwide that tell our kids to question their gender "birth assignment" -- that they could well be a girl trapped in a boy's body or the other way around.**

In whatever state you live (but especially Arizona, Nevada, Georgia, Michigan, Pennsylvania, or Wisconsin) write, call, and email your state legislators to pass laws that ensure fair elections. Also insist that your county party pressure state lawmakers to make elections honest. Election laws must enforce voter picture ID, signature verification of mail and in-person ballots, scrubbing the voter rolls of people who have left the state or the planet, and even more election safeguards. Lawmakers do listen to constituents because they want to get re-elected. We must make sure there's never another stolen election because if election corruption is not stopped, there's no actual reason to hold another one.

We must be relentless, just like the Democrats. We come from strength because we know President Trump's America First trade deals, economic strategies and tax cuts have brought Americans, including minority Americans, more prosperity, higher incomes, and better job

opportunities than ever before. His international policies have made the world a more peaceful place than at any time in recent memory.

The election proved we conservative Trump loyalists are the majority of Republicans, so we have an excellent start on taking over the party. Actually, we already dominate because President Trump's popularity is holding and rising even after the January 6 riot. A January 23-25 survey found 81% of Republican voters hold positive views of Trump, including 54 percent who do so strongly.

Despite the RINOS, the majority base of the party is loyal to the MAGA agenda, a durable package of timeless ideas that will always make our nation great and our people prosperous. **Republican candidates that can articulate these ideas and put them into action -- lower taxes, robust capitalism, supporting business with less regulation, educational choice, energy independence, legal immigration, religious rights, gun rights, freedom of speech -- will win.**

We can stampede the RINOS into the sunset. But we must get off our couches and stop listening to the depressing lies from the leftstream media about the demise of the Republican Party.

Let's get to work. Let's roll.

**Joy Overbeck is a Colorado journalist who has written for American Thinker, Townhall, the Washington Times, The Daily Caller, The Federalist, and others. Follow her (temporarily) on Twitter @joyoverbeck1**

# Questioning Avon's lawsuit against 5 innocent people?

From Page 6

## USC 18 :241-CONSPIRACY AGAINST RIGHTS:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State in the free exercise or enjoyment of any right they shall be fined under this title or imprisoned not more than ten years, or both.

**USC 18 :242-DEPRIVATION OF RIGHTS UNDER COLOR OF LAW:** Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State to the deprivation of any rights shall be fined under this title or imprisoned not more than one year, or both.

To my understanding, the premise for denial of the petition for the Avon recall ballot was based on so many signatures being rejected by the town clerk for discrepancies with the voter registration lists.

## I hereby ask the Court of Eagle County, Colorado;

1. What remedy was offered for noted discrepancies?

2. Why has the burden of remedy been deflected to the recall committee to validate signatures and rectify mistakes with the voter registration lists.

3. Would it be true that to dispute a valid signature on a petition would be an entirely different matter? Does the town really believe that so many citizens of Avon would willfully commit perjury by falsely signing the recall petition, knowing there was a legitimate issue with their voter registration information? Or did they merely sign their

name with a new signature?

4. By what authority is the voter registration list / data deemed invalid?

5. Could most of these issues been remedied with a phone call to the voter?

6. Was any attempt made by the town to resolve the disputed inconsistencies?

7. Why have the plaintiffs deemed these errors or inconsistencies grounds for dismissal of legal signatures?

To the best of my knowledge and understanding - the actions taken against myself and others, under the guise of the Town of Avon are derived from a miscalculation of mathematics? Based on the disputed validity of signatures voluntary given, without duress, by the people of Avon exercising their right to redress?

## I hereby ask the Court of Eagle County, Colorado;

1. Why does a dispute to the proper mathematical calculation of eligible vote counts become moral grounds for a lawsuit?

2. Would it not be apparent that the entire premise of the accusation is false when the law is so ambiguous that it has multiple interpretations, which would nullify its standing in a court of law?

3. Why would the tally of necessary votes to commence a recall ballot be based on the cumulative votes of other candidates (Including votes for me), to recall specific candidates?

4. Would it not be more efficient and accurate to do all calculations for the necessary number of voter

signatures, to be solely derived from the exact number of votes received by each party named on the recall petition ballot initiative? In my humble opinion, the flaw in the interpretation of the law is the use of the number of votes collectively cast for all candidates in the elections, rather than specific numbers relevant only for each candidate. I would like to note, without prejudice, that I was unable to find a definition for "Undervote" in the Black's Law Dictionary (Fifth Pocket Edition), and therefore such a term, in my opinion should hold no legal merit.

## I hereby ask the Court of Eagle County, Colorado;

1. Why would civil servants and town employees, acting without honor ask for monetary compensation for legal fees when they are using public, not personal funds?

2. Who authorized the use of public funds for defamatory action against citizens acting with honor and having honorable intent for voting rights and ballot integrity?

It would appear that the sole intent and purpose of the "Town" to pursue its citizens, is merely a tactic of intimidation and distraction, hoping to let the time to file expire on the recall petition filings while intimidating the committee members into submission with shallow threats of unethical legal action -therefore would it not be in the best interest of the people of the Town of Avon to have this dispute of the number of signatures required for the recall ballot to be dismissed

and replaced with a ruling to proceed with the constitutional right to recall elected servants with the vote of the constituents? Judges Are Sworn to Obey the Constitution Irrespective of Opinion & Consequences—Constitution Rules over Statutes.

State of Colorado, Bill of Rights Section 24. Right to assemble and petition. The people have the right peaceably to assemble for the common good, and to apply those invested with the powers of government for the redress of grievances, by petition or remonstrance.

## I hereby ask the Court of Eagle County, Colorado;

1. Is it ethical for Garfield & Hecht, P.C. for stacking charges and filing false charges against myself, the living person, - where is the burden of proof that I acted without honor for any and all accusations and or charges, as listed in the attached suit?

2. Why do these individuals, acting on behalf of a corporate fiction, the Town of Avon, think it is honorable to threaten the citizens to get the results they want from a court?

3. Would this action make the Town of Avon, conspiring with these indi-

viduals, to be considered "Dirty" under color of law? And is it then true that a "Dirty" town would be irrelevant in pursuing any legal action because they have been deemed "Dirty"? Simmons v. United States, 390 U.S.377 (1968) "The claim and exercise of a Constitutional right cannot be converted into a crime." Miller v. U.S., 230 F. 2d. 486, 490; 42 "There can be no sanction or penalty imposed upon one, because of his exercise of constitutional rights."

This rebuttal is in no way an acceptance or acknowledgement of any of the terms or conditions of the summons invitation with invalid allegations naming the AVON RECALL COMMITTEE.

This rebuttal was created, without prejudice, to enlighten the constituents of the Town of Avon to the gross abuse of power by members of the Avon Town Council and Town Staff. We the People get to decide who our elected officials will be and if they fail to do the duty to which they were elected, We the People have the right to the redress of grievances and hold them accountable for any abuse of power.

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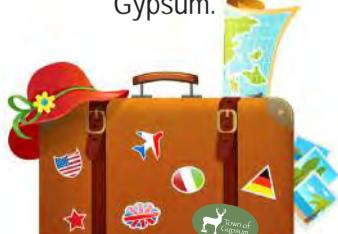
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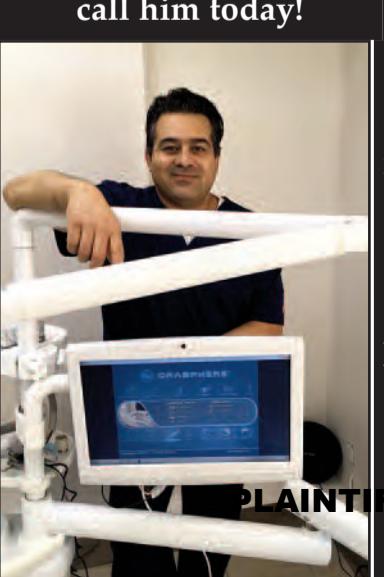
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# The 2020 Playbook for new Presidents!

## Humor By Jacqueline Cartier

It has been a number of years since I worked for a President, and I've noticed that the rules have changed. As newbies to feigned outrage, we must follow the 2016 Democrat playbook, updated for 2020. It includes details on how to welcome and support a new President of the opposing party.

- First, we must be infuriated at a "rigged election." It doesn't matter if there is proof or not, we must be indignant about how the election is fraudulent, invalid, and stolen, shouting chants about how "he" is not "our" President, and making sure well-known has-beens, go on speaking tours, tearfully proclaiming injustice.
- Second, we must insist that the election was fixed by foreign interference; evidence is optional. It will be called Collaboration rather than Collusion because we mustn't offend the new cooperative alliance.

Last time it was

Russia, but that is so 2016.

Red is this year's color of choice, and we're not talking MAGA hats. This shade of red has us dancing with China.

And, unlike the Republican President, the Democrat, via his immediate family, actually did rake in millions of dollars from questionable foreign sources, making the accusations, much more entertaining, for those endless televised inquisitions.

Meanwhile, the transition team is busy creating a "For Sale" sign from the remnants of unused factory buildings and drafting a creative listing for Zillow, which excludes the actual structure of 1600 Pennsylvania, yet buyers are well-aware of its hidden value.

The Open House is scheduled for January 20th.

- Third, we must begin massive investigations immediately. Nothing says welcome to the White House, like a subpoena.

Inaugural invitations must include a list of defense attorneys, instructions on how to



Jacqueline Cartier

respond to no-knock raids, and photos of their new bling... adjustable steel bracelets.

- Fourth, the official White House welcoming committee must include FBI agents (for your security, of course), who offer compassion and assistance regarding any concerns, taking copious notes, infused with confidential snarky comments, as they engage in a warm and friendly tete-a-tete / interrogation (Tomato, To-mah-to), while gathering charming tidbits of trivia/evidence (Tomato, To-mah-to), for a future surprise

party/congressional hearing (Tomato, To-mah-to), hosted by a secret admirer/Special Counsel (Tomato, To-mah-to).

- Fifth and most important, the gift that keeps on giving... Impeachment.

Same tune, different orchestra. The prologue is written by the welcoming committee; with subsequent acts, structured around selectively edited diplomatic conversations, and scenes featuring dramatic sneak attacks on staff, friends, and family; followed by a chorus of prior business dealings, examined with the thoroughness of a proctologist; culminating in a full censorship of media communications, timed perfectly with an upcoming election. The epilogue is still being written.

All truth which con-

tradicts the preconceived narrative, will be thoroughly reported/buried (Tomato, To-mah-to), by the major news outlets and social media platforms.

Welcome to the White House, Mr. President. Let the games begin.

**Jacqueline Cartier is CEO of Winning Images, a public affairs firm, specializing in communications and crisis management, serving government and corporate clients both here and abroad.**

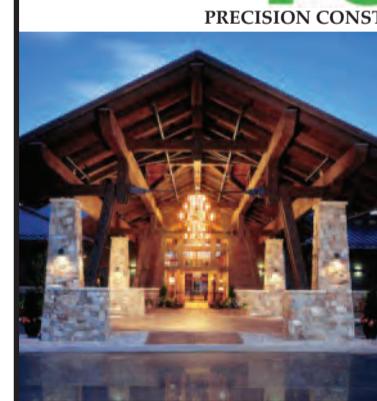
**Cartier is also a newspaper columnist, magazine publisher, and author, who has worked on public policy and controversial issues from the White House to local jurisdictions.**



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## CHAPTER 320

DATE FILED: February 25, 2021 3:52 PM  
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 CASE NUMBER: **2020CV30264**  
 RECALL OF OFFICERS OF INCORPORATED TOWNS

(Senate Bill No. 322. By Senators Theobald and Harpel)

## A N A C T

## RELATING TO THE RECALL OF MUNICIPAL OFFICERS.

*Be It Enacted by the General Assembly of the State of Colorado:*

**Elective Officer  
of Incorporated  
Town Subject  
to Recall**

Section 1. Every elective officer of any incorporated town of the State of Colorado may be recalled from office at any time by the electors entitled to vote for a successor of such incumbent, through the procedure in the manner herein provided for, which procedure shall be known as the Recall of Municipal Officers, and shall be in addition to, and not including any other method of removal provided by law.

**Procedure**

Section 2. The procedure hereunder to effect the recall of an elective officer of an incorporated town shall be as follows:

**Petition—  
Where Filed—  
Number of  
Signatures  
Required—  
Form**

A petition signed by electors entitled to vote for a successor of the incumbent sought to be recalled, equal in number to forty per centum of all ballots cast at the last preceding municipal election in said town demanding an election of the successor to the officer named in said petition, shall be filed in the office in which petitions for nomination to office held by the incumbent sought to be recalled are required to be filed; 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 electors, and the 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.

**May Be  
Circulated  
in Sections**

Section 3. Any recall petition may be circulated and signed in sections, provided each section shall contain a full and accurate copy of the title and text of the petition; and such recall petition shall be filed in the office in which

**EXHIBIT C**

petitions for nomination to office held by the incumbent sought to be recalled are required to be filed.

The signatures to such recall petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street number, if any. The person circulating such sheet must make and subscribe an oath on said sheet that the signatures thereon are genuine, and a false oath, willfully so made and subscribed by such person, shall be perjury and be punished as such. All petitions shall be deemed and held to be sufficient if they appear to be signed by the requisite number of signers who shall be deemed and held to be qualified electors, unless a protest in writing under oath shall be filed in the office in which such petition has been filed, by some qualified elector, within fifteen days after such petition is filed, setting forth specifically the grounds of such protest, whereupon the officer with whom such petition is filed shall forthwith mail a copy of such protest to the person or persons named in such petition as representing the signers thereof, together with a notice fixing a time for hearing such protest not less than five nor more than ten days after such notice is mailed. All hearings shall be before the officer with whom such protest is filed, and all testimony shall be under oath. Such hearings shall be summary and not subject to delay, and must be concluded within thirty days after such petition is filed, and the result thereof shall be forthwith certified to the person or persons representing the signers of such petition. In case the petition is not sufficient it may be withdrawn by the person or a majority of the persons representing the signers of such petition, and may, within fifteen days thereafter, be amended and resiled as an original petition. 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 incorporated town is located, 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.

When such petition is sufficient, the officer with whom such recall petition was filed shall forthwith submit said petition, together with a certificate of its sufficiency to the board of trustees of such incorporated town, which board shall thereupon order and fix the date, holding the election not less than thirty days nor more than sixty days from the date of submission of said petition: Provided, if a

*Signing*

*Circulator  
Make Oath  
by Affidavit*

*Protest May Be  
Filed Within  
15 Days*

*Hearing*

*Amendment*

*Review of  
Findings*

*Trustees  
Fix Date  
of Election*

municipal election is to be held within ninety days after the date of submission of said petition, the recall election shall be held as a part of said municipal election.

Resignation—  
Vacancy—  
How Filled

Section 4. If such officer shall offer his resignation, it shall be accepted, and the vacancy caused by such resignation, or from any other cause, shall be filled as provided by law; but the person appointed to fill such vacancy shall hold his office only until the person elected at the recall election shall qualify. If such officer shall not resign within five days after the sufficiency of the recall petition shall have been sustained, the board of trustees shall make, or cause to be made publication of notice for the holding of such election, and the same shall be conducted, returned, and the result thereof declared in all respects as in the case of municipal elections.

Ballot—  
Form of

On the official ballot at such elections shall be printed in not more than 200 words, the reasons set forth in the petition for demanding his recall, and in not more than three hundred words there shall also be printed, if desired by him, the officer's justification of his course in office. If such officer shall resign at any time subsequent to the filing thereof, the recall election shall be called notwithstanding such resignation.

There shall be printed on the official ballot, as to every officer whose recall is to be voted on, the words, "Shall (name of person against whom recall petition is filed) be recalled from office of (title of office)?" Following such question shall be the words "Yes" and "No" on separate lines, with a blank space at the right of each, in which the voter shall indicate, by marking a cross (X), his vote for or against such recall.

On such ballots, under each question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person sought to be recalled; but no vote cast shall be counted for any candidate for such office, unless the voter also voted for or against the recall of such person sought to be recalled from said office. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office.

If a majority of those voting on said question of the recall of any incumbent from office shall vote "No", said incumbent shall continue in said office; if a majority shall vote "Yes", such incumbent shall thereupon be deemed removed from such office upon the qualification of his successor.

If the vote had in such recall election shall recall the officer then the candidate who has received the highest number of votes for the office thereby vacated shall be declared elected for the remainder of the term, and a certificate of election shall be forthwith issued to him by the canvassing board. In case the person who received the highest number of votes shall fail to qualify within fifteen days after the issuance of a certificate of election, the office shall be deemed vacant, and shall be filled according to law.

If Officer Is  
Recalled  
Candidate  
Receiving Highest  
Vote Declared  
Elected

Candidates for the office may be nominated by petition, as now provided by law, which petition shall be filed in the office in which petitions for nomination to office are required by law to be filed not less than fifteen days before such recall election.

Nomination  
of Candidates

Section 5. No recall petition shall be circulated or signed against any officer until he has actually held his office for at least six months, unless he holds his office by virtue of appointment to fill a vacancy.

After one recall petition and election, no further petition shall be filed against the same officer during the term for which he was elected, unless the petitioners signing said petition shall equal fifty per centum of the ballots cast at the last preceding municipal election.

Recall After  
Six Months

Section 6. If any provision of this Act or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

Severability  
Clause

Section 7. The General Assembly hereby finds, determines and declares this Act necessary for the immediate preservation of the public peace, health and safety.

Safety Clause

Section 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

Emergency

Approved: March 27, 1947.

## CHAPTER 127

datedate filenumber casenumber  
title article section  
govttype municipal

**SENATE BILL 91-69.**

BY SENATOR Alison;  
also REPRESENTATIVES Entz, Ruddick, and Snyder.

**AN ACT**

CONCERNING AMENDMENTS TO STATUTORY PROVISIONS RELATING TO MUNICIPAL POWERS PROVIDED IN ARTICLE 10 OF TITLE 13, ARTICLE 4 OF TITLE 14, ARTICLE 20 OF TITLE 30, ARTICLES 4, 10, AND 16 OF TITLE 31, AND ARTICLE 32 OF TITLE 34, COLORADO REVISED STATUTES, AS AMENDED.

*Be it enacted by the General Assembly of the State of Colorado:*

Section 1. 13-10-105 (1) (b), Colorado Revised Statutes, 1987 Repl. Vol., is amended to read:

**13-10-105. Municipal judge - appointment - removal.** (1) (b) The municipal governing body may appoint such additional municipal judges or assistant judges as may be necessary to act, OR SUCH SUBSTITUTE JUDGES AS CIRCUMSTANCES MAY REQUIRE in case of temporary absence, sickness, disqualification, or other inability of the presiding OR ASSISTANT municipal judge JUDGES to act.

Section 2. 13-10-107, Colorado Revised Statutes, 1987 Repl. Vol., is amended to read:

**13-10-107. Compensation of municipal judges.** (1) The municipal governing body shall provide by ordinance for the salary of the municipal judge AND ASSISTANT JUDGES. Such salary shall be a fixed annual compensation and payable on a monthly or other periodic basis. THE MUNICIPAL GOVERNING BODY MAY PAY ANY SUBSTITUTE JUDGE APPOINTED PURSUANT TO SECTION 13-10-105 (1) (b) BASED UPON THE NUMBER OF COURT SESSIONS SERVED BY SUCH JUDGE.

(2) Payment of any fees or other compensation based directly on the number of individual cases handled or heard by the municipal judge is prohibited.

Section 3. 13-10-112, Colorado Revised Statutes, 1987 Repl. Vol., is amended to read:

*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

**EXHIBIT D**

**APPENDIX 3 PART 3**

**13-10-112. Powers and procedures.** (1) The municipal judge of any municipal court has all judicial powers relating to the operation of his court, subject to any rules of procedure governing the operation and conduct of municipal courts promulgated by the Colorado supreme court. The presiding municipal judge of any municipal court has authority to issue local rules of procedure consistent with any rules of procedure adopted by the Colorado supreme court.

**(2) THE JUDICIAL POWERS OF ANY MUNICIPAL JUDGE SHALL INCLUDE THE POWER TO ENFORCE SUBPOENAS ISSUED BY ANY BOARD, COMMISSION, HEARING OFFICER, OR OTHER BODY OR OFFICER OF THE MUNICIPALITY AUTHORIZED BY LAW OR ORDINANCE TO ISSUE SUBPOENAS.**

Section 4. 13-10-113 (1) and (3), Colorado Revised Statutes, 1987 Repl. Vol., are amended and the said 13-10-113 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

**13-10-113. Fines and penalties.** (1) Any person convicted of violating a municipal ordinance IN A MUNICIPAL COURT OF RECORD may be incarcerated for a period not to exceed ninety days ONE YEAR or fined an amount not to exceed three hundred ONE THOUSAND dollars, or both.

**(1.5) ANY PERSON CONVICTED OF VIOLATING A MUNICIPAL ORDINANCE IN A MUNICIPAL COURT WHICH IS NOT OF RECORD MAY BE INCARCERATED FOR A PERIOD NOT TO EXCEED NINETY DAYS OR FINED AN AMOUNT NOT TO EXCEED THREE HUNDRED DOLLARS, OR BOTH.**

(3) The municipal judge is empowered in his discretion to assess costs, against any defendant AS ESTABLISHED BY THE MUNICIPAL GOVERNING BODY BY ORDINANCE, AGAINST ANY DEFENDANT WHO PLEADS GUILTY OR NOLO CONTENDERE OR WHO ENTERS INTO A PLEA AGREEMENT OR who, after trial, is found guilty of an ordinance violation. Such costs shall not exceed fifteen dollars for trial to the court and forty-five dollars for trial by jury.

Section 5. 14-4-102 (1) and (5), Colorado Revised Statutes, 1987 Repl. Vol., as amended, are amended to read:

**14-4-102. Restraining orders to prevent domestic abuse.** (1) The A MUNICIPAL COURT OF RECORD, IF AUTHORIZED BY THE MUNICIPAL GOVERNING BODY, county court, and district court shall have authority to issue temporary and permanent restraining orders to prevent domestic abuse whether or not such relief could be obtained in a domestic relations action filed in a district court.

(5) Upon the filing of a complaint, duly verified, alleging that the defendant has committed acts constituting domestic abuse against the plaintiff or a minor child of either of the parties, any judge of a MUNICIPAL, county, or district court, after hearing the evidence and being fully satisfied therein that sufficient causes exists, may issue a temporary restraining order to prevent domestic abuse and a citation directed to the defendant, commanding him to appear before the court at a specific time and date, to show cause, if any, why said temporary restraining order should not be made permanent.

Section 6. 30-20-301 (1), Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-301. Definitions.** (1) "Governmental agency" means any county or city MUNICIPALITY in the state only.

Section 7. 30-20-302, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-302. Public improvements within and without boundaries.** Any city or county GOVERNMENTAL AGENCY may acquire, construct, maintain, add to, and improve any public project, which public project may be located within or without or partly within and partly without the territorial limits of such governmental agency.

Section 8. 30-20-303, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-303. Anticipation warrants.** For the purpose of defraying the cost of construction, erection, reconstruction, or improvement of existing facilities, the legislative body of any city or county GOVERNMENTAL AGENCY may, pursuant to a resolution or ordinance, issue anticipation warrants, which order, resolution, or ordinance shall set forth the proposed public project, the amount of warrants to be issued, and the maximum rate of interest. In every instance, the order, resolution, or ordinance shall provide that the project is being undertaken under the provisions of this part 3.

Section 9. 30-20-305, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-305. Terms and interest.** All anticipation warrants issued under the provisions of this part 3 shall bear interest at a rate not exceeding a net effective interest rate to be established by the official legislative body of the city or county GOVERNMENTAL AGENCY prior to the sale or issuance of such warrants. All warrants shall be executed in such a manner and be payable serially in annual installments beginning not later than two years and extending not more than twenty years from the date thereof and at such place as the city or county GOVERNMENTAL AGENCY determines.

Section 10. 30-20-306, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-306. Revenue and sinking fund - pledge of general income prohibited.** The official legislative body of any city or county GOVERNMENTAL AGENCY is authorized to set aside a special sinking fund in the office of the city or county treasurer as the case may be, OF THE GOVERNMENTAL AGENCY for the payment of anticipation warrants authorized by and issued under the provisions of this part 3 and for the payment of interest due on such warrants; except that the general income of the city or county GOVERNMENTAL AGENCY shall not be pledged for the payment of the principal of the warrants and interest thereon. The city treasurer or county treasurer, as the case may be, OF THE GOVERNMENTAL AGENCY shall deposit in said sinking fund all rents, royalties, fees, rates, and charges derived from or rendered by the project.

Section 11. 30-20-309, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**30-20-309. Obligations payable from project revenue only.** Nothing in this part 3 shall be construed to authorize or permit any governmental agency to incur any obligation of any kind or nature, except such as shall be payable solely from moneys accruing to the special sinking fund created pursuant to section 30-20-306, and it shall be plainly stated on the face of each warrant that has been issued under the provisions of this part 3 that it does not constitute an indebtedness of the city or county GOVERNMENTAL AGENCY within the meaning of any constitutional provision or limitation.

Section 12. 31-4-207 (2), Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-4-207. Mayor - selection.** (2) If the mayor is to be elected by popular vote, he shall be elected by a plurality of the votes cast for that office at the regular election in the city. He shall be a registered elector who has resided within the limits of the city for a period of at least twelve consecutive months immediately preceding the date of the election; except that, in the case of annexation, any person who has resided within the annexed territory for the time prescribed in this subsection (2) shall be deemed to have met the residence requirements for the city to which the territory was annexed. The mayor shall assume his office at the next regularly scheduled meeting of the city council following his election or upon such earlier date as the council may specify. He shall hold his office for a term of two years. AT THE SAME MEETING OF THE CITY COUNCIL, THE CITY COUNCIL SHALL CHOOSE, BY A MAJORITY VOTE, ONE OF ITS MEMBERS TO ACT AS MAYOR PRO TEM IN THE TEMPORARY ABSENCE OF THE MAYOR. THE CITY COUNCIL MAY APPOINT ONE OF ITS MEMBERS ACTING MAYOR IN THE EVENT BOTH THE MAYOR AND THE MAYOR PRO TEM ARE TEMPORARILY ABSENT FROM THE CITY OR UNABLE TO PERFORM THE DUTIES OF THE MAYOR. In case of a vacancy in the office of the mayor, the city council shall choose his successor for the unexpired term.

Section 13. 31-4-217, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-217. Publicity of records.** All records and accounts of every office and department of the city shall be open to inspection by any citizen at all reasonable times and under reasonable regulations established by the city manager, except such records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish. RECORDS OF THE CITY SHALL BE OPEN TO INSPECTION AT REASONABLE TIMES AND UNDER REASONABLE REGULATIONS ESTABLISHED BY THE CITY AS PROVIDED BY ARTICLE 72 OF TITLE 24, C.R.S.

Section 14. 31-4-304, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-304. Appointment of officers - compensation.** The board of trustees shall appoint a clerk, treasurer, marshal, and town attorney, or shall provide by ordinance for the election of such officers, and may appoint such other officers, including a town administrator, as it deems necessary for the good government of the corporation, and it shall prescribe by ordinance their duties when the same are not defined by law and the compensation or fees

they are entitled to receive for their services. The board of trustees may require of them an oath of office and a bond, with surety, for the faithful discharge of their duties. The election of officers shall be at the regular election, and no appointment of any officer shall continue beyond thirty days after compliance with section 31-4-401 by the members of the succeeding board of trustees.

Section 15. 31-4-305, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-305. Clerk - duties.** The clerk shall attend all meetings of the board of trustees and make a true and accurate record of all the proceedings, rules, and ordinances made and passed by the board of trustees. The record, at any time, shall be open for the inspection of qualified electors of the town. RECORDS OF THE TOWN SHALL BE OPEN TO INSPECTION AT ALL REASONABLE TIMES AND UNDER REASONABLE REGULATIONS ESTABLISHED BY THE TOWN AS PROVIDED BY ARTICLE 72 OF TITLE 24, C.R.S.

Section 16. 31-4-306, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-306. Marshal or chief of police - powers and duties.** The marshal shall be an officer of the town and OR CHIEF OF POLICE shall have the same power that sheriffs have by law, coextensive with the county in cases of violation of town ordinances, for offenses committed within the limits of the town. He shall execute all writs and processes directed to him by the municipal judge in any case arising under a town ordinance and receive the same fees for his services that sheriffs are allowed in similar cases.

Section 17. 31-4-307, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-307. Removal of officers - causes - notice.** By a majority vote of all members of the board of trustees, the mayor, the clerk, the treasurer, the marshal, any member of the board, or any other officer of the town may be removed from office. No such removal shall be made without a charge in writing and an opportunity of hearing being given unless the officer against whom the charge is made has moved out of the limits of the town. When any officer ceases to reside within the limits of the town, he may be removed from office pursuant to this section. A municipal judge may be removed during his term of office only for cause, as set forth in section 13-10-105 (2), C.R.S.

Section 18. 31-4-401 (2), Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-4-401. Oath of officers - bonds - waiver - declaring office vacant.** (2) The governing body of any city or town shall MAY require, from the treasurer and such other officers as it determines proper, a bond, with proper penalty and surety, for the care and disposition of municipal funds in their hands and the faithful discharge of the duties of their offices. Such governing body has the power to declare vacant the office of any person appointed or elected to any office who fails to take the oath of office or give bond when required within ten days after he has been notified of his appointment

or election, and it shall proceed to appoint his successor as in other cases of vacancy. The governing body may waive the requirement of such bonds.

Section 19. 31-4-502, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-502. Procedure - petition - signatures.** (1) The procedure to effect the recall of an elective officer of a municipality shall be as follows:

(a) A petition, 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 all ballots cast for all the candidates for that particular office at the last preceding regular election in said municipality, demanding an election of the successor to the officer named in said petition shall be filed in the office in which petitions for nomination to the office held by the incumbent sought to be recalled are required to be filed.

(b) Such petition shall contain a general statement, in not more than two hundred words, of the grounds on which such recall is sought, which statement is intended for the information of the registered electors.

(c) The registered electors shall be the sole and exclusive judges of the legality, reasonableness, and sufficiency of such grounds assigned for such recall, and said grounds shall not be open to review.

(a) (I) A PETITION CONTAINING THE REQUISITE NUMBER OF SIGNATURES UNDER PARAGRAPH (d) OF THIS SUBSECTION (1) SHALL BE FILED IN THE OFFICE OF THE MUNICIPAL CLERK, DEMANDING AN ELECTION OF A SUCCESSOR TO THE OFFICER NAMED IN THE PETITION. EACH PETITION SHALL DESIGNATE BY NAME AND ADDRESS NOT LESS THAN THREE NOR MORE THAN FIVE PERSONS, REFERRED TO IN THIS SECTION AS THE "COMMITTEE", WHO SHALL REPRESENT THE SIGNERS THEREOF IN ALL MATTERS AFFECTING THE SAME. THE PETITION SHALL CLEARLY INDICATE THE NAME OF THE MUNICIPALITY AND THE NAME OF THE OFFICER SOUGHT TO BE RECALLED. THE PETITION SHALL INCLUDE THE NAME OF ONLY ONE PERSON TO BE RECALLED. THE PETITION SHALL 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.

(II) 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.**

**(b) DIRECTLY FOLLOWING THE WARNING IN PARAGRAPH (a) OF THIS SUBSECTION (1) SHALL BE PRINTED IN BOLD-FACED TYPE THE FOLLOWING:**

**PETITION TO RECALL (NAME OF PERSON SOUGHT TO BE RECALLED) FROM THE OFFICE OF (TITLE OF OFFICE).**

**(c) NO RECALL PETITION SHALL BE CIRCULATED UNTIL IT HAS BEEN APPROVED AS MEETING THE REQUIREMENTS OF THIS SECTION AS TO FORM. THE CLERK SHALL APPROVE OR DISAPPROVE A PETITION AS TO FORM BY THE CLOSE OF THE SECOND BUSINESS DAY FOLLOWING SUBMISSION OF THE PROPOSED PETITION. THE CLERK SHALL MAIL WRITTEN NOTICE OF SUCH CLERK'S ACTION TO THE OFFICER SOUGHT TO BE RECALLED ON THE DAY THAT ANY SUCH PETITION IS APPROVED.**

**(d) 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. IF MORE THAN ONE PERSON IS REQUIRED BY LAW TO BE ELECTED TO FILL THE OFFICE OF WHICH THE PERSON SOUGHT TO BE RECALLED IS AN INCUMBENT, THEN THE RECALL PETITION SHALL BE SIGNED BY REGISTERED ELECTORS ENTITLED TO VOTE FOR A SUCCESSOR TO THE INCUMBENT SOUGHT TO BE RECALLED EQUAL IN NUMBER TO TWENTY-FIVE PERCENT OF THE ENTIRE VOTE CAST AT THE LAST PRECEDING REGULAR ELECTION HELD IN THE MUNICIPALITY FOR ALL CANDIDATES FOR THE OFFICE TO WHICH THE INCUMBENT SOUGHT TO BE RECALLED WAS ELECTED AS ONE OF THE OFFICERS THEREOF, SUCH ENTIRE VOTE BEING DIVIDED BY THE NUMBER OF ALL OFFICERS ELECTED TO SUCH OFFICE AT THE LAST PRECEDING REGULAR ELECTION HELD IN THE MUNICIPALITY.**

Section 20. 31-4-503 (1), (2), (3), and (4), Colorado Revised Statutes, 1986 Repl. Vol., are amended to read:

**31-4-503. Petition in sections - signing - affidavit - review - tampering with petition.** (1) Any recall petition may be circulated and signed in sections, if BUT each section contains SHALL CONTAIN a full and accurate copy of the title and text of the petition.

(2) (a) The signatures to such recall petition need not all be on one sheet of paper, but each signer shall add to his signature the date of his signing said petition and his place of residence, giving his street number, if any. The person circulating such sheet shall make and subscribe an oath on said sheet that the signatures thereon are genuine, and a false oath, willfully so made and subscribed by such person, is perjury in the second degree, as defined in section 18-8-503, C.R.S., and shall be punishable as such. All petitions are sufficient if they appear to be signed by the requisite number of signers who are registered electors unless a protest in writing under oath is filed in the office in which such petition has been filed by some registered elector within fifteen days after such petition is filed setting forth specifically the grounds of such protest; whereupon, the officer with whom such petition is filed shall forthwith mail a copy of such protest to the persons named in such petition as representing the signers thereof, together with a notice fixing a time for hearing such protest not less than five days nor more than ten days after such notice is mailed. ALL SUCH RECALL PETITIONS SHALL BE FILED IN THE OFFICE OF THE MUNICIPAL CLERK WITHIN SIXTY DAYS FROM THE DATE ON WHICH THE MUNICIPAL CLERK APPROVES THE PETITION AS TO FORM.

(b) ANY RECALL PETITION SHALL BE SIGNED ONLY BY REGISTERED ELECTORS USING THEIR OWN SIGNATURES, AFTER WHICH EACH SUCH ELECTOR SHALL PRINT OR, IF SUCH ELECTOR IS UNABLE TO DO SO, SHALL CAUSE TO BE PRINTED SUCH ELECTOR'S LEGAL NAME, THE RESIDENCE ADDRESS OF SUCH PERSON, INCLUDING THE STREET AND NUMBER, IF ANY, AND THE DATE OF SIGNING THE SAME.

(c) TO EACH SUCH PETITION OR SECTION THEREOF SHALL BE ATTACHED AN AFFIDAVIT OF SOME REGISTERED ELECTOR STATING THE AFFIANT'S ADDRESS, THAT THE AFFIANT IS A REGISTERED ELECTOR, THAT THE AFFIANT CIRCULATED THE SAID PETITION, THAT THE AFFIANT MADE NO MISREPRESENTATION OF THE PURPOSE OF SUCH PETITION TO ANY SIGNER THEREOF, THAT EACH SIGNATURE THEREON WAS AFFIXED IN THE AFFIANT'S PRESENCE, THAT EACH SIGNATURE THEREON IS THE SIGNATURE OF THE PERSON WHOSE NAME IT PURPORTS TO BE, THAT TO THE BEST OF THE KNOWLEDGE AND BELIEF OF THE AFFIANT EACH OF THE PERSONS SIGNING SAID PETITION WAS AT THE TIME OF SIGNING A REGISTERED ELECTOR, AND THAT THE AFFIANT NEITHER HAS PAID NOR SHALL PAY AND THAT THE AFFIANT BELIEVES THAT NO OTHER PERSON HAS SO PAID OR SHALL PAY, DIRECTLY OR INDIRECTLY, ANY MONEY OR OTHER THING OF VALUE TO ANY SIGNER FOR THE PURPOSE OF INDUCING OR CAUSING SUCH SIGNER TO SIGN SUCH PETITION.

(d) ANY DISASSEMBLY OF THE PETITION WHICH HAS THE EFFECT OF SEPARATING THE AFFIDAVITS FROM THE SIGNATURES SHALL RENDER THE PETITION INVALID AND OF NO FORCE AND EFFECT.

(3) All hearings shall be before the officer with whom such protest is filed, and all testimony shall be under oath. Such hearings shall be summary and not subject to delay, and shall be concluded within thirty days after such petition is filed, and the result thereof shall be forthwith certified to the persons representing the signers of such petition. In case the petition is not sufficient, it may be withdrawn by the person or a majority of the persons representing the signers of such petition and, within fifteen days thereafter, may be amended and resubmitted as an original petition. The finding as to the sufficiency of any petition may be reviewed by the district court for the county in which such municipality is located 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 grounds assigned in such petition for the recall of the incumbent sought to be recalled from the office thereby.

(3) (a) THE MUNICIPAL CLERK SHALL ISSUE A WRITTEN DETERMINATION THAT A RECALL PETITION IS SUFFICIENT OR NOT SUFFICIENT BY THE CLOSE OF BUSINESS ON THE FIFTH BUSINESS DAY AFTER SUCH PETITION IS FILED OR, IF SUCH DAY IS NOT A REGULAR BUSINESS DAY, ON THE FIRST REGULAR BUSINESS DAY THEREAFTER, UNLESS A PROTEST HAS BEEN FILED PRIOR TO THAT DATE. THE CLERK SHALL FORTHWITH MAIL A COPY OF SUCH WRITTEN DETERMINATION TO THE OFFICER SOUGHT TO BE RECALLED AND TO THE COMMITTEE. ANY SUCH PETITION SHALL BE DEEMED SUFFICIENT IF THE MUNICIPAL CLERK DETERMINES THAT IT WAS TIMELY FILED, HAS ATTACHED THERETO THE REQUIRED AFFIDAVITS, AND WAS SIGNED BY THE REQUISITE NUMBER OF REGISTERED ELECTORS OF THE MUNICIPALITY WITHIN SIXTY DAYS FOLLOWING THE DATE UPON WHICH THE CLERK APPROVED THE FORM OF THE PETITION. THE CLERK SHALL NOT REMOVE THE SIGNATURE OF AN ELECTOR FROM THE PETITION AFTER SUCH PETITION IS FILED. IF A PETITION IS DETERMINED BY THE CLERK TO BE NOT SUFFICIENT, THE CLERK SHALL IDENTIFY THOSE PORTIONS OF THE PETITION THAT ARE NOT SUFFICIENT AND THE REASONS THEREFOR.

(b) A PROTEST IN WRITING UNDER OATH MAY BE FILED IN THE OFFICE OF THE MUNICIPAL CLERK BY SOME REGISTERED ELECTOR WHO RESIDES IN THE MUNICIPALITY WITHIN FIFTEEN DAYS AFTER SUCH PETITION IS FILED SETTING FORTH SPECIFICALLY THE GROUNDS OF SUCH PROTEST. GROUNDS FOR PROTEST MAY INCLUDE, BUT SHALL NOT BE LIMITED TO, THE FAILURE OF ANY PORTION OF A PETITION OR CIRCULATOR AFFIDAVIT OR PETITION CIRCULATOR TO MEET THE REQUIREMENTS OF THIS SECTION. THE MUNICIPAL CLERK SHALL FORTHWITH

MAIL A COPY OF SUCH PROTEST TO THE COMMITTEE NAMED IN THE PETITION AS REPRESENTING THE SIGNERS THEREOF AND TO THE COUNTY CLERK AND RECORDER, TOGETHER WITH A NOTICE FIXING A TIME FOR HEARING SUCH PROTEST NOT LESS THAN FIVE NOR MORE THAN TEN DAYS AFTER SUCH NOTICE IS MAILED. THE COUNTY CLERK AND RECORDER SHALL, UPON RECEIPT OF SUCH NOTICE, PREPARE A REGISTRATION LIST PURSUANT TO SECTION 31-10-205 TO BE UTILIZED IN DETERMINING WHETHER SUCH PETITION IS SUFFICIENT. EVERY HEARING SHALL BE BEFORE THE MUNICIPAL CLERK WITH WHOM SUCH PROTEST IS FILED, WHO SHALL SERVE AS HEARING OFFICER UNLESS SOME OTHER PERSON IS DESIGNATED BY THE GOVERNING BODY AS THE HEARING OFFICER, AND THE TESTIMONY IN EVERY SUCH HEARING SHALL BE UNDER OATH. THE HEARING OFFICER SHALL HAVE THE POWER TO ISSUE SUBPOENAS AND COMPEL THE ATTENDANCE OF WITNESSES. SUCH A HEARING SHALL BE SUMMARY AND NOT SUBJECT TO DELAY AND SHALL BE CONCLUDED WITHIN THIRTY DAYS AFTER SUCH PETITION IS FILED. NO LATER THAN FIVE DAYS AFTER THE CONCLUSION OF THE HEARING, THE HEARING OFFICER SHALL ISSUE A WRITTEN DETERMINATION OF WHETHER THE PETITION IS SUFFICIENT OR NOT SUFFICIENT. IF THE HEARING OFFICER DETERMINES THAT A PETITION IS NOT SUFFICIENT, HE SHALL IDENTIFY THOSE PORTIONS OF THE PETITION WHICH ARE NOT SUFFICIENT AND THE REASONS THEREFOR. THE RESULT OF SUCH A HEARING SHALL BE FORTHWITH CERTIFIED TO THE COMMITTEE AND THE OFFICER SOUGHT TO BE RECALLED.

(c) IN CASE THE RECALL PETITION IS NOT SUFFICIENT, IT MAY BE WITHDRAWN BY A MAJORITY OF THE COMMITTEE AND, WITHIN FIFTEEN DAYS AFTER THE MUNICIPAL CLERK OR HEARING OFFICER ISSUES A WRITTEN DETERMINATION THAT THE PETITION IS NOT SUFFICIENT, MAY BE AMENDED BY THE ADDITION OF ANY REQUIRED INFORMATION RELATING TO THE SIGNERS THEREOF OR THE ATTACHMENT OF PROPER CIRCULATOR AFFIDAVITS AND REFILED AS AN ORIGINAL PETITION; EXCEPT THAT ANY PETITION AMENDED AND REFILED AS PROVIDED IN THIS PARAGRAPH (c) MAY NOT AGAIN BE WITHDRAWN AND REFILED. THE MUNICIPAL CLERK SHALL ISSUE A WRITTEN DETERMINATION THAT SUCH REFILED PETITION IS SUFFICIENT OR NOT SUFFICIENT WITHIN FOUR BUSINESS DAYS AFTER SAID PETITION IS FILED. ANY PROTEST CONCERNING THE REFILED PETITION SHALL BE FILED WITHIN FIVE BUSINESS DAYS OF THE DATE ON WHICH SUCH PETITION WAS REFILED, AND ANY HEARING SHALL BE CONDUCTED AS PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (3).

(d) THE FINDING AS TO THE SUFFICIENCY OF ANY PETITION MAY BE REVIEWED BY THE DISTRICT COURT FOR THE COUNTY IN WHICH SUCH MUNICIPALITY OR PORTION THEREOF IS LOCATED UPON APPLICATION OF EITHER THE OFFICER SOUGHT TO BE RECALLED OR THE OFFICER'S REPRESENTATIVE OR A MAJORITY OF THE COMMITTEE, 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 GROUNDS ASSIGNED IN SUCH PETITION FOR THE RECALL OF THE INCUMBENT SOUGHT TO BE RECALLED FROM THE OFFICE THEREBY.

(4) When such RECALL petition is DETERMINED sufficient, the officer with whom such recall petition was filed MUNICIPAL CLERK shall forthwith submit said petition, together with a certificate of its sufficiency, to the governing body of such municipality which AT THE FIRST MEETING OF SUCH BODY FOLLOWING EXPIRATION OF THE PERIOD WITHIN WHICH A PROTEST MAY BE FILED, OR AT THE FIRST MEETING OF SUCH BODY FOLLOWING THE DETERMINATION OF A HEARING OFFICER THAT A PETITION IS SUFFICIENT, WHICH-EVER IS LATER. IF THE OFFICER SOUGHT TO BE RECALLED DOES NOT RESIGN WITHIN FIVE DAYS AFTER THE CLERK DETERMINES THE PETITION TO BE SUFFICIENT, THE GOVERNING body shall thereupon order and fix A the date holding the FOR THE RECALL election TO BE HELD not less than thirty days nor more than sixty NINETY days after FROM the date of submission of said THE petition; BUT, if a regular election is to be held within ninety days after the date of submission of said petition, the recall election shall be held as a part of said regular election; EXCEPT THAT, IF THE OFFICER SOUGHT TO BE RECALLED IS SEEKING REELECTION AT SAID REGULAR ELECTION, ONLY THE QUESTION OF SUCH OFFICER'S REELECTION SHALL APPEAR ON THE BALLOT. IF A SUCCESSOR TO THE OFFICER SOUGHT TO BE RECALLED IS TO BE SELECTED AT SUCH REGULAR ELECTION AND THE OFFICER SOUGHT TO BE RECALLED IS NOT SEEKING REELECTION, THE QUESTION OF SUCH OFFICER'S RECALL SHALL NOT APPEAR ON THE BALLOT OF SUCH REGULAR ELECTION.

Section 21. 31-4-504, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-4-504. Resignation - vacancy filled - election - ballot - nomination.**  
(1) IF AN OFFICER RESIGNS AT ANY TIME BEFORE THE CALLING OF THE RECALL ELECTION BY THE GOVERNING BODY, ALL RECALL PROCEEDINGS SHALL BE TERMINATED, AND THE VACANCY CAUSED BY SUCH RESIGNATION SHALL BE FILLED AS PROVIDED BY LAW.

(1) (2) If such officer offers his resignation, it shall be accepted, and RESIGNS AFTER THE CALLING OF THE RECALL ELECTION BY THE GOVERNING BODY, the vacancy caused by such resignation or from any other cause shall be filled as provided by law, but the person appointed to fill such vacancy shall hold his office only until the person elected at the recall election complies with section 31-4-401. EXCEPT AS PROVIDED IN SECTION 31-4-503 (4), if such officer does not resign within five days after the sufficiency of the recall petition has been sustained CALLING OF THE RECALL ELECTION BY THE GOVERNING BODY, the governing body shall cause notice to be published for the holding of such election, and the same shall be conducted and returned and the result thereof declared in all respects as in the case of regular elections.

(2) (3) (a) On the official ballot at such elections shall be printed, in not more than two hundred words, the reasons set forth in the petition for demanding his recall, and, in not more than three hundred words, there shall also be printed, if desired by him, the officer's justification of his course in office. If such officer resigns at any time subsequent to the filing of such petition CALLING OF THE RECALL ELECTION, the recall election shall be called HELD, notwithstanding such resignation.

(3) (b) There shall be printed on the official ballot, as to every officer whose recall is to be voted on, the words, "Shall (name of person against whom recall petition is filed) be recalled from the office of (title of office)?". Following such question shall be the words "yes" and "no" on separate lines with a blank space at the right of each in which the voter shall indicate, by marking a cross mark (X), his vote for or against such recall.

(4) (c) On such ballots, under each question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person sought to be recalled, but no vote cast shall be counted for any candidate for such office unless the voter also voted for or against the recall of such person sought to be recalled from said office. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office. ALL CANDIDATES ON THE BALLOT SHALL BE LISTED IN ALPHABETICAL ORDER.

(4) CANDIDATES FOR THE OFFICE AT A RECALL ELECTION MAY BE NOMINATED BY PETITION AS PROVIDED IN SECTION 31-10-302; EXCEPT THAT NOMINATING PETITIONS MAY BE CIRCULATED BEGINNING ON THE FIRST BUSINESS DAY AFTER THE GOVERNING BODY SETS THE DATE FOR THE RECALL ELECTION AND SHALL BE FILED NO LATER THAN FIFTEEN DAYS PRIOR TO SUCH RECALL ELECTION.

(5) (a) APPLICATIONS FOR ABSENTEE BALLOTS SHALL BE MADE AVAILABLE BY THE MUNICIPAL CLERK NO LATER THAN TWENTY-FOUR HOURS AFTER THE GOVERNING BODY FIXES THE DATE FOR THE HOLDING OF THE RECALL ELECTION THROUGH THE CLOSE OF BUSINESS ON THE FIFTH DAY BEFORE THE RECALL ELECTION.

(b) ABSENTEE BALLOTS SHALL BE AVAILABLE NO LATER THAN TEN DAYS BEFORE THE RECALL ELECTION.

(c) THE ABSENTEE POLLING PLACE IN THE OFFICE OF THE MUNICIPAL CLERK SHALL BE OPEN DURING REGULAR BUSINESS HOURS BETWEEN THE TENTH AND FIFTH BUSINESS DAYS PRECEDING THE RECALL ELECTION.

(5) (6) If a majority of those voting on said question of the recall of any incumbent from office vote "no", said incumbent shall continue in said office. If a majority vote "yes", such incumbent shall be removed from such office upon compliance with section 31-4-401 by his successor.

(6) (7) If the vote in such recall election recalls the officer, the candidate who has received the highest number of votes for the office thereby vacated shall be declared elected for the remainder of the term, and a certificate

of election shall be forthwith issued to him by the canvassing board. In case the person who received the highest number of votes fails to comply with section 31-4-401 within fifteen days after the issuance of a certificate of election, OR IN THE EVENT NO PERSON SOUGHT ELECTION, the office shall be deemed vacant and shall be filled according to law.

(7) Candidates for the office may be nominated by petition as provided by law, which petition shall be filed in the office in which petitions for nomination to office are required by law to be filed not less than fifteen days before such recall election.

Section 22. 31-4-504.5 (1), (3), and (4), Colorado Revised Statutes, 1986 Repl. Vol., are amended to read:

**31-4-504.5. Incumbent not recalled - reimbursement.** (1) If at any recall election the incumbent whose recall is sought is not recalled, OR IN THE EVENT OF A PROTEST, THE HEARING OFFICER DETERMINES THAT THE PETITIONS ARE NOT SUFFICIENT BASED UPON THE CONDUCT ON THE PART OF PETITION CIRCULATORS, THE MUNICIPALITY MAY REPAY THE INCUMBENT he shall be repaid from the state treasury for any money actually expended by him as expenses of such election when such expenses are authorized by this section.

(3) The incumbent shall file a complete and detailed request for reimbursement within sixty days after the date of the recall election with the governing body of the municipality holding the recall election OR PROTEST HEARING, who WHICH shall then review the reimbursement request for appropriateness under subsection (2) of this section, and refer such request, with recommendations, to the controller within thirty days after receipt of the reimbursement request AND, IN THE EVENT THE MUNICIPALITY HAS DETERMINED BY ORDINANCE TO REPAY SUCH EXPENSES, SUCH MUNICIPALITY SHALL REPAY SUCH EXPENSES WITHIN FORTY-FIVE DAYS OF RECEIPT OF THE REQUEST.

(4) The general assembly shall provide appropriations for such purpose, but in no event shall the sum appropriated exceed an amount equal to ten cents per voter.

Section 23. 31-10-205, Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-10-205. Registration lists.** The county clerk and recorder of each county, no later than the fifth day preceding any municipal election in his county OR UPON RECEIPT OF THE NOTICE MADE PURSUANT TO SECTION 31-4-503 (3) (b), shall prepare a complete copy of the list of the registered electors of each municipal election precinct which is located within his county and is involved in such municipal election; but, in any municipal election precinct consisting of one or more whole general election precincts, the county registration books for such precinct may be used in lieu of a separate registration list. The registration list for each municipal election precinct shall contain, in alphabetical order, the names and addresses of all registered electors residing within the municipal election precinct whose names appeared on the county registration records at the close of business on the twenty-fifth day preceding the municipal election OR, WHEN NOTICE IS RECEIVED PURSUANT TO SECTION 31-4-503 (3) (b), AT

THE CLOSE OF BUSINESS ON THE DATE PRECEDING RECEIPT OF SUCH NOTICE. The county clerk and recorder shall certify and deliver such registration lists or registration books to the respective clerks on or before the fifth day preceding the election.

Section 24. 31-10-302 (3) and (4), Colorado Revised Statutes, 1986 Repl. Vol., as amended, are amended to read:

**31-10-302. Nomination of municipal officers.** (3) Each registered elector signing a petition shall add to his signature his PRINT OR, IF SUCH ELECTOR IS UNABLE TO DO SO, SHALL CAUSE TO BE PRINTED SUCH ELECTOR'S LEGAL NAME AND place of residence. The circulator of each nomination petition shall make an affidavit that each signature thereon is the signature of the person whose name it purports to be and that each signer has stated to the circulator that he is a registered elector of the municipality or municipality and ward, as the case may be, for which the nomination is made. The signature of each signer of a petition shall constitute prima facie evidence of his qualifications without the requirement that each signer make an affidavit as to his qualifications.

(4) No petition is valid that does not contain the requisite number of signatures of registered electors. Any such petition may be amended in this respect TO CORRECT OR REPLACE THOSE SIGNATURES WHICH THE CLERK FINDS ARE NOT IN APPARENT CONFORMITY WITH THE REQUIREMENTS OF THIS SECTION at any time prior to twenty-two days before the day of election.

Section 25. 31-10-306, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-10-306. Write-in candidate affidavit.** The governing body of a municipality may provide by ordinance that no write-in vote for any municipal office shall be counted unless an affidavit of intent has been filed with the clerk by the person whose name is written in prior to five TWENTY days before the day of the election indicating that such person desires the office and is qualified to assume the duties of that office if elected.

Section 26. 31-10-507, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-10-507. Election may be cancelled - when.** In any ordinance adopted by the governing body of the municipality requiring an affidavit of intent for write-in candidates as provided in section 31-10-306, the governing body may also provide that, if the only matter before the voters is the election of persons to office and if, at the close of business on the Friday NINETEENTH DAY before the election, there are not more candidates than offices to be filled at such election, including candidates filing affidavits of intent, the clerk, shall certify such fact to the governing body, and it shall hold a meeting and may IF INSTRUCTED BY RESOLUTION OF THE GOVERNING BODY EITHER BEFORE OR AFTER SUCH DATE, SHALL cancel the election and by resolution declare the candidates elected. If so provided by ordinance, upon such declaration the candidates shall be deemed elected. Notice of such cancellation shall be published, if possible, in order to inform the electors of the municipality, and notice of such cancellation shall be posted at each polling place and in not less than one other public place.

Section 27. 31-10-903, Colorado Revised Statutes, 1986 Repl. Vol., is amended to read:

**31-10-903. Ballots changed if candidate dies or withdraws.** If any person duly nominated dies before the day fixed for the election and the fact of such death becomes known to the clerk OR WITHDRAWS BY FILING AN AFFIDAVIT OF WITHDRAWAL WITH THE CLERK BEFORE THE DATE FIXED FOR ELECTION, the name of the deceased OR WITHDRAWN candidate shall not be printed upon the ballots for the election. If the ballots are already printed, the name of the deceased candidate shall be erased or cancelled, if possible, before the ballots are delivered to the voters.

Section 28. 31-16-101 (1), Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-16-101. Ordinance powers - penalty.** (1) The governing body of each municipality has power to enforce obedience to PROVIDE FOR ENFORCEMENT OF ordinances adopted by it by a fine of not more than three hundred ONE THOUSAND dollars, or by imprisonment for not more than ninety days ONE YEAR, or by both such fine and imprisonment.

Section 29. 31-16-103, Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-16-103. Majority must vote for appropriations - proving ordinances.** All ordinances and all ORDINANCES, resolutions, and orders for the appropriation of money shall require for their passage or adoption the concurrence of a majority of the governing body of any city or town. Unless otherwise specifically provided by statute or ordinance, all other actions of the governing body upon which a vote is taken shall require for adoption the concurrence of a majority of those present if a quorum exists. All ordinances may be proven by the seal of the city or town, and, when printed in book or pamphlet form and purporting to be printed and published by authority of the city or town, the same shall be received in evidence in all courts and places without further proof.

Section 30. 31-16-108, Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended to read:

**31-16-108. Majority of all members required - record.** On the adoption of every AN ordinance, and of every resolution, authorizing the expenditure OR ORDER FOR THE APPROPRIATION of money or the entering into of a contract by the governing body of any city or town, the yeas and nays shall be called and recorded, and the concurrence of a majority of the governing body shall be required. The names of those who voted and the vote each candidate received upon the vote resulting in an appointment shall be recorded.

Section 31. 34-32-110 (8), Colorado Revised Statutes, 1984 Repl. Vol., as amended, is amended to read:

**34-32-110. Limited impact operations - expedited process.** (8) If the operator is a unit of county OR MUNICIPAL government or the state department of highways, the operator may, at its discretion, submit one composite application and annual report for all similarly situated sand, gravel, or quarry

operations. Such composite application and annual report shall comply with subsections (2) to (7) of this section; except that no application fee or annual report fee shall be required of county OR MUNICIPAL government or the state department of highways, whether or not a composite application is submitted. Financial warranty under subsection (3) of this section shall not be required of the operator if it is a unit of county OR MUNICIPAL government or the state department of highways and the operator submits a written guarantee, in lieu of financial warranty, stating that the affected lands will be reclaimed in accordance with the terms of the permit and section 34-32-116.

Section 32. 34-32-112 (6), Colorado Revised Statutes, 1984 Repl. Vol., as amended, is amended to read:

**34-32-112. Application for reclamation permit - fee - notice.** (6) A basic fee of fifty dollars and, in addition, a fee of fifteen dollars per acre for the first fifty acres, ten dollars per acre for the second fifty acres, five dollars per acre for the third fifty acres, and one dollar per acre for any additional acres shall be paid. If the operator is a unit of county OR MUNICIPAL government or the state department of highways, no application, renewal, or amendment fee is required. In no case shall the reclamation permit fee exceed two thousand dollars. A fraction of an acre shall be considered a full acre for computing the fee. In the event of reclamation permit denial, seventy-five percent of the reclamation permit fee shall be refunded. If the refund will be two hundred dollars or less, no refund shall be made.

Section 33. 34-32-117 (3) (a) (IX), Colorado Revised Statutes, 1984 Repl. Vol., is amended to read:

**34-32-117. Warranties of performance - warranties of financial responsibility - release of warranties.** (3) (a) A "financial warranty" shall consist of a written promise, to the board, to be responsible for reclamation costs up to the amount specified by the board pursuant to subsection (4) of this section, together with proof of financial responsibility. Financial warranties may be provided by the operator, by any third party, or by any combination of persons or entities and shall be in such form as the board may prescribe; except that proof of financial responsibility may consist of any one or more of the following:

(IX) Proof that the operator is a department or division of state government or a unit of county OR MUNICIPAL government.

Section 34. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 4, 1991.

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	BalLOTS
Alaska	Sec. 29.26.280(b)	The clerk shall determine the number of signatures required on a petition and inform the contact person in writing. If a petition seeks to recall an official who represents the municipality at large, the petition shall be signed by a number of voters equal to 25 percent of the number of votes cast for that office at the last regular election held before the date written notice is given to the contact person that the petition is available. If a petition seeks to recall an official who represents a district, the petition shall be signed by a number of the voters residing in the district equal to 25 percent of the number of votes cast in the district for that office at the last regular election held before the date the written notice is given to the contact person that the petition is available.	x						
Arizona	Ariz. Const. Art. 8, Sec. 1	Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a recall petition, demand his recall.			x				
Arkansas	Sec. 14-47-112(b)(1)(A)	This petition shall be signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least thirty-five percent (35%) of the number of ballots cast for all candidates for directors at the preceding primary election at which directors were nominated or elected, demanding the election of a successor of the person sought to be removed.							x
California	Sec. 11221(a)	30% of registered voters if less than 1,000; 25% if between 1,000 and 10,000; 20% if registration between 10,000 and 50,000; 15% if registration between 50,000 and 100,000; 10% of registered voters if over 100,000	x						
Colorado	Colo. Const. Art. XXI, Sec. 1; C.R.S. Sec. 31-4-502(d)	25% of entire vote cast of single office; 25% divided by number of officers elected		x					
Florida	Fla. Stat. Ann. Sec. 100.361	Signature requirement varies according to the number of registered voters in the jurisdiction: 50 electors or 10% of the total electors, whichever is greater, in a district of fewer than 500 electors; 100 electors or 10% of the total electors, whichever is greater, in a district of 500-1,999 electors; 250 electors or 10% of the total electors, whichever is greater, in a district of 2,000-4,999 electors; 500 electors or 10% of the total electors, whichever is greater, in a district of 5,000-9,999 electors; 1,000 electors or 10% of total electors, whichever is greater, in a district of 10,000-24,999 electors; 1,000 electors or 5% of the total electors, whichever is greater, in a district of 25,000 or more electors	x						

## EXHIBIT E

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	Ballots
D.C.	Sec. 1-1001.17(h)(1)	A recall petition for an elected officer from a ward shall include the valid signatures of 10 percent of the registered qualified electors of the ward from which the officer was elected. The 10 percent shall be computed from the total number of the qualified registered electors from such ward according to the latest official count of the registered qualified electors made by the Board 30 days prior to the date of initial submission to the Board of the notice of intention to recall.		x					
Georgia	Sec. 21-4-4(a)(2)	In the case of a state officer whose electoral district encompasses only a part of the state or in the case of a local officer, the number of electors necessary to petition the recall of the officer shall be equal to at least 30 percent of the number of electors registered and qualified to vote at the last preceding election for any candidate offering for the office held by the officer.		x					
Idaho	Sec. 34-1702	If the petition seeks recall of any of the officers named in subsection (3) of section 34-1701, Idaho Code, the petition shall be filed with the city clerk, and must be signed by registered electors of the city equal in number to twenty percent (20%) of the number of electors registered to vote at the last general city election held in the city for the election of officers.		x					
Kansas	Sec. 25-4325	The recall committee may file the petition only if signed by registered electors in the election district of the local officer sought to be recalled equal in number to not less than 40% of the votes cast for all candidates for the office of the local officer sought to be recalled, such percentage to be based upon the last general election for the current term of office of the local officer sought to be recalled. If more than one person was elected to such office at such election the number of signatures required shall be equal to not less than 40% of the votes cast at such election for all candidates for the office divided by the number of persons elected to such office.			x				
Louisiana	1300.2(B)(3)(a)	(3)(a) If fewer than one thousand qualified electors reside within the voting area, the petition shall be signed by at least forty percent of the electors. (b) If one thousand or more but fewer than twenty-five thousand qualified electors reside within the voting area, the petition shall be signed by at least thirty-three and one-third percent of the electors. (c) If twenty-five thousand or more but fewer than one hundred thousand qualified electors reside within the voting area, the petition shall be signed by at least twenty-five percent of the electors. (d) If one hundred thousand or more qualified electors reside within the voting area, the petition shall be signed by at least twenty percent of the electors.	x						

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	Ballots
Maine	Sec. 2505(1)	On the written petition pursuant to subsection 5 of a number of voters equal to at least 10% of the number of votes cast in the municipality at the last gubernatorial election, an election must be held to determine the recall of an elected official of that municipality.					x		
Michigan	Const. Art. 2, Sec. 8	25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. <b>Note</b> - statute provides Section 168.955 provides " The petitions shall be signed by registered and qualified electors equal to not less than 25% of the number of votes cast for candidates for the office of governor at the last preceding general election in the electoral district of the officer sought to be recalled."					x		
Minnesota	Sec. 351.16	The petitioner must attach to the petition documents which contain the signatures of supporters who are registered voters totaling at least 25 percent of the number of persons who voted in the preceding election for the office which is held by the county official named in the petition.					x		
Missouri	Sec. 77.650(2)	A petition signed by voters entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five percent of the total number of registered voters in such city entitled to vote for a successor to the incumbent sought to be removed	x						
Montana	Sec. 2-16-614	(3) (a) Except as provided in subsection (3)(b), recall petitions for elected or appointed county officers must contain the signatures of qualified electors equaling at least 15% of the number of persons registered to vote at the preceding county general election. (b) If a recall petition is for a county commissioner in a county that is divided into commissioner districts pursuant to 7-4-2102, then the petition: (i) must contain the signatures of qualified electors equaling at least 15% of the number of persons registered to vote at the preceding county general election; and (ii) must also contain the signatures from at least 15% of the qualified electors residing in that commissioner's commission district. (4) Recall petitions for elected or appointed officers of municipalities or school districts must contain the signatures of qualified electors equaling at least 20% of the number of persons registered to vote at the preceding election for the municipality or school district.		x					

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	Ballots
Nebraska	Sec. 32-1303(1)	1) A petition demanding that the question of removing an elected official or member of a governing body listed in section 32-1302 be submitted to the registered voters shall be signed by registered voters equal in number to at least thirty-five percent of the total vote cast for that office in the last general election, except that (a) for an office for which more than one candidate is chosen, the petition shall be signed by registered voters equal in number to at least thirty-five percent of the number of votes cast for the person receiving the most votes for such office in the last general election and (b) for a member of a governing body of a village, the petition shall be signed by registered voters of the village equal in number to at least forty-five percent of the total vote cast for the person receiving the most votes for that office in the last general election. The signatures shall be affixed to petition papers and shall be considered part of the petition.	x						
Nevada	Const. Art. 2, Sec. 9	Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents. For this purpose, not less than twenty-five percent (25%) of the number who actually voted in the state or in the county, district, or municipality which he represents, at the election in which he was elected, shall file their petition, in the manner herein provided, demanding his recall by the people							
New Jersey	Const. Art. 1. Sec. 2(b)	Any such laws shall include a provision that a recall election shall be held upon petition of at least 25% of the registered voters in the electoral district of the official sought to be recalled.	x						
New Mexico	Art. X, Sec 9	The recall petition shall be signed by registered voters:(1) of the county if the official sought to be recalled was elected at-large; or (2) of the district from which the official sought to be recalled was elected; and (3) not less in number than thirty-three and one-third percent of the number of persons who voted in the election for the office in the last preceding general election at which the office was voted upon.						x	
North Dakota	Art. III, Sec 10	Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition of electors equal in number to twenty-five percent of those who voted at the preceding general election for the office of governor in the state, county, or district in which the official is to be recalled.	x						

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	Ballots
Ohio	Sec. 705.92	A petition signed by qualified electors equal in number to at least fifteen per cent of the total votes cast at the most recent regular municipal election, and demanding the election of a successor to the person sought to be removed, shall be filed with the board of elections.	x						
Oregon	Const. Art. II. Sec. 18(2); 249.870	"Fifteen per cent, but not more, of the number of electors who voted for Governor in the officer's electoral district at the most recent election at which a candidate for Governor was elected to a full term, may be required to file their petition demanding the officer's recall by the people."				x			
South Dakota	Sec. 9-13-30	A petition signed by fifteen percent of the registered voters of the municipality, based upon the total number of registered voters at the last preceding general election, demanding the election of a successor to the mayor, commissioner, alderman, or trustee sought to be removed shall be filed with the finance officer and presented by the finance officer to the governing body.	x						
Tennessee	Sec. 6-31-306	A petition, by registered voters equal in number to at least sixty-six percent (66%) of the total vote cast for the office held by the incumbent at the last regular election, demanding the recall of the person sought to be removed shall be filed with the county election commission, and notice given by the commission of such filing by publication at least once in the official city newspaper, which petition shall contain a general statement of the grounds upon which the removal is sought. The signatures to the petition need not all be appended to one (1) paper, but each signer shall sign such signer's name, and shall place thereon, after such signer's name, the date of signing and such signer's place of residence by street and number, or by other customary designation				x			

State	Code Section	Text	Voters	Electors	Entire Vote	Votes Cast	Votes Cast of Governor	Person	Ballots
Washington	Art. 1, Sec. 33; 29A.56.180	<p>"signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election . . ." Statute: When the person, committee, or organization demanding the recall of a public officer has secured sufficient signatures upon the recall petition the person, committee, or organization may submit the same to the officer with whom the charge was filed for filing in his or her office. The number of signatures required shall be as follows:</p> <p>(1) In the case of a state officer, an officer of a city of the first class, a member of a school board in a city of the first class, or a county officer of a county with a population of forty thousand or more—signatures of legal voters equal to twenty-five percent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election.</p> <p>(2) In the case of an officer of any political subdivision, city, town, township, precinct, or school district other than those mentioned in subsection (1) of this section, and in the case of a state senator or representative—signatures of legal voters equal to thirty-five percent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election.</p>							
West Virginia	Sec. 8-12-4(3)	The holding of a special municipal election to submit to the qualified voters of such city the question of the recall of an elected officer upon petition bearing the signatures, written in their own handwriting, of not less than twenty percent of the qualified voters of such city. Not more than one recall election shall be held with respect to an officer during his term of office.	x						
Wisconsin	Const. Art. XIII, Sec. 12; Sec 9.10	Constitution/Statute - a petition for recall of an officer shall be signed by electors equal to at least 25 percent of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled.							
Wyoming	Sec. 15-4-110(a)	Any elected officer may be removed at any time by the qualified electors in the following manner: a petition signed by at least twenty-five percent (25%) of all the registered electors and demanding an election of a successor of the person sought to be removed shall be filed with the city clerk.	x						

DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Avenue PO Box 597 Eagle, Colorado 81631	DATE FILED: February 25, 2021 3:52 PM FILING ID: 6010D7DE3B9B3 CASE NUMBER: 2020CV30264
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<b>Plaintiff:</b> TOWN OF AVON, COLORADO, a Colorado home rule municipality  v.	Case Number: 2020 CV 30264 Div: 3
<b>Defendants:</b> AVON RECALL COMMITTEE	

**[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

The Court, having considered Plaintiff's Motion for Summary Judgment ("Motion"), and being fully advised in the premises, does hereby enter the following relief:

IT IS HEREBY ORDERED:

For the reasons set forth in Plaintiff's Motion, the Court concludes that the required number of signatures to trigger a recall election of Town of Avon ("Town") Town Councilors elected in the November 6, 2018, election pursuant to Article XXI, Section 1 of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) is 496. Therefore, Plaintiff's Motion is hereby GRANTED.

IT IS SO ORDERED.

DONE on this \_\_\_\_ day of \_\_\_\_\_, 2021

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Eagle County District Court Judge

DISTRICT COURT, EAGLE COUNTY, STATE OF COLORADO

Eagle County Justice Center  
885 Chambers Avenue  
P.O. Box 597  
Eagle, CO 81631-0597

DATE FILED: April 28, 2021 19:50:06 PRM  
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CASE NUMBER: 2020CA940264

**Plaintiffs:** TOWN OF AVON, COLORADO, a Colorado home rule municipality

v.

**Defendant:** AVON RECALL COMMITTEE

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**▲COURT USE ONLY▲**

Case No.: 2020CV30264  
Division: 3

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant Avon Recall Committee (the “Committee”), responds in opposition to Plaintiff Town of Avon, Colorado’s (“Avon”) *Motion for Summary Judgment* (the “Motion”) and submits its own Cross-Motion for Summary Judgment on the same issue.<sup>1</sup>

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel has conferred with Christopher Bryan, counsel for Avon. Mr. Bryan has indicated that Avon opposes the requested relief.

<sup>1</sup> The Committee combines its Response with its Cross-Motion pursuant to the Court’s oral instructions at the March 15, 2021 Status Conference.

## **BRIEF SUMMARY**

Avon incorrectly calculated the number of signatures required to trigger a recall election of two Town Councilors and thereby wrongly issued Certificates of Insufficiency and wrongly failed to hold the required recall elections. Under the statute, the number of signatures required is 25% of the “entire vote cast.” Avon’s interpretation equating “entire vote cast” with “ballots cast” is contrary to the plain language of the statute, the statute’s legislative history, the Secretary of State’s implementation of the statute, and is intended to make recall of its current elected officials more onerous. Instead, “entire vote cast” means exactly that: the number of votes actually cast in the election. Because Avon concedes that the Committee obtained sufficient signatures under the correct interpretation of the statute, judgment should be entered directing Avon to accept the Committee’s petitions and hold recall elections.

## **RESPONSE TO AVON’S STATEMENT OF UNDISPUTED FACTS**

The Committee accepts each of Avon’s “Statement of Undisputed Material Facts” as set forth on pages 4 through 6 of the Motion and incorporates them herein.

## **STANDARD OF REVIEW**

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” C.R.C.P. 56(c). The rule is designed to avoid unnecessary trials to further the prompt administration of justice. *Ruscitti v. Sackheim*, 817 P.2d 1046, 1048 (Colo. App. 1991). A motion for summary judgment “must be granted where the facts are undisputed and the opposing party cannot prevail as a matter of law.” *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo. 1993).

Here, the facts are undisputed. The question before the Court is whether “entire votes cast” means the total votes cast in the race, or the total number of ballots cast. This is a question of law to which The Committee is entitled to judgment in its favor.

## **ARGUMENT**

### **A. The Plain Language of the Statute Requires a Recall.**

When construing a constitutional provision, the same set of construction rules apply as when interpreting statutes. *See Lobato v. State*, 2013 CO 30, ¶ 17. The primary purpose is to ascertain and effectuate the legislature’s intent. *McCoy v. People*, 2019 CO 44, ¶ 37. To do so, courts focus on the language of the statute. *Id.* The words and phrases are given their plain and ordinary meanings, are read in context, and construed according to the rules of grammar and common usage. *Id.* In effectuating the purpose of the legislative scheme the scheme is read as a whole, giving consistent effect to all of its parts, and avoiding constructions that would render any words or phrases superfluous or would lead to illogical or absurd results. *Id.* at ¶ 38.

If the statutory language is unambiguous, its plain and ordinary meaning is applied and there is no need to look further. *Carrera v. People*, 2019 CO 83, ¶ 18.

The Colorado Constitution and Colorado statutes on this issue are unambiguous. It is the “entire vote cast” in the election that is used to determine the number of signatures needed on a recall petition, not the number of “ballots cast” as argued by Avon.

Section 1 of Article XXI of the Colorado Constitution (“Section 1”) allows for any elective public officer of the state of Colorado to be recalled from office at any time. It additionally sets forth the procedure required to trigger such a recall as follows:

A petition 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 at the last preceding election for all candidates for the position which the incumbent sought to be recalled occupies...*

Colo. Const. Art. XXI, § 1 (emphasis added).

When a recall is attempted for a multi-seat office, the

*...petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled *equal in number to twenty-five percent of the entire vote cast at the last preceding general election for all candidates for the office*, to which the incumbent sought to be recalled was elected as one of the officers thereof, *said entire vote being divided by the number of all officers elected to such office, at the last preceding general election*;...*

*Id* (emphasis added).

Section 4 of Article XXI of the Colorado Constitution (“Section 4”), allows municipalities to control the manner in which recalls are conducted, but sets a ceiling for the number of signature that a municipality can require to trigger a recall vote. Under Section 4, the municipality

shall not require any such recall to be signed by registered electors more in number than twenty-five percent of the *entire vote cast at the last preceding election, as in [Section 1] hereof more particularly set forth, for all the candidates for office which the incumbent sought to be recalled occupies, as herein above defined.*

*Id.* at § 4 (emphasis added). In this way, the language set forth in Section 1 is also applicable to municipal recalls.

If Section 4 was not sufficient, the Colorado General Assembly additionally adopted procedures for the recall of municipal officers that mirror the language of Section 1. Pursuant to C.R.S. § 31-4-502(1)(d),

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*. If more than one person is required by law to be elected to fill the office of which the person sought to be recalled is an incumbent, then the recall petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled *equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office to which the incumbent sought to be recalled was elected as one of the officers thereof,*

*such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.*

(emphasis added).

Both the Colorado Constitution and the Revised Statute contain nearly identical language requiring that a recall petitioner obtain signatures from a minimum amount equal to 25% “of the entire vote cast for all the candidates for the office” or “of the entire vote cast for all the candidates for that particular office” in order to trigger the recall election.

Here, 1,984 ballots were cast by Avon voters. *See* Motion at 5. Because the election at issue was a multiple seat election, each voter was allowed to cast a vote for up to four of the eight candidates. *Id.* In total, those voters cast 5,276 votes for the candidates of their choosing. *Id.* The “entire vote cast” was 5,276 votes. In order to determine the number of signatures needed to trigger a recall election, the 5,276 is divided by 4 (the number of officers elected in that election) and multiplied by 25%. Therefore, the total number of signatures needed to trigger a recall in this instances was 330 ((5,276/4)\*25% = 329.75).

Avon argues that “entire votes cast” should include not only those votes cast, but also the “undervote,” that is, the votes that could have been cast by the voters but were not. Avon counts the “undervote” as 2,660 and states that the number represents those voters who “voted for at least one candidate but did not use all four votes allotted to them.” Motion at 5.

Avon’s interpretation is contrary to the plain language of the statute. First, a voter’s failure or refusal to fill in a bubble in a particular race is not a “vote cast.” Said another way, failing to cast a vote is not a “vote cast” and cannot be used in calculating the “entire vote cast” in a particular election. Only those votes actually cast should be included when calculating the “entire vote cast.”

Second, Avon’s interpretation would render portions of the statute superfluous and meaningless. Under Avon’s “ballots cast” interpretation, the number of signatures required to trigger a recall election will always be 25% of the total ballots cast. This would be the same in an election for a single official (such as a governor’s race) as it would be in a multiple official election such as the election for Town Counsel, here. Under Avon’s theory, it was completely unnecessary for the legislature to create the procedure by which the “entire vote cast” is first added up and then “such entire vote being divided by the number of all officers elected to such office at the last preceding regular election held in the municipality.” Especially when discussed in conjunction with the legislative history in which “entire vote cast” was changed from “ballots cast,” This is the type of superfluous or illogical construction that the Supreme Court was concerned about in *McCoy*. The statute only makes sense when “entire votes cast” is used in its normal sense: the actual votes cast in the given race. Only then is it logical to divide by the number of open seats in calculating the number of signatures needed to trigger a recall election.

Third, when inspected more closely, Avon’s calculation is arbitrary. Avon claims that those undervotes represent voters who may have done so “intentionally and strategically” (Motion at fn. 9) and that to exclude them would be to exclude the “total expression of opinions” of those voters (Motion at 11) to the point where they are being disenfranchised (Motion at 14). Avon’s counting of undervotes, however, contradicts its own expressed goal. For instance, voters who cast a ballot but, for intentional and strategic reasons, chose not to vote for *any* candidate in the Town Council race would seemingly not be included in those who “voted for at least one candidate but did not use all four votes allotted to them.” According to the language used in its Motion, such undervotes would not be counted. Similarly, voters who, for equally intentional and strategic reasons, chose not to return their ballot *at all* also are making and expression an opinion but would not be included in the undervote. If the calculation of “entire votes cast” for

the purposes of triggering a recall election includes some person who did not cast a vote in that particular race, it should include *all* votes that could have, but were not, cast in that race. This is the type of absurd interpretation cautioned by the Colorado Supreme Court. *See State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000) (holding that a statutory interpretation leading to an illogical or absurd result will not be followed.)

The “entire vote cast” is counted in order to determine the number of signatures required to trigger a recall election. Included votes that were not actually cast, whether intentional or not, is contrary to the plain meaning of the statute. Therefore, the statutory requirement should be 25% of the 5,276 votes cast – thereby requiring 330 signatures to trigger a recall. Because Avon concedes that the Committee collected at least 330 signatures, the Court should order that Avon move forward with the recall vote.

#### **B. The Legislative History Requires a Recall.**

Even if the statutory language is ambiguous, which the Committee contends it is not, the legislative history demonstrates that “entire votes cast” cannot be the same as “ballots cast” as argued by Avon. Only if the Court finds that the language is ambiguous, i.e., is susceptible of multiple reasonable interpretations, may consider other aids to statutory construction, such as the consequences of a given construction, the end to be achieved by the statute, and the statute’s legislative history. *McCoy*, *supra*, ¶ 38.

As addressed above, the consequences of Avon’s interpretation of the statute leads to absurd and undesirable consequences.

Additionally, the statute’s legislative history is contrary to Avon’s position. The municipal recall statute was first enacted by the General Assembly in 1947. Under that law, the number of signatures required to trigger a recall election was “equal in number to forty per centum of *all ballots cast* at the last preceding municipal election...” (emphasis added). *See S.B.*

322, 36th Gen. Assembly, Reg. Sess. (Colo. 1947), Exhibit C to Motion. In 1985, the percentage was reduced from 40% to 25% of all ballots cast. *See S.B. 85-102*, 55th Gen. Assembly, Reg. Sess. (Colo. 1985).

In 1991, the General Assembly amended the statute to include the language that exists today. It deleted the language of “equal in number to twenty-five percent of *all ballots cast...*” and replaced it with “equal in number to twenty-five percent of the *entire vote cast...*” (emphasis added). *See Exhibit D to Motion* at § 31-4-502.

The change is transparent. The statutory language moved from “ballots cast” to “votes cast.” No longer was the signature requirement based on the number of ballots cast, but is now simply the number of votes cast in that election.

Avon argues that the obvious implications of this change should be ignored because Avon could not find direct discussion in a recording of legislative hearing regarding the change. Whether or not such discussion exist is not the standard. Instead, the legislative history here demonstrates an intentional break from “ballots cast” to “entire vote cast.” Courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The change is deliberate and clear, “ballots cast” is no longer the standard used under C.R.S. § 31-4-502.

The case law cited by Avon in support of this position is equally distinguishable. In none of those cases was the change so abrupt and apparent as the change from “ballots cast” to “entire vote cast.” For instance, in *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 318 (1985), the U.S. Supreme Court was deciding whether the legislatures’ rewording of its jurisdiction over lower court decisions “against the constitutionality of any Act of Congress” to decisions “holding any Act of Congress unconstitutional” was meaningful. Unsurprisingly, the

Court held that the terms were synonymous and only looked to legislative history to verify that no substantive comments were made regarding an intent to bring an “unheralded change in phraseology to divest us of jurisdiction....” *Id.*

In *Muniz v. Hoffman*, 422 U.S. 454, 467-74 (1975), the U.S. Supreme Court was looking at revisions made to the criminal code in which provisions from other titles were reorganized and recodified. As reflected in the legislative history, this was a “massive undertaking” in which the intent was not to change the law, but to perform “substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions.” *Id.* at 468-69. Changes were assumed to be non-substantive. There is no similar legislation here. Moreover, “ballots cast” is not an awkward term that called for clarification.

Similarly, in *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276 (11th Cir. 2000), the 11th Circuit refused to “read this minor change [in the statute] to effectuate a major statutory shift.” There, Congress slightly updated the definition of “cable service” to include programming services that are required for the “selection *or use* of such video programming....” *Id.* The addition of the term “or use,” the Court found, was not significant to justify expansion of the term “cable service” to include both video and non-video, because if it had meant such a drastic change “it would have said so.” *Id.* Here, unlike in *Gulf Power*, the Colorado legislature did “say so” when it changed “ballots cast” to “entire vote cast.” In making this change, the legislature demonstrated its intent that simply taking 25% of the total number of ballots cast was no longer acceptable. Instead, 25% of the total vote cast is the new standard.

### **C. The Secretary of State’s Interpretation Requires a Recall.**

Just as a municipality conducts recall elections within its jurisdiction, the Colorado Secretary of State conducts recall elections on the state-wide level. *See Exhibit A*, Affidavit of

Caleb Thornton, at ¶ 5. It also serves as a hub for municipalities to direct election related questions and provide statutory interpretation so that elections are run consistently throughout the state.

The Colorado Secretary of State oversees and manages recall elections for all state and certain political subdivision officeholders. *Id.* Included in its obligations is the determination of the signature threshold to place a recall question on the ballot. *Id.*

In determining the number of signatures required to trigger a recall election, The Colorado Secretary of State must interpret Section 1 of Article XXI of the Colorado Constitution. *Id.* at ¶ 7. Again, as discussed above, this language mirrors the “entire votes cast” language at issue in this lawsuit. The Colorado Secretary of State has interpreted “entire votes cast” to mean the total number of votes cast in the given election, not the number of ballots cast. *Id.* This is relevant because acceptance of Avon’s argument would require a change in policy and procedure with The Colorado Secretary of State and could throw into question any recall elections that took place employing that interpretation.

For instance, in the 2018 General Election, a total of 2,566,784 ballots were cast. *Id.* ¶ 9. In that election, a total of 2,525,062 votes for governor were cast amongst the four candidates. *See id.* That means that 41,722 people cast a ballot but chose not to vote in the governor’s race. Having received the most votes, Jared Polis was elected governor of Colorado and took office in 2019.

In 2020, a recall of Governor Polis was attempted. In that recall attempt, the Colorado Secretary of State determined that the number of signatures required to trigger a recall election. In order to determine the number of signatures required to recall Governor Polis, the Department of State would use the total votes casts in that particular race (2,525,062) multiplied by .25 for a total of 631,266 (rounded up to the nearest whole integer) signatures required. *Id.* ¶ 10. This

number is 25% of the total votes cast ( $2,525,062 \times 25\% = 631,266$ ), not the total ballots cast ( $2,566,784 \times 25\% = 641,696$ ).<sup>2</sup>

It is immaterial whether the election is a single seat or multiple seat election. “Entire votes cast” must be interpreted the same across the board. Under its plain language, “undervotes” are not included in the calculation of signatures needed to trigger a recall.

**D. The Consequence of Avon’s Interpretation is that All Recall Elections Will Always be More Difficult.**

If undervotes must be counted as part of the “entire vote cast,” then all recall elections will require more signatures, not just multiple candidate elections at the municipal level. As discussed above, the language in C.R.S. §§ 31-4-502 mirrors the language used for recall elections in Sections 1 and 4 of Article XXI of the Colorado Constitution.

Undervotes do not only occur in multiple seat elections, such as the election for Town Counsel at issue here. They also occur in single vote elections as described with respect to the governor’s race, above. If “entire votes cast” is read to include undervotes, then the signatures necessary to require a recall will be the same as “ballots cast” in *every* local and statewide race, no matter how many seats are being elected in each race.

Such a result is in direct contradiction to the plain language of the statute, the legislative history, and the practices of the Colorado Secretary of State. If Avon’s interpretation is accepted, then all prior recalls, state-wide, may be put into question.

Instead, by requiring signatures in an amount equal to twenty-five percent of the ballots cast, Avon is in violation of Section 4. Constitutionally, Avon cannot require that the Committee obtain signatures from more in number than twenty-five percent of the entire vote cast at the last

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<sup>2</sup> The total number of ballots cast will always equal the total number of votes plus the total number of undervotes divided by the number of seats being voted on. In a single seat race, the number is simply divided by one.

preceding election. Judgment should be entered directing Avon to withdraw its Certificates of Insufficiency, accept the Committee's petitions, and immediately hold a recall election.

**E. Colorado's Recall Process Does Not Violate the United States Constitution.**

By requiring signatures in an amount equal to twenty-five percent of the entire vote cast in order to trigger a recall election, no one is being “compelled” to vote (Motion at 22) or disenfranchised if they chose not to vote or to undervote (Motion at 14, 23). In fact, an undervote makes it *easier* to trigger a recall election since there are less total votes cast thereby ensuring maximum accessibility to the voting system.

The instant question is a far cry from the issues in *In re Hickenlooper*, 2013 CO 62. There, the Colorado Supreme Court was considering a Constitutional provision that provided that a voter could not vote for a successor candidate after a successful recall unless the voter also voted for or against the recall. *Id.* at ¶ 17. This was a clear case of voter disenfranchisement because it placed a restriction on the right to vote. As stated by the Colorado Supreme Court, a “prior participation requirement” is “plainly unconstitutional” as it violates “the right to speak and the right to refrain from speaking....” *Id.* at ¶¶ 23-24.

None of the concerns cited in *In re Hickenlooper* with respect to the First or Fourteenth Amendment are present here. No one is being compelling to vote in one election in order to ensure that they can vote in a subsequent election. No person's right to vote is being denied because they failed, or chose, not to vote in a separate election. *See id.* at ¶ 26. Said another way, each voter, whether they vote, undervote, or abstain completely from voting in a particular race is treated any differently from voters who do something different. There is no “regulation that compels voters to take a position on one issue” in order to retain their right to vote in another. *See id.* at ¶ 28. The 25% of the “entire votes cast” calculation is just that: a means of calculating

the number of signatures required from *any* registered voter to trigger a recall election. It is not a restriction on the right to vote.

Avon can cite to no law supporting their proposition that not including undervotes in calculating the number of signatures needed to trigger a recall election is somehow unconstitutional because such law cannot exist. Simply put, the right to vote is not being abridged by the method of calculation. Each voter has the right to cast a vote for all, or fewer, than the maximum number of candidates. Choosing not to vote, or choosing to vote for fewer than the maximum, is a decision not to cast a vote. When one does not cast a vote, it is simply not included in the number of “entire votes cast.” It does not disenfranchise or in any way affect the right of that individual to vote in future elections.<sup>3</sup>

If Avon’s argument regarding the constitutionality is correct (that undervotes should be counted because to do otherwise would be the equivalent of compelling them to vote the maximum number of votes in order to have their votes included in the calculation of the number of signatures needed to trigger a recall), then the law leads to the absurd conclusion that it is also disenfranchising those persons who deliberately choose not to cast any ballot. By not casting a ballot, those persons also may be an “expression of one’s preference or opinion.” *See In re Hickenlooper*, *supra*, at ¶ 26 (“Conversely, a voter could wish to affirmatively refrain from answering the recall question due to philosophical or political objections to (or disinterest regarding) the recall of the incumbent official....”).

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<sup>3</sup> The 25% threshold of “entire votes cast” is an arbitrary threshold. Nothing in the U.S. Constitution would prevent the Colorado legislature from changing that threshold to 25% of the “registered voters” or even a number equal to 50% of the “entire votes cast for the candidate being recalled.” Under the latter example, voters who cast votes for other candidates would, under Avon’s theory, be disenfranchised. This cannot be correct.

Voters who choose not to cast a ballot should be equally protected under the constitution as those who cast a ballot but choose not to cast the maximum number of votes.

Unlike the right to vote, there is no constitutional right to have a non-vote included in calculating the number of signatures needed to trigger a recall election. Sections 1 and 4 of Article XXI of the Colorado Constitution do not infringe on any rights and are therefore constitutional.

### **CONCLUSION**

“Entire votes cast” mean exactly that: the total of all the votes cast for any candidate in that particular race. Avon incorrectly and unconstitutionally increased the number of signatures needed by The Committee to trigger a recall election when it included “undervotes” in that calculation. In Avon’s attempt to count non-cast “undervotes,” Avon is subverting the plain language of the statute and the legislative history. “Entire votes casts” is not equivalent to “ballots cast.” The Committee requests that the Court deny Avon’s Motion and grant The Committee’s cross-motion for summary judgment and order the Avon vacate their Certificates of Insufficiency, accept the Committee’s petitions, and immediately hold recall elections.

The Committee reserves the right to ask the court for reimbursement of its costs incurred in defense of the petition signers post-ruling by the court on the matter argued herein.

Respectfully submitted this 16th day of April, 2021.

SWEETBAUM SANDS ANDERSON PC

By: s/ Andrew S. Miller  
Alan D. Sweetbaum, #13491  
Andrew Miller, #44219  
*Attorneys for Defendant Avon Recall  
Committee*

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2021, a copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT** was served via the Court authorized electronic service upon the following:

Christopher D. Bryan  
Andrea S. Bryan  
Paul F. Wisor  
GARFIELD & HECHT, P.C.  
0070 Benchmark Road, Unit 104  
P.O. Box 5450  
Avon, CO 81620

*s/Phyllis Pierce*  
Phyllis Pierce

DATE FILED: April 16, 2021 5:06 PM  
FILING ID: DFAFEAAAC010A  
CASE NUMBER: 2020CV30264

**DISTRICT COURT, EAGLE COUNTY, STATE OF COLORADO**

Eagle County Justice Center  
885 Chambers Avenue  
P.O. Box 597  
Eagle, CO 81631-0597

**Plaintiffs:** TOWN OF AVON, COLORADO, a Colorado home rule municipality

v.

**Defendants:** AVON RECALL COMMITTEE

*Attorneys for Defendants Avon Recall Committee*  
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**▲COURT USE ONLY▲**

Case No.: 2020CV30264

Division/Ctrm:

**DECLARATION OF CALEB THORNTON**

I, Caleb Thornton, declare as follows:

1. I am the Legal, Policy, and Rulemaking Manager of the Elections Division for the Colorado Secretary of State ("Department of State").
2. I am authorized to speak on behalf of the Department of State regarding the statements made in this Affidavit.
3. The basic mission of the Department of State is to collect, secure, and make accessible a wide variety of public records, ensure the integrity of elections, and enhance commerce.
4. With respect to elections, the Department of State, among other duties, supervises statewide and federal elections, maintains the statewide voter registration file, verifies statewide initiative and referendum petition signatures, and administers Colorado's Campaign Finance

**EXHIBIT A**

Laws; and serves as the filing office for unincorporated municipalities and for conflict of interest disclosure statements.

5. The Department of State oversees and manages recall elections for all state and certain political subdivision officeholders (Governor, Attorney General, Secretary of State, State Treasurer, members of the General Assembly, members of the State Board of Education, members of the CU Board of Regents, members of the RTD Board of Directors, and District Attorney). Included in this is the creation and approval of recall petitions and determination of the signature threshold to place a recall question on the ballot.

6. I am familiar with the policy, procedures, and legal framework implemented by the Department of State in enforcement of election rules and law and, more specifically, recalls.

7. Generally, the signature threshold to place a recall question on the ballot for a state or certain political subdivision elected official is 25% of the total votes cast at the last preceding general election for that office. This requirement is based off of the language set forth in Section 1 of Article XXI of the Colorado Constitution ("...equal in number to twenty-five percent of the entire vote cast at the last preceding election for all candidates for the position which the incumbent sought to be recalled occupies...").

8. In determining the number of signatures required to place a recall question on the ballot for state or certain political subdivision officeholders, the Department of State calculates 25% of the entire vote cast for that particular position in the last election. The "entire vote cast" is the number of affirmative votes and does not include ballots in which a vote is not cast in that particular race, which is known as an "undervote". In this sense, the number of votes cast is often less than the total number of ballots cast.

9. As an example, at the time of the 2018 General Election there were 3,953,613 registered voters. In that election, 2,566,784 ballots were cast. In the Governor/Lieutenant Governor's race, there were 1,348,888 votes cast for Jared Polis/Dianne Primavera, 1,080,801 votes cast for Walker Stapleton/Lang Sias, 25,854 votes cast for Bill Hammons/Eric Bodenstab, and 69,519 votes cast for Scott Helker/Michele Poague for a total of 2,525,062 votes cast. This means that 41,722 registered voters cast a ballot but did not cast a vote in the Governor/Lieutenant Governor's race.

10. In order to determine the number of signatures required to recall Governor Jared Polis, the Department of State would use the total votes casts in that particular race (2,525,062) multiplied by .25 for a total of 631,266 (rounded up to the nearest whole integer) signatures required.

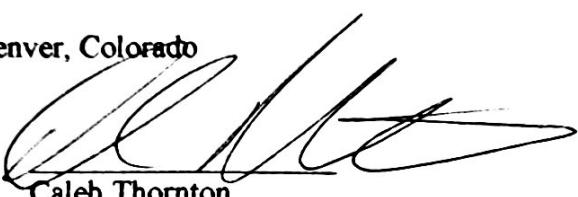
[signature page to follow]

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on the 15<sup>th</sup> day of April, 2021

at Denver, Colorado

by:

A handwritten signature in black ink, appearing to read "Caleb Thornton".

Caleb Thornton

DISTRICT COURT, EAGLE COUNTY, STATE OF COLORADO

Eagle County Justice Center  
885 Chambers Avenue  
P.O. Box 597  
Eagle, CO 81631-0597

DATE FILED: April 16, 2021 5:06 PM  
FILING ID: DFAFEAAC010A  
CASE NUMBER: 2020CV30264

**Plaintiffs:** TOWN OF AVON, COLORADO, a Colorado home rule municipality

v.

**Defendant:** AVON RECALL COMMITTEE

**▲COURT USE ONLY▲**

Case No.: 2020CV30264

Division: 3

**ORDER RE: DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

THE COURT, having reviewed the Town of Avon, Colorado's Motion for Summary Judgment, any response and replies, and having reviewed the Avon Recall Committee's Cross-Motion for Summary Judgment, any response and replies, the file, and being advised in the premises, hereby

GRANTS the Avon Recall Committee's Cross-Motion for Summary Judgement. The phrase "entire vote cast" as used in C.R.S. § 31-4-502(1)(d) means all votes cast and does not include "undervotes," i.e., ballots that were returned in which the number of choices selected by the voter in a race is less than the maximum number allowed for that contest.

AND ORDERS the Town of Avon to vacate the Certificates of Insufficiency issued for the Avon Recall Committee's petitions, accept those petitions, and immediately hold recall elections.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

BY THE COURT

\_\_\_\_\_  
District Court Judge

DISTRICT COURT, EAGLE COUNTY,  
COLORADO  
885 Chambers Avenue  
PO Box 597  
Eagle, Colorado 81631

DATE FILED: May 27, 2020 11:50 AM  
FILED IN: COLORADO  
CASE NUMBER: 2020CV30264

**Plaintiff:**

TOWN OF AVON, COLORADO, a Colorado home  
rule municipality

v.

COURT USE ONLY

**Defendant:**

AVON RECALL COMMITTEE

*Attorneys for Plaintiff:*

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Case Number:  
2020 CV 30264

Div: 3

**PLAINTIFF'S REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff the Town of Avon, Colorado, a Colorado home rule municipality (“Town”), by and through legal counsel, Garfield & Hecht, P.C., respectfully submits this combined Reply in Support (“Reply”) of their pending Motion for Summary Judgment (“Motion”) and Response to Defendant’s Cross-Motion for Summary Judgment, stating as follows:

## **I. INTRODUCTION**

The parties agree on very little, but they do agree on two key things: (1) that there was an attempted but unsuccessful recall of a municipal election in Avon and (2) that there are no genuine issues of material fact that preclude entry of summary judgment in this civil action.

Defendant the Avon Recall Committee's (the "Committee") Response to the Motion and its Cross-Motion for Summary Judgment (collectively referred to as the "Response") do little, if anything, to counter the legal arguments set forth in the Motion warranting summary judgment for the Town. The Committee's Response completely ignores Colorado Supreme Court case law and the plain meaning of the phrase "entire vote cast." The Committee's view of the law, unlike the Town's, fails to give effect to every provision of constitutional and statutory text in question, thus leading to absurd and illogical results. The Committee's interpretation, if accepted, also violates the First and Fourteenth Amendments of the United States Constitution by diluting the votes of those who, for strategic reasons or no reason at all, do not allocate the maximum number of allowed votes for candidates. For purposes of being counted in the calculation of a recall, the Committee's approach compels voters to vote for the maximum number of candidates for such individual voters to be treated equally as their counterparts who choose to allocate all their votes to candidates for office.

The Court should therefore grant the Town's Motion and enter summary judgment in favor of the Town and against the Committee.

## II. ARGUMENT

**A. The Town's interpretation is the only interpretation that is consistent with the plain meaning of the constitutional and statutory text, the legislative history, and governing Colorado Supreme Court case law.**

**1. The phrase “entire vote cast” is not the same as “votes cast.”**

The Committee mistakenly contends “entire *vote* cast” means the same thing as “*votes* cast.”<sup>1</sup> In this instance, the singular word “vote” does not equate to the plural form “votes.” Under the Committee’s interpretation, the recall signature threshold is based on the affirmative votes made in favor political candidates (i.e., the number of “check marks” on a ballot) instead of based on the number of electors who actually participated in the election preceding the attempted recall. The Town’s argument, on the other hand, is that the plain language in Article XXI, Section 1 of the Colorado Constitution (“Section 1”) and C.R.S. § 31-4-502 (the “Recall Statute”) means that a recall will not be triggered until 25% of the *electorate* agrees. The Town’s interpretation is the only one that is consistent with the plain language of the Colorado Constitution and the Recall Statute, the legislative history of the Recall Statute, and Colorado case law.

The Committee argues, without citing any authority, that the phrase “entire *vote* cast” means “only those votes actually cast should be included” when calculating the recall. Response at p. 5. This argument ignores the plain and accepted dictionary definition of “vote” as “to

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<sup>1</sup> Throughout its Response, the Committee repeatedly uses the phrase “entire *votes* cast” instead of the phrase “entire *vote* cast” that actually appears in Section 1 of the Colorado Constitution and in the Recall Statute. It is unknown whether this error is accidental or an intentional attempt to confuse this Court. But the distinction is significant. And not just constitutionally and statutorily. The word “vote” is frequently used a collective term, as in the popular phrases “get out the *vote*” or “rock the *vote*”—which are commonly aimed at increasing voter turnout in elections.

express an opinion” or “an expression of an opinion or preference,” and the Committee fails to set forth an alternative plain meaning of the phrase “entire vote cast.” *See* WEBSTER’S THIRD NEW INT’L DICTIONARY <https://www.merriam-webster.com/dictionary/vote>.

Contrary to the Committee’s contention, the phrase “entire vote cast” does not mean the same thing as “votes cast.” Had the drafters of Article XXI, Section 1 of Colorado Constitution (“Section 1”) or the Recall Statute intended to use the phrase “votes cast” instead of “entire vote cast,” they easily could have done so, just like several other states have done. *See* Mot. at p. 21, Ex. E. In fact, the drafters did use the “votes cast” method instead of “entire vote cast” in Section 4 of Article XXI (“Section 4”) when describing the threshold necessary to trigger a second recall of an elected official. Section 4 provides that a second recall cannot be attempted “unless the petitioners signing said petition shall equal 50% of the *votes cast* at the last preceding general election.” *See* Colo. Const. art. XXI, § 4 (emphasis added). The drafters of Section 1 and the Recall Statute were both aware of the “votes cast” approach and chose not to utilize that threshold for initial recalls. This Court should not now, in 2021, override those choices.

**2. *Only the Town’s interpretation gives consistent effect to all parts of the statutory scheme, breathes meaning to all words and phrases, and avoids illogical results.***

Both the Town and the Committee agree that the Court must endeavor to effectuate the purpose of the legislative scheme. *McCoy v. People*, 442 P.3d 379, 389 (Colo. 2019). In doing so, the Court must read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Id.* at 389. The Town’s interpretation of “entire vote cast” yields, without fail, a recall threshold of 25% of the electorate under every single

electoral scenario. This consistent outcome is the result of fidelity to all provisions of the Colorado Constitution and Recall Statute, which can only be achieved by reading “entire vote cast” to mean votes allocated plus undervotes.

Specifically, in reading the statutory scheme as a whole and giving harmony to all parts, the Court must examine how Sections 1 and 4, which require all races be subject to the same 25% threshold, work in concert with the requirement that in multi-candidate races the entire vote cast is multiplied by 25% (as are single seat races) and then divided by the number of seats to be filled (the “Denominator Requirement”).

As noted in the Town’s Motion, the cross-reference in Section 4 to Section 1’s 25% threshold makes perfectly clear the 25% threshold to trigger a recall is the same threshold for elections involving single seats as well as multi-seat races. *See* Mot. at pp. 14-15. That is, the 25% standard is the same for each type of race. This standard is enshrined in the Colorado Constitution and cannot be altered by state or municipal legislation or overridden by judicial fiat. *See* Colo. Const. art V, § 1. In the election at issue, 1,984 Town electors chose to vote for Avon Town Council candidates. These electors allotted 5,276 total votes to the candidates for Town Council. There were 2,660 undervotes. Were a mayor elected at-large, there would have presumably been 1,984 votes. Both the “entire vote cast” approach and “votes cast” approach yield a 25% recall threshold of 496 signatures. Pursuant to Sections 1 and 4, the same 496 signature threshold should also apply to the Town Council members running for multiple seats. As we all well know by now, the Town’s “entire vote cast” methodology in a multi-candidate race also yields 496 signatures while the Committee’s “votes cast” approach yields 330. The Town’s interpretation meets the requirements of Section 1 and 4. The Committee’s approach

does not, so it is therefore constitutionally deficient.

The Committee insists the Town's interpretation renders meaningless the Denominator Requirement. *See* Response at p. 6. To the contrary, the only way to give meaning to this "Denominator Requirement" is to adopt the Town's interpretation of "entire vote cast." If one calculated the recall threshold using the "entire vote cast" method and merely stopped at votes allocated plus undervotes, and multiplied by .25%, without also dividing by the number of seats to be filed, then the signature threshold for the 2018 election would be 1,984 signatures, i.e., four times the amount that would have been required for the hypothetical mayor, in violation of Sections 1 and 4. The drafters, however, recognized that the *only* way to reach the 25% threshold required by Sections 1 and 4 (496 signatures in this case) is to utilize the Denominator Requirement.

It is the Committee's approach, in fact, that renders the Denominator Requirement superfluous and inconsistent with Sections 1 and 4. Using the "votes cast" approach, there were 5,276 votes cast in the 2018 election. Multiplying this number by 25% results in signature threshold of 1,319. At this point, the Colorado Constitution and the Recall Statute require the Denominator Requirement be applied. Doing so under the "votes cast" approach yields a signature threshold of 330 signatures, far short of the 496 required by the mandate established by Sections 1 and 4 that single seat and multi-candidate races be subject to the same threshold. Most charitably, the "votes cast" approach renders the Denominator Requirement a tool for poorly estimating the number of signatures required to meet the 25% threshold requirement. More realistically, the "votes cast" approach renders the Denominator Requirement meaningless, and Sections 1 and 4 and the Denominator Requirement cannot be consistently read together under

the “votes cast” approach.

The Denominator Requirement is not illogical as the Committee suggests. It is only illogical if one wrongly characterizes the Town’s approach to be a “ballots cast” approach, as the Committee does, rather than votes allocated plus undervotes actually advocated by the Town.<sup>2</sup> *See* Response p. 6. Applying the now well-known formula to the “ballots cast” approach would result in a signature threshold of 124 signatures, far below the 496 signature requirement for an at-large candidate, violating Sections 1 and 4’s 25% threshold requirement.

To compare and contrast the absurdity that arises from the Committee’s “votes cast” approach with the consistency of the Town’s “entire vote cast” approach, consider an example where every voter in the 2018 Town election “bullet-voted” and only cast an affirmative vote for one candidate for Town Council (instead of using all four maximum allowable votes for that multi-seat race). In that case, under the Committee’s “votes cast” method, there would have been 1,984 “votes cast” for all Town Council candidates, so, again, only 124 signatures would be needed<sup>3</sup> to trigger a recall of any of the Town Council members, amounting to a *mere 6%* of the electorate. But, under the Town’s “entire vote cast” interpretation, the 25% requirement under Sections 1 and 4 would be met, and the resulting signature threshold would be 496.<sup>4</sup>

Both the Town and the Committee agree the Court should construe the overall

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<sup>2</sup> As noted below, if used in 2018, the “ballots cast” approach articulated by the General Assembly prior to 1991 would yield a signature threshold of 496 signatures as well because the General Assembly removed the requirement that the ballots cast be divided by four. The formula only required the ballots be multiplied by 25% (1,984 x .25 = 496).

<sup>3</sup> Per C.R.E. 201, the Court can take judicial notice of the mathematical facts that 25% of 1,984 equals 496 and that 496 divided by 4 equals 124.

<sup>4</sup> Here is the mathematical expression: 1,984(.25)/4=496.

constitutional and statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. But only the Town's "entire vote cast approach" meets that standard.

**3. *Legislative history supports counting undervotes in "entire vote cast."***

The legislative history of the Recall Statute also shows that the General Assembly has always believed "ballots cast" and "entire vote cast" to be synonymous such that a recall election would not be triggered unless at least 25% of the electorate agreed.

As both the Town and the Committee have pointed out, when the Recall Statute was first enacted in 1947, it provided that the number of signatures required to trigger a recall was "forty per centum of *ballots cast* at the last preceding municipal election." *See S.B. 322*, 36<sup>th</sup> GEN. ASSEMB., Reg. Sess. (Colo. 1947). Notably, there was no requirement the ballots cast be divided by the number of candidates running in multi-seat elections. The number of ballots cast accurately captured the electorate participating in the election in question. The threshold percentage was later changed in 1985 to 25% from 40% in response to a Colorado Supreme Court decision finding that the 40% statutory requirement was contrary to the Colorado Constitution. *See Shroyer v. Sokol*, 550 P.2d 309, 311 (Colo. 1976) ("The 40 percent statutory requirement is a substantive provision in conflict with the constitution and accordingly must fall."). When the General Assembly changed the percentage in the Recall Statute to comply with the Colorado Constitution, it did *not* change the "ballots cast" language, a strong indication that it believed "ballots cast" to be synonymous with the "entire vote cast" language used in the Colorado Constitution. In 1991, the General Assembly, in conjunction with a large and

comprehensive municipal “clean-up bill,” amended the Recall Statute and, among numerous other things, replaced the phrase “ballots cast” with “entire vote cast.”<sup>5</sup> *See* Mot. at Ex. D. Importantly, the General Assembly included the requirement that in multi-seat races the entire vote be multiplied by 25% and then divided by the Denominator Requirement.

The recordings of the hearings precipitating this change make it apparent that the change was not intended to change the recall signature threshold. In fact, not one word was uttered at any of the legislative hearings about the change in the language, further supporting the conclusion that the General Assembly has always believed that “ballots cast” and “entire vote cast” are synonymous. At no point was it ever mentioned that this change in language would drastically reduce the signature threshold to trigger a recall of multi-seat candidates. If the General Assembly truly intended such a major shift, it would have said so, but it did not. In fact, had the General Assembly intended such a shift from the threshold established by the “ballots cast” approach, to a “votes cast” approach, the General Assembly would not have included the Denominator Requirement. The inclusion of the Denominator Requirement was, as demonstrated above, necessary to generate the same signature threshold produced by the “ballots cast” approach.

There is no indication, and the Committee has not pointed to any, that the phrase “ballots cast” suffered from constitutional infirmity—which is presumably why that language was not amended in 1989 when the percentage was changed to 25% from 40%. At most, the General Assembly intended consistency with the Colorado constitutional recall provisions, and it did so

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<sup>5</sup> The Committee erroneously (and misleadingly) claims that the language was changed from “ballots cast” to “votes cast.” Response at p. 8. As discussed above, the distinction between the phrase “votes cast” and “entire vote cast” is legally and factually significant.

with the knowledge the Colorado Supreme Court had ruled in *Bernzen v. City of Boulder* that a recall is triggered when 25% of the electorate signs the petition. 525 P.2d 416, 419 (Colo. 1974). Elected representatives are presumed to know the law. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979). Had the General Assembly meant to set a threshold advocated for by the Committee, it would have used the term “votes cast.” The General Assembly had the opportunity to use “votes cast” but declined to do so.

**4. *The Committee's interpretation ignores the Colorado Supreme Court's decision in Bernzen recognizing the legislative intent that that the signature threshold for recalls must always equate to at least 25% of the electorate.***

Conspicuously absent from the Committee's Response is any acknowledgment whatsoever of the Colorado Supreme Court's decision in *Bernzen*. In that case, the Colorado Supreme Court reinforced what the statutory text and legislative history discussed above makes clear: that, to trigger a recall of an elected official in a multi-seat position, the signatures of at least 25% of the *electorate* (i.e., the ballots cast) are required. *Bernzen*, 525 P.2d at 415.

The only way to consistently reach the threshold of at least 25% of the electorate established by the Colorado Supreme Court is under the Town's interpretation of the Recall Statute. The Committee's interpretation, on the other hand, is in direct conflict with *Bernzen*, as the threshold for a recall will be consistently less than 25% of the electorate—in this case, that threshold would be far less, at only 16% of the electorate. By contrast, the Town's methodology accords with state law. As *Bernzen* emphasized, the legislature never intended that a recall would be triggered by such a “small and unrepresentative minority.” *Id.*<sup>6</sup> Indeed, a multitude of

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<sup>6</sup> Such a low threshold to trigger a recall election would lead to anti-democratic outcomes and would subvert fair and regular elections, resulting in more frequent hyper-partisan recall efforts.

municipalities explicitly follow this precedent in their code and charters by expressly requiring a signature threshold of 25% of the “electorate” or “ballots cast.” *See* Mot. at p. 14, fn. 4.

The Committee’s interpretation cannot be squared with Colorado Supreme Court precedent and must be rejected.

**5. *The Secretary of State’s historical practice is of no probative value to a determination of the issue before this Court.***

While ignoring the case law on the constitutional and statutory phrases, the Committee relies heavily on an affidavit from the Colorado Secretary of State’s (“SOS”) office regarding how that office has interpreted Section 1 of Article XXI of the Colorado Constitution. *See* Response at pp. 9-11. Among other things, the Committee argues that the SOS’ interpretation<sup>7</sup> should be deemed persuasive because the SOS serves as a “hub” for election advice to municipalities. *See* Response at p. 10. But that is not actually true.

The SOS has no role in the conduct of municipal elections, including recall elections, as the SOS official who signed a declaration appended to the Response readily acknowledges in a supplemental declaration that has been recently obtained and which is attached hereto. **Exhibit F** (Declaration of Caleb Thornton)<sup>8</sup> at ¶ 4. As further evidence that the SOS does not, and does not want to, play any role in the conduct of municipal elections, the SOS has recently modified its rules to make clear that it will no longer process municipal campaign finance complaints. *See* 8 CCR 1505-6, Rule 17.6 (“Any filing related to a municipal campaign finance matter must be

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<sup>7</sup> The Committee asserts that the SOS “implements” the “statute.” *See* Response at p. 2. The SOS, however, does not “implement” either the Recall Statute or the constitutional provision.

<sup>8</sup> Although this is the only exhibit attached to this Reply, the Town has used continuous lettering of exhibits in this C.R.C.P. 56 motions practice, so this document is labeled Exhibit F, following Exhibits A-E that were attached to the underlying Motion.

filed with the municipal clerk.”).

Moreover, the elections that the SOS directly oversees are all single-officeholder elections. *See Ex. F* at ¶ 5. That is significant because the strategy of bullet-voting plays no role in single-officeholder elections since voters can only vote for one candidate. But, in multi-seat elections such as the Town’s Council election, it is highly common (as evidenced by the 2,660 undervotes in the November 6, 2018, election) for voters to express their strong view in favor of one or more candidates (or disfavor of others) by allocating fewer than the maximum votes allowed, thereby increasing the chances that their preferred candidate(s) will win. The Committee’s interpretation partially disenfranchises the multitude of voters who make the choice to undervote and treats them differently than those who allocate the maximum number of votes.

Furthermore, the SOS elections are, as a matter of law, conducted under Title 1 of the Colorado Revised Statutes. The Town’s elections, however, are conducted under Title 31. There is strong evidence that the General Assembly has always intended that the recall threshold for elected municipal officers occupying multi-seat offices be 25% of the electorate, which is exactly what the Colorado Supreme Court emphasized in *Bernzen, supra*. This intent is also supported by the many municipal codes throughout Colorado that require 25% of the “ballots cast” or “registered electors” as the threshold for conducting a recall. *See Mot.* at p. 14. While the Committee expresses the concern that, if the Town’s interpretation is accepted, it would call into question prior recall elections, the Court will note that every recall election prior to the 1991 amendment of the Recall Statute in fact would have adhered to the Colorado Constitution under the pre-1991 “ballots cast” method in the Recall Statute.

There is no evidence that the SOS has ever been asked to address the issue at hand in this

case. The SOS's historical practice cannot overcome the dictates of the plain language of the constitutional and statutory text, the legislative history, applicable Colorado Supreme Court precedent, and the United States Constitution. The Committee has cited no authority for the proposition that the SOS's interpretation is in any way binding, or even persuasive, authority for this Court. Past practice of the SOS as to a different type of election does not constitute immutable precedent.

In short, the SOS' historical practice is of no help to the determination of the issues presented in this case and should be disregarded by this Court. The fact that the Committee places so much reliance on the SOS' declaration demonstrates the weakness of its position under controlling legal authorities that the Town cites and adheres to.

**B. If the phrase “entire vote cast” in Section 1 and the Recall Statute does not include undervotes, then those provisions are unconstitutional.**

The Committee's assertion that the phrase “entire vote cast” (if it is interpreted so as not to include undervotes) does not “disenfranchise or in any way affect the right of individuals to vote in future elections” (Response at p. 13) misses the point that the First Amendment to the United States Constitution protects a citizen's right to refrain from speaking at all. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects voters' right to refrain from speaking at all). Under the Committee's interpretation, if a voter allocates a vote for only one candidate where she could have voted for up to four candidates, then, when it comes time for calculating a recall threshold, her vote counts less than that of someone who voted for two, three, or four candidates. In other words, if the Committee has its way, a voter who wants her participation in an election to count equally to that of other voters for purposes of calculating a recall threshold must vote for the maximum number of candidates.

This is analogous to *In Re Hickenlooper*, where the Colorado Supreme Court held that the “prior participation” requirement violated the First Amendment because it “compels voters, if they wish for their vote to matter, to take a position on the recall even if they have no opinion on or strongly oppose such elections.” 312 P.3d 153, 158 (Colo. 2013). Likewise, under the Committee’s approach, the provisions at issue here would compel voters, if they wish their vote to matter as much as other voters (i.e., if they wish to be treated equally), to vote for the maximum number of candidates even if they have no opinions on those candidates. That is precisely the type of compelled speech that the Colorado Supreme Court has ruled to be prohibited by the First Amendment. *Id.*

The interpretation of “entire votes cast” espoused by the Committee also violates the Fourteenth Amendment by penalizing those voters who, for whatever reason, do not wish to vote for the maximum number of Town Council candidates. Although the language at issue in the Colorado Constitution and the Recall Statute does not completely invalidate a voter’s choice like the “prior participation” requirement at issue in *In Re Hickenlooper*, it undeniably dilutes the *weight* of those votes for purposes of a recall calculation. And, as the United States Supreme Court has stated, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Committee has provided no reason at all, and certainly no compelling or even rational reason, why a voter who chooses to bullet vote or to “undervote” should not have her vote weighted the same as others who allocated all of their votes when the time comes for determining whether or not there should be an election to recall one or more of those candidates.

The Committee also resorts to a straw man argument when it mischaracterizes the Town's argument by saying the Town believes that registered voters who fail to return a ballot at all would also be disenfranchised if they are not included in the recall threshold calculation. That's false. The Town's position is that, under any interpretation of "entire vote cast," one must actually deposit a ballot to cast a vote. An unreturned ballot is not a cast ballot and is not a cast vote. Under United States Supreme Court precedent, an unconstitutional burden is not placed on someone's right to vote by requiring that they actually deposit a ballot in the first place. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.") (internal quotations omitted). If a voter has a strong negative opinion, or no opinion, about any of the candidates or issues on the ballot in an election, that voter can simply deposit a blank ballot. No one could reasonably say that such a voter didn't "vote" in the election. Once an elector participates in an election by actually depositing a ballot, that voter has the right to be treated on an equal basis as others who also participated in the election.

And that is precisely the problem with the Committee's interpretation: it treats those who participated and did not allocate all of their votes differently from those who did. If a voter wants her vote to be fully and equally counted when it comes time to calculate the recall threshold, that voter would be compelled to express a view as to candidates that she may adamantly oppose or have no opinion on. "Virtually no regulation that compels voters to take a position can pass constitutional muster." *In Re Hickenlooper*, 312 P.3d at 159 (citing *Anderson v. Celebrezze*, 460

U.S. 780, 792-93 (1983) and *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The provisions at issue do just that if the Committee's interpretation is adopted and therefore cannot pass constitutional muster.

Of course, this Court can avoid having to strike down the constitutional and statutory provisions as unconstitutional if it agrees with the Town's interpretation. *See People v. M.B.*, 90 P.3d 880, 881 (Colo. 2004) ("If a statute can be construed in a manner that adheres to constitutional requirements, we must adopt that construction."). This is yet another reason the Court should grant the Town's Motion and enter summary judgment in its favor.

### **III. CONCLUSION**

For the reasons set forth herein, as well as in the Town's underlying Motion, the plain language, legislative history, and Colorado case law all dictate that a recall of a municipal elected official cannot take place unless 25% of the electorate agree. If the Court disagrees, then the Recall Statute and Section 1 must be deemed unconstitutional. The Court should grant the Town's Motion, enter summary judgment in the Town's favor, and deny the Committee's Cross-Motion. Counsel for the Town is invites oral argument on the parties' C.R.C.P. 56 motions if doing so would materially assist the Court. The Town respectfully reserves all rights.

DATED: May 7, 2021.

Respectfully submitted,

GARFIELD & HECHT, P.C.



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Christopher D. Bryan, A.R. #35522

Andrea S. Bryan, A.R. #40223

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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that, on May 7, 2021, a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** was filed and served via the Colorado Courts E-Filing System upon the following:

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Andrew Miller  
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*s/Rebekah Ortell*  
Rebekah Ortell

DISTRICT COURT, EAGLE COUNTY,  
COLORADO  
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DATE FILED: May 7, 2021 9:30 PM  
FILING ID: E6F1D3F9633DA  
CASE NUMBER: 2020CV30264

**Plaintiff:**  
TOWN OF AVON, COLORADO, a Colorado home  
rule municipality

**v.**  
**Defendant:**  
AVON RECALL COMMITTEE

COURT USE ONLY

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Case Number: 2020 CV 30264

Div.: 3

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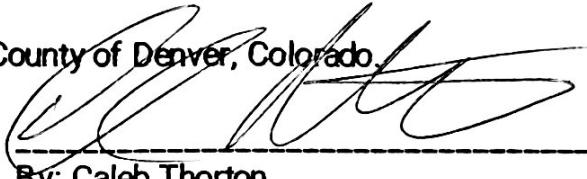
#### DECLARATION OF CALEB THORNTON

I, Caleb Thornton, declare as follows:

1. I am the Legal, Policy, and Rulemaking Manager of the Elections Division for the Colorado Secretary of State ("Department of State").
2. I am authorized to speak on behalf of the Department of State regarding statements made in this Declaration.
3. The Department of State oversees and manages recall elections for all state and certain political subdivision officeholders (Governor, Attorney General, Secretary of State, State Treasurer, members of the General Assembly, members of the State Board of Education, members of the CU Board of Regents, members of the RTD Board of Directors and District Attorneys).

4. The Department of State has no role in the conduct of municipal elections, including municipal recall elections.
5. None of the offices for which the Department of State directly determines the number of signatures needed to recall an officer involves the election of multiple candidates to multiple seats.

Executed on this 25 day of May 2021, at City and County of Denver, Colorado.



By: Caleb Thornton

<p>DISTRICT COURT, EAGLE COUNTY, STATE OF COLORADO</p> <p>Eagle County Justice Center 885 Chambers Avenue P.O. Box 597 Eagle, CO 81631-0597</p> <hr/> <p><b>Plaintiffs:</b> TOWN OF AVON, COLORADO, a Colorado home rule municipality</p> <p>v.</p> <p><b>Defendant:</b> AVON RECALL COMMITTEE</p> <hr/> <p><i>Attorneys for Defendant Avon Recall Committee</i> SWEETBAUM SANDS RAMMING PC Alan D. Sweetbaum, Esq. #13491 Andrew Miller, Esq. #44219 1125 Seventeenth Street, Suite 2100 Denver, Colorado 80202 Phone No.: (303) 296-3377 Email: asweetbaum@sweetbaumsands.com amiller@sweetbaumsands.com</p>	<p><a href="#">DATE FILED: May 28, 2021 9:04 AM</a>  <a href="#">FILING ID: 4E4C8E03C91FA4</a>  <a href="#">CASE NUMBER: 2020CA930264</a></p> <hr/> <p style="text-align: center;"><b>▲COURT USE ONLY▲</b></p> <hr/> <p>Case No.: 2020CV30264</p> <p>Division: 3</p>
<p><b>DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT</b></p>	

Defendant Avon Recall Committee (the “Committee”), replies in support of its Cross-Motion for Summary Judgment against Plaintiff Town of Avon, Colorado (“Avon”).

#### **BRIEF SUMMARY**

Avon’s argument ignores the plain language of the statute. To trigger a recall election in Colorado, the moving party needs to acquire signatures equal to 25% of the “entire vote cast” in the prior election for that position. The phrase “entire vote cast” means the number of votes actually cast in the election. It does not include votes that were not cast, as suggested by Avon. By including votes that were not cast, Avon’s calculation is the same as 25% of all ballots cast. It’s argument, therefore, is in direct opposition to the change in statutory language when “all

ballots cast” was stricken in 1991 by the General Assembly and replaced with “entire vote cast.” See Exhibit D to Motion at § 31-4-502.

Because “entire vote cast” includes only those votes actually cast in the election, the Committee obtained sufficient signatures under the statute to trigger a recall election. Judgment should be entered directing Avon to accept the Committee’s petitions and hold recall elections.

## **ARGUMENT**

### **A. “Entire Vote Cast” Cannot Be The Same As “All Ballots Cast.”**

As addressed in the Committee’s prior briefing, in 1991 the statutory language of C.R.S. § 31-4-502 was changed from requiring signatures equal to 25% of “all ballots cast” to trigger a recall election and instead now requires 25% of the “entire vote cast.” At a minimum, the phrase “entire vote cast” must mean something different than “all ballots cast.”

If Avon’s argument was the correct interpretation of “entire vote cast,” there would be no difference in the calculation of votes needed from when the statute instead used “all ballots cast.” Take, for example, a single seat election in which there were 1,984 ballots submitted and 1,319 vote cast for that seat (leaving an “undervote” of 665 votes). Under the “all ballots cast” analysis, the calculation of number of votes needed to trigger a recall election would be  $25\% \times 1,984 = 496$ .

Under Avon’s theory of “entire vote cast,” the arithmetic is slightly more complicated, but always leads to the same result as the “all ballots cast” calculation. Here, Avon would add the number of votes cast (1,319) with the number of undervotes (665) to obtain a total number of “votes” of 1,984. Notably, the number of ballots returned with a vote cast plus the number of ballots returned without a vote cast will always be the same as ballots cast. Under Avon’s theory, the calculation of number of votes needed to trigger a recall election would be  $25\% \times (1,319 + 665) = 496$ . This is the same result as under the “all ballots cast” analysis. The exact same result

is achieved because the total number of votes cast plus the number of undervotes will always be equal to the total number of ballots cast.<sup>1</sup> The change in statutory language must mean something. Therefore, Avon's interpretation must be incorrect.

Instead, "entire vote cast" means only those votes actually cast in the election and does not include ballots that were submitted but did not cast a vote, i.e., undervotes. In our example, the correct calculation would simply be  $25\% \times 1,319 = 330$ .

The calculation for a multi-seat race under C.R.S. § 31-4-502 is similar, except that the number of votes is simply divided by the number of contested seats. Pursuant to the statute, in these races the total number of votes actually cast in the race is first divided by the number of contested seats, and then multiplied by 25%. For instance, here, 1,984 ballots were cast in a 4-seat, at-large, election. Therefore, those 1,984 voters had  $7,936$  ( $1,984 \times 4$ ) available votes. However, of those available votes only 5,276 were cast. Therefore, the "entire vote cast" was 5,276 votes. In order to determine the number of signatures needed to trigger a recall election, the 5,276 is divided by 4 (the number of seats being elected) and then multiplied by 25% to get 330 signatures needed to trigger a recall ( $(5,276/4) \times 25\% = 329.75$ ).

Avon argues that "entire vote cast" should include not only those votes cast, but also the "undervote," that is, the votes that could have been cast by the voters but were not. Under Avon's theory, it is the 7,936 number that is divided by 4 and then multiplied by 25%. The total available votes (7,936) divided by the number of available seats will always be equal to the number of ballots cast ( $7,936/4 = 1,984$ ). This is because it is simply the inverse of the

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<sup>1</sup> Avon glosses over the fact that, even in single seat races, rarely does any race received votes from 100% of the ballots submitted. Presumably to avoid an untenable conclusion, Avon states that "[w]ere a mayor elected at-large, there would have presumably been 1,984 votes" from the 1,984 ballots submitted. Response at 5. Even in the 2018 General Election Governor's race cited in the Committee's prior brief, there were 41,722 registered voters who cast a ballot but did not cast a vote in that particular race.

calculation used to determine the number of total available votes to begin with. Under Avon's theory, the total number of ballots is multiplied by the number of seats, then divided by the number of seats, and then multiplied by 25%. Here, that calculation is  $(1,984 \times 4)/4 \times 25\%$ . It is simply a reversion back to "all ballots casts." Doing so not only causes the legislative change from "all ballots cast" to "entire vote cast" to have no meaning, but also causes the calculation to be overly complicated when the legislature could have simply left it at "all ballots cast" instead of the total number of votes for all candidates divided by the number of candidates.

**B. Avon Misunderstands Why the Denominator is Necessary.**

The "Denominator Requirement" (dividing the total votes by the number of seats in a multi-seat race) exists because of the change from "all ballots cast" to "entire vote cast," and not, as suggested by Avon, in spite of it. Previously, when the recall standard was 25% of "all ballots cast," there was no need to divide by the number of seats being elected because the number of ballots did not change with the number of seats being vote on. That is, whether a single seat (e.g., governor) or multi-seat (e.g., city council) race was being recalled, the 25% of ballots cast would be the same.

Now, under the "entire vote cast" standard, it is necessary to divide the total number of actual votes by the number of seats being elected because the total number of votes is not stagnant like the number of ballots cast. Avon's argument makes the entire calculation redundant and unnecessary. For a single seat election the election official must now add up the total votes plus the total undervotes rather than simply taking the total number of ballots cast (which both necessarily yield the same result). For a multi-seat election the election official must now add up the total votes, plus the total undervotes, then divide by the total number of seats available. As discussed above, this number will always be the same as the total number of ballots cast. If the

1991 bill was truly a “clean-up bill” as argued by Avon, it only made things unnecessarily complicated and introduced additional opportunity for error.

Instead, the calculation is necessary because the “entire vote cast” is different from the number of ballots cast. Avon’s position must be rejected.

**C. Bernzen is Inapplicable to the Issue Here.**

That the Colorado Supreme Court in *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974) stated that signatures from at least 25% of the electorate is necessary to trigger a recall election does not address the issue presented here and, if it does, stands in favor of the Committee’s interpretation. In *Bernzen*, the issues before the Colorado Supreme Court were whether the Courts should inquire into the sufficiency of a statement of grounds for recall after it was already approved by the municipality (it may not) and whether one can run as a candidate to succeed oneself after being recalled (one may not). The signature requirement was not an issue in that case and, therefore, is mere dicta.

Even so, the language is *Bernzen* is not necessarily determinative to the issue presented here. The entirety of the discussion of the signature requirement in *Bernzen* is as follows:

Thus, Colorado is not a state in which official misconduct is necessarily required as a ground for recall. Rather, the dissatisfaction, whatever the reason, of the electorate is sufficient to set the recall procedures in motion. The framers, by requiring that a recall petition contain the signatures of at least 25% of all votes cast in the last election for all candidates for the position which the person sought to be recalled occupies, assured that a recall election will not be held in response to the wishes of a small and unrepresentative minority. However, once at least 25% of the electorate have expressed their dissatisfaction, the constitution reserves the recall power to the will of the electorate. Courts of law are not to intercede into the reasons expressed by the majority.

*Id.* at 419 (citations omitted). The reference to “25% of the electorate” and “25% of all votes cast in the last election for all candidates for the position” is unclear and can be read in a number of different ways. For instance, “25% of the electorate” could refer to 25% of all eligible voters. It

could also mean 25% of the persons who submitted a ballot (as advanced by Avon). However, neither of these are the same thing as “25% of all votes cast,” the other statement made by the Court. The Committee’s interpretation of the statute is the only one that harmonizes with both of these statements. 25% of the entire vote cast means exactly that: 25% of all votes cast.<sup>2</sup>

**D. The Secretary of State’s Interpretation of “Entire Vote Cast” is Persuasive.**

Avon went to great lengths to obtain another affidavit of the Secretary of State. That affidavit merely states that the Secretary of State does not conduct local elections. The Committee never took that position. The affidavit obtained by Avon is irrelevant.

What is relevant is that the Colorado Secretary of State interprets the exact same “entire vote cast” language as is at issue here. Simply because the Colorado Secretary of State does not conduct municipal elections or directly oversee any multi-seat elections, does not render its interpretation of the statute irrelevant. “Entire vote cast” means the same thing with respect to Colorado election law whether it is found in Article XXI of the Constitution, Title 1 of the Colorado Revised Statutes, or Title 31 of the Colorado Revised Statutes. In this way, any decision by this Court will not only affect the election at issue here, but be persuasive authority in all recall elections.

As outlined in the Committee’s prior brief, the Colorado Secretary of State interprets “entire vote cast” to only include those votes actually cast for a candidate and does not include any “undervotes.” As discussed above, this is the only interpretation that makes sense with the plain language of the statute and with its legislative history.

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<sup>2</sup> Avon repeatedly dwells on the fact that the Committee, in its prior brief, often includes a typographical error in using “entire votes cast” instead of “entire vote cast” as the statutory language. See Response 3 (“The Committee mistakenly contends ‘entire vote cast’ mean the same thing as ‘votes cast.’”). Notably, the Colorado Supreme Court in *Bernzen* also equates the two, because the two phrases mean the same thing.

**E. There are no Constitutional Concerns with Colorado's Recall Statute.**

Avon argues that it is unconstitutional to not include undervotes in calculating the number of signatures required to trigger a recall election. There is no basis for this argument. No voter is disenfranchised by any calculation of the signature requirement that triggers a recall. The right to vote is a fundamental right. The right to have a particular vote included in the calculation of the number of signatures required to trigger a recall election is not. The tally is simply the number of signatures required to trigger a recall election, it is not forcing someone to vote, or punishing them if they do not.

As addressed in the Committee's prior brief, the constitutional concerns found in *In re Hickenlooper*, 2013 CO 62, do not exist here. There, the provision in question required that a voter vote in the recall election before he/she could vote for a successor candidate. *Id.* at ¶ 17. Unlike here, *Hickenlooper* clearly dealt with the issue of voter disenfranchisement because it placed a 'prior participation requirement' on the right to vote. *Id.*

Under the Committee's interpretation of "entire vote cast" there is no effect on anyone's right to vote. Unlike *Hickenlooper*, no one is being forced to participate in one election in order to safeguard their right in a subsequent election. The 25% of the "entire vote cast" calculation is simply a means of calculating the number of signatures required to trigger a recall election. It does not restrict the right to vote.

**CONCLUSION**

The Court should deny Avon's Motion for Summary Judgment and grant The Committee's Cross-Motion for Summary Judgment and order Avon to vacate their Certificates of Insufficiency, accept the Committee's petitions, and immediately hold recall elections.

The Committee reserves the right to ask the court for reimbursement of its fee and costs incurred in defense of the petition signers.

Respectfully submitted this 25th day of May, 2021.

SWEETBAUM SANDS ANDERSON PC

By: s/ Andrew S. Miller  
Alan D. Sweetbaum, #13491  
Andrew Miller, #44219  
*Attorneys for Defendant Avon Recall  
Committee*

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2021, a copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** was served via the Court authorized electronic service upon the following:

Christopher D. Bryan  
Andrea S. Bryan  
Paul F. Wisor  
GARFIELD & HECHT, P.C.  
0070 Benchmark Road, Unit 104  
P.O. Box 5450  
Avon, CO 81620

*s/Phyllis Pierce*  
Phyllis Pierce

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DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, CO 81631	DATE FILED: June 28, 2021 9:04 PM <b>EAGLE COUNTY, COLORADO</b> <b>CASE NUMBER: 2021CA946</b>
<b>Plaintiff:</b> TOWN OF AVON, COLORADO, a Colorado home rule municipality;  v.	Case No. 2020CV30264  Div.: 3
<b>Defendant:</b> AVON RECALL COMMITTEE.	

### **ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

THIS MATTER is before the Court on *Plaintiff's Motion for Summary Judgment* submitted by Plaintiff Town of Avon, Colorado (the "Town"), by and through counsel, on February 24, 2021 (the "Town's Motion"). On April 16, 2021, Defendant Avon Recall Committee (the "Committee") submitted, by and through counsel, *Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment* *Breakaway West Association's Motion for Summary Judgment* (the "Committee's Cross-Motion").<sup>1</sup> On May 7, 2021, the Town submitted, by and through counsel, *Plaintiff's Reply in Support of Motion for Summary Judgment and Response to Defendant's Cross-Motion for Summary Judgment* (the "Town's Reply"). On May 25, 2021, the Committee submitted, by and through counsel, *Defendant's Reply in Support of Cross-Motion for Summary Judgment* (the "Committee's Reply"). Having considered the Motions and Replies, the Court is fully informed and hereby issues the following Order.

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<sup>1</sup>The Committee combined its Response with its cross-motion for summary judgment pursuant to the Court's oral instructions during the March 15, 2021 status conference. Plaintiff's Motion and the Committee's Cross-Motion address the same issue.

## I. INTRODUCTION

This matter involves the number of signatures required to trigger a recall of the election of two Town Councilors in the Town's November 6, 2018 general election. On November 6, 2018, the Town held a general election in which eight candidates sought election to the position of Town Councilor. There were four vacant seats for the position. Each elector could vote for up to four of the eight candidates. 1,984 electors voted for Town Council candidates and a total of 5,276 votes were cast.

On or about October 12, 2020, the Committee submitted petitions to recall two Town elected officials: Mayor Sarah Smith Hymes ("Hymes") and Councilor Tamra Underwood ("Underwood"). The Town Clerk verified that the petition to recall Hymes contained 425 valid signatures and the petition to recall Underwood contained 445 valid signatures. The Committee was subsequently informed that the recall petitions did not contain the required 496 valid signatures to trigger a recall election.

On November 3, 2020, the Committee resubmitted petitions to recall Hymes and Underwood as original petitions (collectively, the "Petitions"). The Committee submitted 462 signatures to recall Hymes and 452 signatures to recall Underwood. On November 9, 2020, the Town Clerk issued Certificates of Insufficiency on grounds that the Petitions lacked the 496 signatures calculated by the Town Clerk to require a recall election pursuant to Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d).

The Town initiated this action by the filing of the Complaint on December 1, 2020. It seeks a declaratory judgment that the Town Clerk correctly calculated the minimum number of signatures necessary to trigger a recall election under Article XXI of the Colorado Constitution

and C.R.S. § 31-4-502(1)(d).<sup>2</sup> On January 11, 2021, the Committee filed its Answer and Counterclaim seeking a declaratory judgment that its Petitions contain a sufficient number of valid signatures to trigger a recall election under Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d).

Both parties have filed motions for summary judgment on their respective claims for declaratory judgment. The sole issue before the Court is the number of signatures required to trigger a recall of the election of two Town Councilors in the Town's November 6, 2018 general election pursuant to Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d). There are no material facts in dispute and the Court may determine the parties' motions as a matter of law.

## II. STANDARD OF REVIEW

The purpose of summary judgment is to "permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail." *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 603 (Colo. App. 2004) (quoting *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984)). Summary judgment should be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). A material fact is a fact that will affect the outcome of a case. *Id.* (citing *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984)).

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<sup>2</sup> In the alternative, the Town seeks a declaration that the signature requirements for a recall contained in Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) violate the First and Fourteenth Amendments to the United States Constitution.

The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991)(citing C.R.C.P. 56(c); *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987)). The party moving for summary judgment may satisfy this burden by demonstrating an absence of evidence in the record to support the nonmoving party's case. *Id.* Once the moving party has met this initial burden, the burden shifts to the non-moving party to establish a triable issue of fact. *Id.* In making this showing, the party opposing the motion for summary judgment may not rest upon the mere allegations or denials of his or her pleading but must demonstrate by admissible evidence that a real controversy exists. *Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000). A genuine issue cannot be raised simply by means of argument. *A-1 Auto Repair & Detail, Inc.*, at 603 (citing *Hauser v. Rose Health Care Sys.*, 857 P.2d 524, 527 (Colo. App. 1993)).

### III. ANALYSIS

The Town's position is that the Town Clerk correctly calculated that 496 signatures are required to trigger a recall of the election of the two Town Councilors in the Town's November 6, 2018. The Committee proffers that the Town incorrectly calculated the signatures as only 330 signatures are required.

This dispute is one of statutory interpretation. Specifically, it is the meaning of the term "entire vote cast" within Section 1 of Article XXI of the Colorado Constitution ("Section 1") and C.R.S. § 31-4-502(1)(d). Section 1 sets forth the procedure required to recall an election as follows:

A petition 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 at the last preceding election for all candidates* for the position which the incumbent sought to be recalled occupies...

Colo. Const. Art. XXI, § 1 (emphasis added).

Section 1 further provides the procedure for recall when candidates are selected to fill multiple seats:

The said petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled *equal in number to twenty-five percent of the entire vote cast at the last preceding general election for all candidates for the office*, to which the incumbent sought to be recalled was elected as one of the officers thereof, said entire vote being divided by the number of all officers elected to such office, at the last preceding general election;...

*Id.* (emphasis added).

Section 4 of Article XXI of the Colorado Constitution (“Section 4”) allows municipalities to control the manner in which recalls are conducted; however, it sets a limitation for the number of signatures that a municipality can require to trigger a recall. That is, the language set forth in Section 1 is also applicable to municipal recalls. Under Section 4, the municipality:

shall not require any such recall to be signed by registered electors more in number than twenty-five percent of the *entire vote cast at the last preceding election, as in [Section 1] hereof more particularly set forth, for all the candidates for office which the incumbent sought to be recalled occupies*, as herein above defined.

*Id.* at § 4 (emphasis added).

The Colorado General Assembly also adopted procedures for the recall of municipal officers that is identical to the language of Section 1. C.R.S. § 31-4-502(1)(d) provides as follows:

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*. If more than one person is required by law to be elected to fill the office of which the person sought to be recalled is an incumbent, then the recall petition shall be signed by registered electors entitled to vote for a successor to the incumbent sought to be recalled *equal in number to twenty-five percent of the entire vote cast at the last preceding regular election held in the municipality for all candidates for the office* to which the incumbent sought to be recalled was elected as one of the officers thereof, *such entire vote being divided by the number of all*

*officers elected to such office at the last preceding regular election held in the municipality.*

C.R.S. § 31-4-502(1)(d) (emphasis added).

The Colorado Constitution and C.R.S. § 31-4-502(1)(d) respectively mandate that the signatures required to trigger the recall of an election are equal to 25% “of the entire vote cast for all the candidates for the office” and “of the entire vote cast for all the candidates for that particular office.”

The Town contends that the phrase “entire vote cast” means the number of electors who participated in a given election, which is calculated by the affirmative votes in favor of a candidate, as well as all votes “strategically withheld” or not cast (“undervotes”).<sup>3</sup> In the election at issue, the Town counted the “undervotes” as 2,660. The Town calculated the number of signatures required to trigger a recall as follows:

$$\begin{aligned} 5,276 \text{ votes submitted for candidates} + 2,660 \text{ “undervotes”} &= 7,936 \\ 7,936 \times .25 &= 1,984 \\ \text{Divided by the number of open seats } 1,984/4 &= \mathbf{496 \text{ signatures}} \\ 496/1,984 &= 25\%. \end{aligned}$$

The Committee asserts that “entire vote cast” means only those votes actually cast, and not those withheld or undervotes. Its computation of the number of signatures required to trigger a recall election was as follows:

$$\begin{aligned} 5,276 \text{ votes cast for candidates} \times .25 &= 1,319 \\ \text{Divided by the number of open seats } 1,319/4 &= \mathbf{329.75 \text{ (rounded to 330) signatures}} \\ 330/1,319 &= 25.02\%. \end{aligned}$$

When construing a constitutional provision, the same set of construction rules apply as when interpreting statutes. *See Lobato v. State*, 304 P.3d 1132, 1138 (Colo. 2013) (internal citation omitted). The primary purpose is to ascertain and effectuate the legislature’s intent. *McCoy v.*

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<sup>3</sup> An undervote is “an instance where the voter marked votes for fewer than the maximum number of candidates or responses for a ballot measure.” *See* Colorado Secretary of State Election Rules, 8 C.C.R. 1505-1, Rule 1.1.44. *See also* Motion, at 2, 9.

*People*, 442 P.3d 379, 389 (Colo. 2019) (internal citation omitted). To do so, courts focus on the language of the statute. *Id.* The words and phrases are given their plain and ordinary meanings, are read in context, and construed according to the rules of grammar and common usage. *Id.* In effectuating the purpose of the legislative scheme, it is read as a whole, giving consistent effect to all of its parts, and avoiding constructions that would render any words or phrases superfluous or would lead to illogical or absurd results. *Id.* If the statutory language is unambiguous, its plain and ordinary meaning is applied and there is no need to look further. *Id.* (internal citation omitted).

The language of the relevant sections of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) are unambiguous. Applying the plain and ordinary meaning to the term “entire vote cast” includes votes cast; not those withheld, undervotes, or otherwise not cast. The legislative history supports this interpretation. The municipal recall statute was first enacted by the General Assembly in 1947. Under that law, the number of signatures required to trigger a recall election was “equal in number to forty per centum of all ballots cast at the last preceding municipal election...” (emphasis added). *See* S.B. 322, 36th Gen. Assembly, Reg. Sess. (Colo. 1947). In 1985, the percentage was reduced from 40% to 25% of all ballots cast. *See* S.B. 85-102, 55th Gen. Assembly, Reg. Sess. (Colo. 1985). In 1991, the General Assembly amended the statute to include the statute’s present language. Therein it deleted the language of “equal in number to twenty-five percent of all ballots cast...” and replaced it with “equal in number to twenty-five percent of the entire vote cast...” (emphasis added). *See* Exhibit D to Motion, S.B. 91-69, C.R.S. § 31-4-502. The amendment changed the signature requirement to trigger a recall based on the number of ballots cast to the number of votes cast.

The Town argues, *inter alia*, that its request for inclusion of the 2,660 undervotes or votes not cast is both consistent with the plain language of the term “entire vote cast” and results in a

“uniform outcome across elections.” The Town’s interpretation would require application of the former “all ballots cast” language of the statute; that is, the total number of votes cast plus the number of “undervotes” or votes not cast, which will always be equal to the total number of ballots cast. This position is untenable. It is in opposition to the amended statutory language, plain and ordinary meaning of the term “entire vote cast,” and would require the Court to disregard the legislative change intended by the General Assembly.

Moreover, while this interpretation of “entire vote cast” may not result in a “uniform outcome across elections” (25% of the voting electorate), the Town has failed to proffer a persuasive argument for why such result is required and determinative of the issue before the Court. The Town relies on *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974) for the proposition that at least 25% of the electorate is required to trigger a recall election. However, *Bernzen*, decided in 1974, does not address the issue presented in this matter. In *Bernzen*, the Colorado Supreme Court addressed, *inter alia*, the limitation on judicial review of the sufficiency of the statement of grounds for recall contained within a petition.

The Court concludes that the term “entire vote cast” within Article XXI of the Colorado Constitution and C.R.S. § 31-4-502(1)(d) includes those votes cast; not those withheld or considered “undervotes.” The Court finds that the Committee obtained a sufficient number of signatures required to trigger a recall of the election of the two Town Councilors in the Town’s November 6, 2018 general election.

The Court hereby denies the Town’s Motion and grants the Committee’s Cross-Motion.

#### IV. ORDER

IT IS ORDERED:

1. The Court hereby GRANTS the Committee’s Cross-Motion and DENIES the Town’s Motion.

2. The Town is ordered to VACATE the Certificates of Insufficiency, ACCEPT the Committee's Petitions, and HOLD recall elections.
3. The parties shall submit a proposed date for the recall elections within seven (7) days of the issuance of this Order.

So Ordered this 23<sup>rd</sup> day of June, 2021.

BY THE COURT:



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Russell H. Granger  
District Court Judge