DISTRICT COURT, LARIMER (FT COLLINS) COUNTY, COLORADO Court Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521	
Plaintiff: LARRY SARNER v. **Defendants:** CITY OF LOVELAND, COLORADO, et al.	▲ COURT USE ONLY ▲
Plaintiff: PROTECT OUR LOVELAND, INC. v. **Defendants:** CITY OF LOVELAND, COLORADO, et al.	Consolidated Case Number: 2013CV31071 Consolidated with Case Number: 2013CV31142 Division: 4C
Attorneys for Plaintiff Protect Our Loveland: Names: Michael Ray Harris (CO Bar No. 35395) Kelly Deanne Davis (CO Bar No. 46114) Christopher R. Stork (Student Attorney) Lauren Hammond (Student Attorney) Nicholas J. Lopez (Student Attorney) Address: Environmental Law Clinic University of Denver Sturm College of Law 2255 E. Evans Ave Denver, CO 80208 Phone: (303) 871-6140 FAX: (303) 871-6847 E-mail: elc@law.du.edu Name: James Daniel Leftwich (CO Bar No. 38510) Address: MindDrive Legal Services, LLC 4730 Walnut Street Suite 110 (Office 2) Boulder, CO 80301 Phone: (720) 212-0831 Email: dan@minddrivelegal.com	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Protect Our Loveland, Inc., by and through counsel, hereby submits the following Reply in Support of Plaintiff's Motion for Preliminary Injunction.[1]

A. Protect Our Loveland has Sufficiently Demonstrated a Reasonable Likelihood of Success on the Merits.

I. The Court Has Jurisdiction to Rule on the Motion for Preliminary Injunction before Ruling on Protester's Complaint.

Before consolidation, Judge French requested that the parties address the issue of "[w]hether this court can properly hear Plaintiff's motion for preliminary injunction in this case before the issues in [Protester's appeal] are resolved." Order on Motion to Shorten Time (Oct. 1, 2013). The crux of this issue, as well as whether the Court should ultimately grant such relief, is the proper interpretation of the term "final determination of petition sufficiency." Based on an erroneous interpretation of this term, the City acted in an unlawful manner that harms Protect Our Loveland's interests, and judicial intervention is necessary to remedy this wrong. Where citizens exercise the right of initiative and meet all statutory requirements necessary as determined by the City Clerk, the City must act.

It is not disputed that, following a "final determination of petition sufficiency," the city council has a duty to act in one of two ways: (1) adopt the proposed ordinance without alteration within twenty days; or (2) publish the proposed ordinance forthwith and refer the proposed ordinance to the city's voters "at a regular or special election held not less than sixty days and not more that [sic] one hundred fifty days after the final determination of petition sufficiency." C.R.S. § 31-11-104(3). This duty "is ministerial only and should be performed." *Speer v. People*, 122 P. 768, 772 (Colo. 1912). However, the parties do dispute when the "final determination of petition sufficiency" actually occurs.

Additionally, the constitutional right of initiative found at Colo. Const. Art. V., § 1(9) must be considered. By the "express provisions of the Colorado Constitution, the people have reserved for themselves the right to legislate. This right is of the first order; it is not a grant to the people but a reservation by them for themselves." *McKee v. City of Louisville*, 616 P.2d 969, 972(Colo. 1980) (en banc). As a means of preserving the integrity of the initiative process, review of the petition sufficiency determination is available, but not

[1] The City and Protester's arguments are virtually the same except that the City provides legal support and explanation for its assertions. Thus, Protect Our Loveland's Reply focuses on responding to the City's arguments, and all cites to the Response are to the City's Response Brief.

mandated, under the statute at issue here. *See* C.R.S. § 31-11-110(3) (providing that upon application, "the district court may review the determination as to petition sufficiency"). Protect Our Loveland does not contest this Court's jurisdiction to review the Clerk's decision to determine whether she exceeded her jurisdiction or abused her discretion. However, availability of judicial review does not mean the initiative process halts for judicial review to be completed. Protester has an adequate remedy to challenge the Clerk's decision in a manner that would not impair Protect Our Loveland's right of initiative by seeking a stay of the Clerk's decision pending review or seeking expedited review—neither of which he did in this case, because the City unlawfully allowed his action to stay the effect of the Clerk's decision.

As a result, the City has interfered with the right of initiative guaranteed in the state Constitution by failing to submit the initiative to a vote by the Loveland electorate. In order to respect the people's constitutional right of initiative, the Court may, and should, first address Protect Our Loveland's claim that a "final determination of petition sufficiency" was entered by the Clerk when she made a finding of sufficiency following a hearing on the Protest. To rule otherwise abridges the separation of powers doctrine that prohibits judicial interference in the legislative process. *Polhill v. Buckley*, 923 P.2d 119, 122 (Colo. 1996). If the Court finds in favor of Protect Our Loveland on that issue, then the City had a clear statutory duty to adopt the Proposed Ordinance or take the necessary steps to place the Proposed Ordinance on the ballot.

II. The Clerk Issued a "Final Determination of Petition Sufficiency" As That Term is Defined in the Statute and Pursuant to Principles of Statutory Interpretation.

Under the plain language of C.R.S. § 31-11-103(2) and principles of statutory construction, the Clerk entered a "final determination of petition sufficiency" when she issued a written finding of sufficiency following a hearing on the protest. *See* Ex. 4.[2] The City argues that there has not yet been a "final determination of petition sufficiency" because § 31-11-110 contemplates judicial review of the Clerk's sufficiency-finding before it becomes final. Resp. at 5. This approach is flawed under rules of statutory construction, and contrary to the City's assertions, judicial review is not a prerequisite for a final determination.

[2] Exhibit 4 refers to Exhibit 4 of Sharon Carlisle's Affidavit of Protect Our Loveland's Motion for Preliminary Injunction.

The statute is clear that a "final determination of petition sufficiency" is made upon the Clerk's finding of sufficiency or the expiration of time in which a protest must be filed. The statutory definition provides: " 'Final determination of petition sufficiency' means the date following passage of the period of time within which a protest must be filed pursuant to section 31-11-110 or the date on which any protest filed pursuant to section 31-11-110 results in a finding of sufficiency, whichever is later." C.R.S. § 31-11-103(2). The City correctly notes that "the statute should be construed as written since it may be presumed that the General Assembly meant what it said." Resp. at 4. But what the City fails to acknowledge is the absence of a judicial review requirement in the statutory definition of "final determination of petition sufficiency." As written, the definition provides two specific instances in which a "final determination" is met. Had the General Assembly intended for judicial review to occur in order to be a "final determination of petition sufficiency," it would have expressed such intent in the definition. Considered in this context, it is important to point out that, despite the City's vigorous defense of its interpretation of "final determination of petition sufficiency," the City Council and City Attorney acknowledged that the term could be construed this way. Indeed, at its September 3, 2013 meeting, the City Council voted on two competing measures: one that would have allowed the Proposed Ordinance to go forward (failing 4-5), and one that would halt the process. The City Council voted 5-4 to adopt the latter.

Furthermore, there is no basis in the statutory language for the City's reading of a judicial review component into the definition. The City claims that because the definition of "final determination of petition sufficiency" mentions C.R.S. § 31-11-110, the definition contemplates judicial review. *See* Resp. at 5. But a plain reading of § 31-11-103(2) fails to support this interpretation. Section § 31-11-110, which is entitled "Protest," provides for a comprehensive protest procedure; it is not a stand-alone provision for judicial review and is not designed to create a third definition of "final determination of petition sufficiency." Indeed, the definition's reference to § 31-11-110 is specifically tied to a "**protest** filed pursuant to section 31-11-110." It is the **expiration of time to protest or determination made after a protest** that makes the decision "final." The definition serves to demarcate an original finding of petition sufficiency from the final determination, as it relates to a protest under the statutory procedure, not judicial review.[3]

[3] This point is bolstered by the legislative history. The former definition of "final determination of petition sufficiency" included a third circumstance: "the date on which the clerk issues a statement of insufficiency pursuant to section 31-11-109." 1995 Colo. Legis. Serv. H.B. 95-1211. The definition was amended to its current form in 1996. Thus, the General Assembly specifically addressed the definition and did not include any mention of

Protect Our Loveland's reading conforms to the Colorado courts' consistent upholding of the right of initiative. "Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." *McKee*, 616 P.2d at 972. "[The] court has always liberally construed this fundamental right, and, concomitantly, we have viewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." *Id*. The Colorado Supreme Court has also acknowledged that "while the Colorado Constitution certainly guarantees the right of initiative and referendum to the people, the legislative body may, **so long as it does not diminish these rights,** enact provisions regarding their exercise." *Clark v. City of Aurora*, 782 P.2d 771, 777 n.6 (Colo. 1989) (emphasis added).

Moreover, judicial review is generally not a prerequisite for a final agency action to take effect. In fact, C.R.S. § 24-4-106, which provides for judicial review of state agency action, makes clear that judicial review may commence upon a "final agency action" or "order." *See McClellan v. Meyer*, 900 P.2d 24, 29-30 (reviewing Secretary of State's petition determination under guidance of § 24-4-106 and continually referring to the Secretary's decision as "final action"). In order for judicial review to commence in this context, a "final determination of petition sufficiency" must have occurred, unless the statute provides otherwise. Because the legislature did not include judicial review in the definition, the City's interpretation is inconsistent with the legislative intent. To hold that an agency action is not final merely because judicial review is available would lead to uncertainty and confusion as to the status of law and usurp a lower body's decisionmaking authority.

The City's contention that the "General Assembly did not end the process for determining petition sufficiency [following the hearing before the clerk]" is also flawed. *See* Resp. at 6. Section 31-11-110(2) explicitly states that upon a protest hearing, "the hearing officer shall issue a written determination of whether the petition is sufficient or not sufficient." C.R.S. § 31-11-110(2). Under § 31-11-103(2), that is the last step of the "final determination of petition sufficiency." The City contends that the final sentence of C.R.S. § 31-11-110 means that judicial review must be completed before there is a final determination. Resp. at 6. But this contention finds no support in the statute's plain language. Review may be sought of the Clerk's "determination **as to** petition sufficiency," meaning a determination of sufficiency or insufficiency. This is made clear by the fact that petition proponents or the municipality may also seek an application for judicial review; it is not solely a protester's right. Thus, an application for judicial review does not equate to a "protest," and the inclusion of "protest" in the definition of "final determination of petition

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judicial review. Also, the current definition shows that "finality" was meant to hinge on the outcome of a protest (if any), and to differentiate between an original finding of sufficiency as opposed to a final one.

sufficiency" does not mean the definition also encompasses judicial review. Therefore, the "final determination" has already been made, and the statute simply provides a mechanism for reviewing that "final determination."

This reading also accords with the Colorado Supreme Court's holding in *Armstrong v. Davidson* that a title board's denial of rehearing or expiration of time constitute the "final determination" in the context of a ballot-title challenge., 10 P.3d 1278, 1283 (2000). There, the Court found that initiative-proponents could circulate a petition while an opponent was pursuing appellate review because the "Referendum and Initiative statutes [did] not contain any provision prohibiting [such action]" following a final determination. The City is wrong in dismissing *Armstrong* as "clearly distinguishable." *See* Resp. at 9. Although Protect Our Loveland acknowledges that the risk of reversal on appeal fell mostly on the proponents, this was not central to the Court's analysis, and the Court's holding supports the proposition that judicial review is not a required component of a final determination and does not entirely halt the initiative process. *Armstrong* further shows that the Court interprets initiative law in favor of placing matters before voters, and this principle guides statutory construction. *Id*. at 1281.

In contrast, the City's interpretation unduly diminishes the people's constitutional right of initiative. The Colorado Supreme Court has repeatedly held that the people's constitutional right to the initiative process is to be "liberally construed in a manner allowing the greatest possible exercise of that right." *McKee*, 616 P.2d at 972; *Election Comm'n of City & Cnty. of Denver v. McNichols*, 565 P.2d 937, 939 (Colo. 1977) (en banc); *Burks v. City of Lafayette*, 349 P.2d 692, 694 (Colo. 1960). The City's interpretation would result in an impermissible level of disruption in citizens' exercise of the initiative process. Under the City's view, a single protester could halt the initiative process indefinitely, regardless of the merit (or lack thereof) of his claims. Accepting the City's approach would create dangerous precedent for other initiatives, essentially any one person could delay an initiative they did not like by filing a complaint, without regard to the rights of the petition's proponents or signers thereof. This is antithetical to the self-executing right of initiative expressed in the Colorado Constitution and the General Assembly's intent in crafting provisions to facilitate that right.

Additionally, the City inappropriately employs external definitions in an attempt to bolster its preferred definition of "final determination of petition sufficiency." *See* Resp. at 7 (looking to Black's Law Dictionary to define "final," and "final decision or judgment"). In doing so, the City fails to acknowledge the well-established rule of statutory construction that when the legislature defines a term, that definition supersedes any other potential meaning. "If the General Assembly has defined a statutory term, a court must apply that definition." *People v. Swain*, 959 P.2d 426, 429(Colo. 1998) (en banc). Further, "the General

Assembly may furnish its own definitions of words and phrases in order to guide and direct judicial determination of the intendments of the legislation although such definitions may differ from ordinary usage." *Id*. The General Assembly specifically defined "determination of petition sufficiency" for a reason. It intended the phrase to be a statutory term of art that would guide and direct judicial determinations. The City's attempt to parse out a definition distinct from the statutory phrase ignores this rule of statutory construction and results in a definition inconsistent with that provided by the General Assembly.

Likewise, the City's attempt to support this contention by citing language from case law fails to acknowledge that it cannot utilize irrelevant case law to fabricate a new meaning of a statutorily created term of art when the term is defined in the statute itself. *See* Resp. at 7. The case law only serves the purpose of endorsing the Black Law's Dictionary definition of "final." Such analysis is irrelevant in interpreting the statutory term of art created by C.R.S. § 31-11-110(2).

Even if the Court determines that the statute's plain language is ambiguous, the statutory purpose supports Protect Our Loveland's interpretation. Where "explicit statutory provisions are ambiguous or silent regarding the matter at issue, we interpret the statute to comport with the legislature's objectives." *Buckley v. Chilcutt*, 968 P.2d 112, 117 (Colo. 1998) (en banc). Article 11 begins with an explicit statement of the General Assembly's intent "to set forth in this article the procedures for exercising the initiative and referendum powers reserved to the municipal electors in [Colo. Const., Art. V, § 1(9)]. It is not the intention of the general assembly to limit or abridge in any manner these powers but rather to properly safeguard, protect, and preserve inviolate for municipal electors." C.R.S. § 31-11-101. The statutory intent is to facilitate the exercise of initiative power, and it should be read as a whole "to give consistent, harmonious and sensible effect to all of its parts." *Buckley*, 968 P.2d at 117 (citations omitted). Protect Our Loveland's reading effectuates the statutory purpose and advances the legislature's clearly express intent to protect the right of initiative.

Similarly, "[i]n construing statutory language, [the court] reads the statute as a whole, with a goal of giving 'consistent, harmonious, and sensible effect to all its parts.'" *People v. Summers*, 208 P.3d 251, 254 (Colo. 2009). Pursuant to that purpose, C.R.S. § 31-11-109(3) provides that if the clerk fails to issue a statement within 30 days of the petition's filing, the petition is deemed sufficient. Thus, the statute was designed to err on the side of putting an initiative before the voters. Further, C.R.S. § 31-11-118(1) provides that the Clerk "shall render all interpretations and shall make all initial decisions as to controversies or other matters arising in the operation of this article," except as otherwise provided. This shows it is not the City Council's prerogative to decide on Article 11's interpretations, and the Clerk's decision deserves deference. The City's interpretation

diminishes the Clerk's important role by taking away her power to make "final determinations" and transferring that authority to the courts. The City's interpretation would contradict the statutory intent to facilitate the initiative process and give the clerk plenary authority, as expressed in these various provisions.

Finally, the City's interpretation creates tension with the fact that Protester has filed his appeal under C.R.C.P. 106(a)(4). C.R.S. § 31-11-110 does not provide a time frame for seeking judicial review. C.R.C.P. 106(b) provides that in the absence of a statutory time frame, review must be sought within 28 days of the decision. Accordingly, Protester had until September 24, 2013 to file an appeal with the district court, as the City Attorney points out in his Memorandum to the City Council. *See* Ex. 3.[4] Under Article 11, however, the City Council must act within 20 days after a final determination of petition sufficiency. Thus, under the City's interpretation, a minimum of an additional 28 days would be added to the 20 days in which the City Council is required to act, to accommodate the filing of an appeal. When considered in conjunction with the deadlines under the Election Code, this would mean that a citizen initiative would rarely make it on to the ballot of a regular election, forcing expensive special elections to occur regularly. This could not have been the legislative intent of Article 11. For all these reasons, Protect Our Loveland's reading of "final determination of petition sufficiency" should be adopted.

III. *Buckley v. Chilcutt* is Inapposite Because in That Case, Unlike Here, There Was Never Any Determination of Petition Sufficiency.

Contrary to the City's assertions, *Buckley v. Chilcutt* does not dictate the proper course of action in the instant case. Resp. at 8-10. The City has overstated the factual similarities between *Buckley* and this case, and the findings in *Buckley* on which the City relies are not applicable beyond the unique circumstances of that case.

Buckley presented a unique factual situation. *Buckley* involved the Secretary of State's verification of a statewide initiative petition, and the review process under C.R.S. §§ 1-40-118 to 119. Because of the much higher number of signatures required for such petitions, the Secretary first conducts a random sampling of signatures. C.R.S. § 1-40-116(4). Depending on the result of that sample, the Secretary may deem the petition sufficient, insufficient, or proceed with a line-by-line review of individual signatures. *Id*. If this review is not completed within 30 days, the petition is deemed sufficient. *Id*. § 1-40-118(1). The Secretary conducted a random sampling and deemed the petition insufficient. *Buckley*, 968 P.2d at 114. The petition-proponents appealed the finding, and it was found

[4] Exhibit 3 to Protect Our Loveland's Motion for Preliminary Injunction, John Duval's Memorandum to City Council (Sept. 3, 2013) ("Ex. 3").

that the Secretary made mistakes in her initial review and invalidated some valid signatures. *Id.* at 116. Because the Secretary did not issue a decision based on a valid review within 30 days, the district court ordered the Secretary to put the initiative on the ballot. *Id*. The Colorado Supreme Court reversed the district court. *Id*. at 120. Noting that the petition was never deemed sufficient and that the Secretary would have conducted a line-by-line review had she not committed errors, the Court held that the proper course of action was for the Secretary to complete a line-by-line review of signatures. *Id.* The Court held that placing the initiative on the ballot absent any showing that the signature requirement had been met "would be to require Colorado's voters to decide on an initiative that has not met a basic constitutional requirement for placement on the ballot." *Id.* at 117.

The instant case presents a very different situation. Here, the Clerk has already found that Protect Our Loveland's petition contains a sufficient number of valid signatures, both in her initial finding and in her determination after the protest hearing. The Clerk reviewed each signature individually and made a timely finding. Thus, the Proposed Ordinance "demonstrates a certain level of support (from electors)," to warrant placement on the ballot. *See id.* at 117.

Moreover, the *Buckley* decision was informed by the fact that the Colorado Constitution specifically requires a minimum percentage of signatures on state initiative petitions. Colo. Const. art. V, § 1(2). The Court was understandably reluctant to create precedent allowing an initiative to be placed on the ballot without any showing that this "substantive constitutional requirement" had been met. By contrast, here the Clerk reviewed each signatures at least once and up to three times, and issued her final finding of sufficiency, per statutory procedures. Thus, the City's reference to *Buckley* that the right of initiative "does not exist without constitutional bounds," is misplaced. *See* Resp. at 10. The Court held that legislation cannot avoid the minimum constitutional requirements specific to state initiatives. *Buckley*, 968 P.2d at 119.[5]

The City also cites *Buckley* to support its contention that judicial review must be completed before a determination is final to "guard against fraud and mistake." Resp. at 10, 12 (citing 968 P.2d at 119). However, the Petition was subject to statutory safeguards to protect against fraud via the Clerk's verification process that resulted in a finding of sufficiency. Again, unlike the present case, there was never a determination of petition sufficiency in *Buckley*. In contrast, the Clerk examined each signature, made an initial

[5] The Colorado Constitution does not provide a minimum signature requirement for municipal initiatives. Home-rule municipalities have authority to set such requirements so long as they do not exceed the constitutional maximum. *See* Colo. Const. Art. V, § 1(9).

finding of sufficiency, and then made a second finding of sufficiency following a hearing on the protest, at which witnesses testified. It is clear the Clerk did not rubber stamp her previous decision, as she did invalidate some of the signatures based on the protest. After these careful review procedures, the Clerk's found the statutory number of signatures was met.

Furthermore, Protester does not allege, with any specificity, fraud or mistake in the Clerk's petition sufficiency determination. Protester challenges the substantive validity of the Proposed Ordinance itself, *see* Sarner Compl. ¶¶ 52, 55, 59, and the Clerk's application of the law in determining the validity of signatures. *Id*. ¶¶ 48-50. Under C.R.C.P. 9, allegations of fraud must be "state[d] with particularity." *See State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 287 (Colo. App. 1994) (noting particularity is required "so allegations of fraud cannot be easily made, and those accused of such wrongdoing can be put on specific notice and have the ability to make a focused response"). Protester's claims cannot be construed as alleging fraud, and thus the Court's concern in *Buckley* does not apply here.

B. Protect Our Loveland Has Sufficiently Demonstrated a Real, Immediate, and Irreparable Danger of Injury.

Protect Our Loveland has demonstrated the danger of real, immediate, and irreparable injury. In opposition, the City argues that Protect Our Loveland must show the threat of an injury which is certain, great, actual, and not theoretical. Resp. at 11. That standard, however, derives from federal case law. Colorado courts have followed the standard articulated in *Rathke v. MacFarlane* which that stated that "the moving party demonstrate[] a **danger** of real, immediate, and irreparable injury which may be prevented by a preliminary injunction." 648 P.2d 648, 653 (1982) (emphasis added)).

Delaying Protect Our Loveland's constitutional right of initiative for an indefinite amount of time presents a real danger of irreparable injury. That notion is of utmost importance here, as this is a time sensitive matter. Protect Our Loveland seeks a two-year moratorium on hydraulic fracturing ("fracking") pending the completion of a state-sponsored study to assess fracking's effects. Under the City's interpretation, it could very well take over two years before the petition's sufficiency is "finally determined," thereby destroying the purpose of the Proposed Ordinance. Such delay will irreparably harm Protect Our Loveland's goal of giving Loveland citizens a voice and a vote on this issue. In

the meantime, support for the initiative which Protect Our Loveland drummed up by investing its time, effort, and money, will erode. [6]

Additionally, continued delay in placing the Proposed Ordinance on the ballot will allow fracking to go forward in the meantime. The City attempts to dismiss this potential harm as "completely speculative." Resp. at 12. Such a characterization ignores the fact that Loveland is located within the Niobrara shale play, an area with significant oil and gas activity, including fracking. Indeed, there are currently three permits on hold within Larimer County for proposed fracking sites. *See* COGIS, Pending Drilling Permits, Larimer County, *available at* http://cogcc.state.co.us/. Thus, companies are actively seeking to drill in the area, and such permits could be approved pending the resolution of Protester's appeal. As a result, the danger of oil and gas companies shirking the will of the people and causing immediate harm to Loveland residents is very real. Thus, the City is wrong to dismiss the danger of this potential harm cannot as simply "speculative."

There is also a real danger that Protect Our Loveland's reputation, credibility, and goodwill will be irreparably injured if the Proposed Ordinance is not placed on the ballot promptly as expected. The City dismisses this injury by simply stating, without any authority, that this is not the type of harm which warrants an injunction. That assertion is false. Colorado courts have found injury to reputation or good will to be an irreparable injury in several preliminary injunction cases. *See Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & Cnty. of Denver*, 292 P.3d 1101, 1111 (Colo. 2013); *Am. Television & Commc'ns Corp. v. Manning*, 651 P.2d 440, 446 (Colo. App. 1982). Accordingly, Protect Our Loveland has shown that there is a sufficient danger of irreparable injury.

The City suggests that delaying action on the initiative is justified when compared to the "greater harm" of allowing an initiative to be placed on the ballot prior to a "final determination" of sufficiency. Resp. at 11. However, as stated above, there has been a final determination of petition sufficiency here, and allowing one citizen to derail the entire process and subjugate the rights of Protect Our Loveland as well as thousands of petition-signatories will set bad precedent contrary to the intent of the state Constitution.

[6] In response to a council member's question, the City Attorney stated that the appeal process "could take at least a year [and] could go on two years." Video: Loveland City Council Meeting of Sept. 3, 2013, at 3:25:53-3:26:20.

C. Protect Our Loveland Lacks a Plain, Speedy, and Adequate Remedy at Law.

The City argues that preliminary injunctive relief must be denied because C.R.S. § 31-11-110(3) and C.R.C.P. 106(a)(4) provide a plain, speedy, and adequate remedy at law. Resp. at 13. This argument again relies on a flawed interpretation of "final determination of petition sufficiency." Because a final determination of petition sufficiency occurred on August 27, 2013, the City only has until January 24, 2014 to submit the Proposed Ordinance to the voters. *See* C.R.S. § 31-11-104 (requiring a vote 60-150 days after a final determination of petition sufficiency). Thus, the potentially lengthy judicial process the City identifies, which would involve not only district court review but also appellate review, is neither "speedy" nor "adequate" under this time-sensitive situation. Under similar circumstances, the Court held inadequate a statutory remedy allowing judicial review of an election official's decision regarding ballot-certification because the statute did not purport to make the district court's judgment final and there was only a short amount of time until the election. *People v. McGaffey*, 46 P. 930, 931 (Colo. 1896).

Because the City envisions a final determination only after judicial review is exhausted, it is not speedy. Nor is it adequate. Absent injunctive relief, Protect Our Loveland will be forced to wait indefinitely while Protester takes appeals and possibly pursues other delay tactics. As explained above, this process could take years; eviscerating the purpose of Protect Our Loveland's proposed two-year moratorium. Thus, Protect Our Loveland lacks a plain, speedy, and adequate remedy at law, and preliminary injunctive relief is appropriate.

D. Issuing a Preliminary Injunction Serves the Public Interest.

Granting a preliminary injunction here will, despite the City's contentions, serve the best interests of the public. *See* Resp. at 13. Where, as here, the City has unreasonably denied its citizens the right to participate in the electoral process, an extraordinary remedy such as a preliminary injunction is warranted. Loveland residents, including Protect Our Loveland's members, have the right to stand up to injustices or questionable industrial processes that potentially threaten their community and be allowed to vote on the issue. The City has chosen to unduly delay and strip its citizens of that right, and, in turn, generally harmed the public interest. Moreover, where the citizens or a group like Protect Our Loveland have met all of the statutory requirements, it is incumbent upon the City to allow its citizens the opportunity to participate and determine how best to address these issues. Barring or indefinitely delaying participation in the electoral process disservices the public interest. Also, continued delay compounds the harm to the public by denying their opportunity to participate in the decision-making process. This has created an

unequal distribution of power between the municipality and its citizens, and a preliminary injunction would serve to right that wrong.

E. Granting the Preliminary Injunction Will Preserve the Status Quo.

Finally, a preliminary injunction will preserve the status quo. The City misunderstands the concept of "status quo" regarding preliminary injunctive relief. *See* Resp. at 13-14. A preliminary injunction is necessary to ensure Protect Our Loveland does not suffer irreparable harm while Protester's appeal is decided. *See Keller Corp. v. Kelly*, 187 P.3d 1133, 1137 (Colo. App. 2008). The City mistakenly asserts that the "last uncontested status between the parties" was the City's vote to take no action on the Petition. *See* Resp. at 13. But again, this assertion rests on the City's flawed interpretation of "final determination of petition sufficiency." Because the Clerk's decision was a final action, the "last uncontested status between the parties" was the Clerk's determination of petition sufficiency following the protest hearing. At that time, the Clerk found the petition could "proceed under C.R.S. § 31-11-104(1) for the presentation of the Initiative's proposed ordinance to the City Council for its consideration for adoption or referral to the City's voters at the municipal election." Ex. 4 at 26. Protester's filing for judicial review did not strip the Petition of its legal sufficiency, and it was Protester who should have been forced to seek a stay of the Clerk's decision. *See* C.R.C.P. 106(a)(4)(V) (providing that officer's decision may be stayed under Rule 65 pending review). It is only because the City decided to erroneously use the appeal as a reason not to fulfill its duty under the law that Protect Our Loveland is in the position of having to seek affirmative relief. The petition was deemed sufficient for the purposes of the City Council taking further action, and the proper course of action is for the City Council to proceed as it would have absent the recent appeal.

F. Granting a Preliminary Injunction Will Not Have the Effect of Providing Protect Our Loveland All of the Relief It Could Obtain Upon a Final Hearing.

Contrary to the City's contentions, issuing a preliminary injunction would not grant Protect Our Loveland all of the relief sought in its Complaint. *See* Resp. at 14-15. Instead, a preliminary injunction would put in motion the steps required to submit the Proposed Ordinance to the voters. Should the vote take place and the Proposed Ordinance pass prior to the effect of the proposed ordinance until after the judicial review is complete. The injunction is in fact *preliminary* until a decision on the merits can be issued. This relief is not identical to the prayer for relief because Protect Our Loveland's Complaint requests that the Proposed Ordinance be put to a vote and not stay the effect of the initiative (if passed) pending review. Compl. ¶ 16. Furthermore, the Complaint requests broader relief in the form of a declaration that the City Council violated its duties under Article 11. *Id.*

Granting a preliminary injunction would not afford Protect Our Loveland complete relief, and its "right to relief is clear and certain" as to be entitled to a preliminary injunction. *Allen v. City & Cnty. of Denver*, 351 P.3d 390, 389 (Colo. 1960).

G. A Nominal Security is Appropriate in This Case.

Only a nominal security should be required to grant Protect Our Loveland preliminary injunctive relief. A nominal security is appropriate in light of the City's actions and the insubstantial damages that may be incurred if it is found that the injunction was improperly granted. The City asserts that it will suffer "compensable loss" should it be compelled to place the issue to a vote at a special election. Resp. at 16. But the City **actively chose** to incur such a loss at the September 3, 2013 City Council meeting, where it discussed and ultimately chose the option to take no action the petition. In response to a council member's inquiry, the Clerk responded that it would cost approximately $60,000 to conduct a special election. *See* Video: Loveland City Council Meeting of Sept. 3, 2013 at 2:40-2:41:07. The City Council then voted not to place the issue on the November ballot, fully aware that it would incur the higher costs of holding a special election if Protester's appeal was unsuccessful. The more prudent choice would have been to take steps to put the measure on the November ballot, with instructions to stay the effect of the vote pending appeal. Having chosen to risk the more expensive option, the City cannot place the burden upon Protect Our Loveland. Accordingly, Protect Our Loveland respectfully requests that it be ordered to provide nominal security, if any, for the preliminary injunction.

CONCLUSION

For the reasons above and in its Motion for Preliminary Injunction, Protect Our Loveland respectfully requests that this Court issue preliminary injunctive relief in the form of an order directing the City to immediately publish the proposed ordinance, set a ballot title, and take all steps necessary to ensure a vote is taken within the time period prescribed by statute, so the constitutionally protected initiative process is allowed to go forward without further delay and interference.

Dated this 28th day of October, 2013.

Respectfully submitted,

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In accordance with C.R.C.P. 121 § 1-26, ¶ 7, a printed copy of this document with original signatures is on file with the Environmental Law Clinic at the University of Denver Sturm College of Law and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of October, 2013, a true and correct copy of the foregoing **Reply In Support of Plaintiff's Motion for Preliminary Injunction** was served via the Integrated Colorado Court's E-filing System (ICCES) on:

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