

<p>DISTRICT COURT, LARIMER (FT. COLLINS) COUNTY,  COLORADO  Address: 201 La Porte Ave., Suite 100  Ft. Collins, CO 80521</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>PLAINTIFF: Larry Sarner</b></p> <p>v.</p> <p><b>DEFENDANTS: City of Loveland, et al.</b></p>	
<p><b>PLAINTIFF: Protect Our Loveland, Inc.</b></p> <p>v.</p> <p><b>DEFENDANTS: City of Loveland, et al.</b></p>	<p>Consolidated Case No.:  2013CV31071</p> <p>Courtroom: 4C</p>
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Protect Our Loveland, by and through counsel, and pursuant to C.R.C.P. 106(a)(4)(VII), respectfully submits this Answer Brief in response to Plaintiff's Opening Brief.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case comes before the Court as a result of Protester Larry Sarner's ("Protester") challenge to the Loveland City Clerk's ("Clerk") official determination of petition sufficiency of Protect Our Loveland's Petition for a Proposed Ordinance entitled the "Loveland Public Health, Safety, and Wellness Act."

As further discussed below, the Clerk's determination that the challenged signatures substantially comply with the law was a proper exercise of her discretionary authority. Colorado courts have long recognized that the right of initiative is fundamental; thus, signatures supporting a petition are to be reviewed under a substantial compliance standard to gauge their sufficiency under the law. The evidence in the record supports the Clerk's Determination of petition sufficiency because the challenged signatures meet the purposes of the applicable provisions. The Clerk's Determination is in accord with the well-established principle that Article 11's provisions must not be construed to unduly hinder the right of initiative through technical constructions. Protester fails to establish any basis that the Clerk abused her discretion by validating Petition signatures.

Moreover, contrary to Protester's assertions, the Clerk acted reasonably by relying upon the list of registered electors provided to her by the Larimer County Clerk and Recorder. The Larimer County Clerk's issuance of the list is an official act that is granted a presumption of validity and regularity. Protester fails to provide the clear evidence needed to overcome this presumption and have the Clerk's findings reversed.

Further, the Clerk correctly found that the Proposed Ordinance constitutes a single subject, pursuant to her authority under the Loveland City Charter. Protester improperly parses the Proposed Ordinance and attempts to present its provisions piecemeal as distinct and unconnected subjects. The Proposed Ordinance's provisions, however, necessarily and properly relate to one common objective: to place a two-year moratorium on hydraulic fracturing within the City of Loveland. Thus, the Proposed Ordinance comprises a single subject, and the Clerk's well-reasoned determination on this issue should be upheld.

Finally, the Court lacks subject-matter jurisdiction to review the substantive merits of the Proposed Ordinance prior to its enactment. Thus, Protester's claims that the Proposed Ordinance is invalid because it is retroactive and preempted by state law are not ripe for review.

Accordingly, Protect Our Loveland respectfully requests that this Court enter judgment in favor of the Defendants, deny Protester's claims for relief, and find that Teresa Andrews, Clerk for the City of Loveland, did not abuse her discretion or exceed her jurisdiction in finding that Protect Our Loveland's Petition in support of its Proposed Ordinance was sufficient.

## **FACTUAL BACKGROUND**

### **a. Protect Our Loveland.**

Protect Our Loveland is a non-profit, grassroots organization seeking to provide citizens a vote on the issue of hydraulic fracturing ("fracking") within the City of Loveland. *Aff. of Ms. Sharon Carlisle in Supp. of Mot. to Intervene* ¶ 4 (Sept. 20, 2013). The group, composed of a large cross-section of Loveland citizens, is focused on learning the facts about fracking, working to educate the public, and obtaining more information about the risks of this industrial process before these operations commence within Loveland's city limits. *Id.* Like many communities across Colorado, Protect Our Loveland seeks to ensure that the citizens of Loveland have the opportunity to make informed decisions on such an important matter. In furtherance of this goal, Protect Our Loveland seeks to submit to the Loveland electorate a Proposed Ordinance entitled the "Loveland Public Health, Safety, and Wellness Act." If passed, the Proposed Ordinance would enact a two-year moratorium on fracking and the storage of fracking waste in the City of Loveland. Text of Proposed Initiative (Ex. 20 at 38).<sup>1</sup>

Protect Our Loveland had hoped to join other communities across Colorado to present such an important issue to Loveland voters in the November 2013 election. With the recent passage of various fracking related initiatives in Fort Collins, Boulder, Lafayette, and Broomfield, these communities have joined Longmont in showing their support in favor

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<sup>1</sup> References to the Certified Record of Protest Hearing lodged with the Court on September 27, 2013 will be identified by the Exhibit's Part Number or Document Title as appropriate, and specify the page of the PDF. For example, Exhibits Filed – Part 20 will be cited as "Ex. 20 at XX."

of slowing or halting fracking through the initiative and voting process. Amid the success and momentum in these other Colorado communities, Protect Our Loveland and Loveland citizens are eager to move forward on their petition.

**b. Petition Process and Protest.**

On May 24, 2013, Protect Our Loveland filed with the Clerk a letter giving notice of its intent to circulate a petition in support of a Proposed Ordinance to be submitted to the City's voters at the November 5, 2013 election, and submitting the proposed petition form.<sup>2</sup> (Ex. 20 at 36). After reviewing Protect Our Loveland's proposed petition form, the Clerk sent a letter dated June 3, 2013, notifying Protect Our Loveland that, pursuant to C.R.S. § 31-11-106(1), its petition form had been approved. (Ex. 20 at 47). The letter also stated that the Clerk obtained from the Larimer County Clerk and Recorder Elections Department the number of Loveland registered electors as of May 21, 2013, that number being 45,044. The Clerk advised Protect Our Loveland that under C.R.S. § 31-11-104(1), the minimum number of valid signatures required on the Petition would be 5% of 45,044, or 2,523 signatures. The Clerk sent a letter dated July 1, 2013, correcting the number of signatures needed to 2,253. (Ex. 20 at 63).

On July 8, 2013, Protect Our Loveland submitted to the Clerk 124 petition sections containing approximately 3,704 signatures. Clerk's Det. at 3.<sup>3</sup> Under C.R.S. § 31-11-109(1), the Clerk conducted a review of the signatures contained in the petition sections. *Id.* In a letter dated July 23, 2013, the Clerk advised Protect Our Loveland that the Clerk had determined that the petitions contained at least 2,256 valid signatures in petition sections 1 through 101, thereby exceeding the requirement for 2,253 signatures previously established. *Id.*; July 23 Letter (Ex. 20 at 67). After completing review of all the petition sections, the Clerk determined that the Petition contained a total of 2,743 valid signatures, or 490 more signatures than the required 2,253 signatures.

On August 16, 2013, the last day of the protest period, Larry Sarner filed with the Clerk a "Protest Pursuant to C.R.S. § 31-11-110 to Protect Our Loveland's Petition in

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<sup>2</sup> Protect Our Loveland originally submitted a letter dated May 20, 2013, giving notice of its intent to circulate a petition in support of a proposed amendment to the Loveland City Charter, which the May 24 letter revised and superseded. (Ex. 20 at 31).

<sup>3</sup> The Clerk's Determination is contained in the Certified Record of Protest Hearing in "Exhibits Filed: Miscellaneous Correspondence," pages 39 through 64. References to the Clerk's Determination are cited as "Clerk's Det. at XX," using the Determination's internal pagination.

Support of a Ballot Measure Seeking an Ordinance Entitled: Loveland Public Health, Safety and Wellness Act” (“Protest”). On August 22, 2013, a Hearing on the Protest was held, where Protester offered a prepared statement and the testimony of two witnesses: Michael Hagihara, Voter Registration Manager for the Colorado Department of State, and Luci Stremme, paralegal at Holsinger Law, LLC. Both witnesses were subject to direct and cross-examination by Protester and Protect Our Loveland.

On August 27, 2013, the Clerk issued a thoroughly researched, twenty-six page “Determination Pursuant to C.R.S. Section 31-11-110” denying the Protest on all four grounds and declaring that the Petition contained the requisite number of signatures. (“Clerk’s Det.”; Ex. Filed: Miscellaneous Correspondence). The Clerk concluded in the Determination that, although 224 signatures were invalidated, “the Protest has not made a sufficient showing for me to reverse my previous statement of sufficiency issued” on July 23, 2013. The Clerk determined that the Petition still contained 2,519 valid signatures, **266 more signatures than the required 2,253 signatures.**<sup>4</sup>

### STANDARD OF REVIEW

In accordance with C.R.C.P. 106(a)(4)(I), “review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.” In determining whether an abuse of discretion has occurred, “a reviewing court must uphold the decision of the governmental body unless there is no competent evidence in the record to support it.” *Bd. of Cty. Comm’rs v. O’Dell*, 920 P.2d 48, 50 (Colo. 1996). In order to make a finding of “no competent evidence,” a court must find that the officer’s decision is “so devoid of

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<sup>4</sup> Protester’s Opening Brief cites to Petition Sections as “Ex. 18 at AXX.” Exhibit 18 is more precisely identified as “Corrected Appendix A” found in Exhibit A to Unopposed Motion for Correction of Record (Nov. 5, 2013). The Corrected Appendix A is originally the Appendix to the Protest, and was Exhibit 18 in the Protest Hearing. Protester’s citations to “Ex. 18 at A-1” reference the page numbers at the bottom of the Appendix, and the cited page lists the challenged Petition Sections and corresponding signature line numbers. Unfortunately, the City lodged the Certified Record of Protest Hearing as several exhibits identified only by a “Part number.” Thus, the Petition Sections are haphazardly cut off into several exhibits, and the Sections are numbered only by handwritten numbers at the top of pages without numerical order. In an effort to assist the Court in identifying the challenged signatures in the Record, Protect Our Loveland has cited to the exhibit number where each cited Section is located and provided the Section number. To further alleviate confusion, Protect Our Loveland also included Protester’s citations next to its citations of Petition Sections.

evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Id.*

## ARGUMENT

### I. The Clerk Did Not Exceed Her Jurisdiction or Abuse Her Discretion by Validating Signatures Submitted in Support of the Petition.

The Court must review the Clerk’s finding only to determine whether the Clerk abused her discretion or exceeded her jurisdiction. C.R.C.P. 106(a)(4). Contrary to this narrow scope of review, Protester seems to seek a *de novo* review of his Protest by the Court.<sup>5</sup> Indeed, Protester does not attempt to explain why the Clerk abused her discretion in issuing her Determination following the Hearing. Instead, Protester reiterates the challenges made in the original Protest and fails to provide the Court with any information regarding the Clerk’s Determination of signature validity. For example, Protester claims that the Clerk abused her discretion for validating certain signatures, when in fact, the Clerk invalidated some of the challenged signatures following the Hearing. The Opening Brief reads as if the Hearing and Determination never occurred, and as a result, the Brief is riddled with inaccurate and duplicative arguments.<sup>6</sup>

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<sup>5</sup> Although Protester briefly mentions C.R.C.P. 106’s standard of review, *see* Pl.’s Br. at 3-4, the brief’s arguments are not presented in a manner invoking this standard of review and read more like a *de novo* challenge to the petition’s sufficiency.

<sup>6</sup> Notably, Protester seeks from the Court relief **already granted** by the Clerk. For instance, the Clerk already invalidated 224 signatures Protester challenges here. *See* Pl.’s Br. at 7-9; Clerk’s Det. at 20-24, 26. Specifically, the Clerk invalidated: 87 signatures because the circulator’s date on their affidavit did not match the date of notarization; Ex. A, Sections 21 & 79; Ex. 2, Section 80. Cited as Ex. 18 in Pl.’s Br. at 7; 103 signatures due to deficient notary stamps; Ex. 6, Sections 25, 128, & 135. Cited as Ex. 18 at A12-16 in Pl.’s Br. at 7; 7 signatures because the circulator’s affidavit omitted his municipality of residence; Ex. 6, Section 32. Cited as Ex. 18 A-16 in Pl.’s Br. at 8; 1 signature due to an incomplete acknowledgement-of-assistance statement; Ex. 18, Section 88, line 38; Cited as Ex. 18 A-19 in Pl.’s Br. at 9; 2 signatures as duplicative; Ex. 18, Sections 9 and 106. Cited as Ex. 18 A-19 in Pl.’s Br. at 9; and 11 signatures due to illegible dates. Ex. 12, Section 35; Ex. 19, Sections 93, 82, and 88, Ex. 20, Section 104; Cited as Ex. 18 at A-20 in Pl.’s Br. at 9. In addition to these categorical invalidations, the Clerk also invalidated 1 signature (out of 32) for incomplete information; Ex. 11, Section 14, line 6; Cited as Ex. 18 A-17 in Pl.’s Br. at 8; and 12 signatures (out of 16) for not matching the list of registered electors. Ex.6, Section 23; Ex. 7, Section 31 and 38; Ex. 8, Section 40, 53, and 57; Ex. 9, Sections 63 and 103; Ex. 10 Sections 109 and 116. Cited as Ex. 18 A-17 in Pl.’s Br. at 8. Yet Protester’s Brief nowhere indicates that these signatures were already invalidated, suggesting that either he did not

In any case, the Court's role is to review the Clerk's Determination for an abuse of discretion. In doing so, courts apply the standard of **substantial compliance**. *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996)(en banc); *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994)(en banc). In other words, courts must determine whether the Clerk could have found that the petition substantially complies with the laws governing the right of initiative. Although requirements such as the percentage of registered voters required to sign a petition are stringently enforced, the courts "have resisted invalidating petitions on the basis of other, more technical defects." *Griff v. City of Grand Junction*, 262 P.3d 906, 912 (Colo. App. 2010). Rather, the constitutional right to initiative and to participate in the legislative process is to be "liberally construed" in favor of that right. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (en banc). Therefore, Colorado courts consider the following factors to determine whether a petition's signatures substantially comply with applicable law: "(1) the extent of noncompliance; (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the noncompliance; (3) whether there was a good faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate." *Fabec*, 922 P.2d at 341, citing *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994)(en banc).

As to the first factor, the extent of noncompliance here is not extensive because each alleged defect only relates to a handful of petition sections or signatures. Indeed, Protester's challenges to whole petition sections are limited to three petition sections at most. See Pl.'s Br. at 5-8; *Fabec*, 922 P.2d at 34 (finding failure to secure notary seals not extensive because non-compliance affected only two circulator's affidavits and 92 signatures total).

Turning to the second factor, Article 11's overall purpose is to "set forth in this article the procedures for exercising the initiative and referendum powers reserved to municipal electors in the Colorado Constitution Article V, § 5(9)" and to protect, rather than limit the right to initiative. C.R.S. § 31-11-101. Each of the challenged signatures should be examined for compliance in light of the purpose of the applicable provision, each of which is grounded in the general premise to facilitate and protect the right of initiative. *Fabec*, 922 P.2d at 341. Protester does not analyze the petition sections for compliance with the purpose of the applicable provisions and in some instances fails to even articulate an argument for non-compliance.

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thoroughly read the Determination, or that he is ignoring it and asking the Court to conduct a *de novo* review of the Clerk's initial findings.

Finally, as to the third factor, Protester nowhere alleges that Protect Our Loveland failed to act in good faith to comply with the applicable requirements or made a conscious decision to mislead the electorate. In fact, Protester concedes “there is no evidence that suggests the noncompliance is based on the conscious effort to mislead the electorate...” Pl.’s Br. at 10. A review of the petition signatures leads to the overwhelming conclusion that the errors that did occur within the 2,743 signatures were the result of human error. As evident by the 2,519 validated signatures, Protect Our Loveland sought to comply in good faith with the law of initiative.

**a. The Clerk’s Validation of 220 Challenged Signatures Was a Proper Exercise of Her Discretion Because All Requirements of Article 11 Were Properly Met.**

Protester challenges 220 signatures on the basis that the notary who authorized the circulator’s affidavit accidentally signed his or her name in the signature block, rather than having the circulator sign his or her name.<sup>7</sup> Pl.’s Br. at 5-6. The Clerk validated all 220 signatures. Clerk’s Det. at 14-15. In each affidavit, the circulator provided the date and his or her address, and signed the required oath, as directed by C.R.S. § 31-11-106(e)(I)(A)-(H). Thus, the affidavits satisfy all of the provision’s requirements.

Protester argues that of the 220 signatures in this Petition Section, “the notary did not correctly identify the affiant in violation of C.R.S. § 31-11-106(3)(e)(I) and 8 C.C.R. § 1505-1.” Article 11 mandates that the circulators’ signature be notarized, but as provided in the Clerk’s Determination, Article 11 does not specify how the notary is required to do so. Clerk’s Det. at 14. Therefore, turning to C.R.S. § 12-55-119(1) for further guidance, the statute provides only that the notary stamp coincide with the jurat that reads as follows: “subscribed and sworn before me in the county of \_\_\_\_\_, state of Colorado, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.” See *Fabec*, 922 P.2d at 330 (construing the requirements of C.R.S. § 12-55-119(1) as evidence of the notary’s acknowledgment that the circulator signed and dated the affidavit in front of him or her). The law does **not** require that the notary write the circulator’s name in this section of the affidavit. Protester’s assertion that the signatures are invalid because the circulator’s name is not printed in the jurat is erroneous and not in accordance with the law. Therefore, the signatures substantially comply with Article 11 and C.R.S. § 12-55-119(1) and the Court should affirm the Clerk’s validation of these signatures.

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<sup>7</sup> Ex. 2 Sections 28 & 34; Ex. 3 Sections 37, 65, & 86; Ex. 4 Sections 91, 107, 117, 127, & 130. Cited as Ex. 18 at A3-A10 in Pl.’s Br. at 6.



Additionally, the notarized circulators' affidavits achieve the purpose of the applicable provision, C.R.S. § 31-11-106. The purpose of this provision is for the notary to authorize the circulator's affidavit and to provide a form for the petition to be based on. "The purpose of the affidavit is [for] the assurance [that] the circulators were aware of their important role in implementing all the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan*, 882 P.2d at 1385. Since the affidavit included all of the requirements under the applicable provision, especially the signed statement by the circulators as to the validity of the signatures contained therein, it substantially complies with the purpose of the affidavit by demonstrating that the circulators knew the law and sought to comply with it in their duty. Although Protester does not allege that the circulators acted in bad faith, it is evident from the circulators' affidavits that they sought to act in good faith because they adhered to all of the affidavit requirements under both C.R.S. §§ 31-11-106 and 12-55-119(1). Finally, under C.R.C.P. 106(a)(4), the Clerk's validation of these signatures was clearly not arbitrary or capricious, and her exercise of discretion should be upheld.

**b. The Clerk Properly Validated 1 Challenged Signature Because the Notary's Commission Expiration Date Was Correctly Stamped on the Affidavit.**

Protester challenges 1 signature because the affidavit of the petition's circulator is dated July 2013, and the notary mistakenly wrote her commission expiration date as May 2, 2013.<sup>8</sup> Pl.'s Br. at 7. The Clerk determined that the signature is valid and substantially complies with the law. Clerk's Det. at 15-16. The Clerk's decision should be upheld because the notary stamp affixed to the affidavit clearly has an expiration date of May 2, **2017**. Ex. 5 at 6, Section 121. It is evident that the notary mistakenly wrote the present year with the same month and day instead of 2017. Protester claims that 1 signature "was improperly notarized as the notary's commission had expired and this signature should be disqualified as insufficient to support the Petition." Pl.'s Br. at 7. The allegation that this error invalidates the signature is flawed because C.R.S. § 12-55-112(2) only requires the following: that the notary "clearly and legibly stamp her official seal, the seal must contain the printed legal name of the notary, the notary's identification number, expiration date, the words "STATE OF COLORADO," and "NOTARY PUBLIC." The affirmation requirements in Section 121 are all met because it is **not required** that the notary handwrite her commission expiration date thus. Furthermore, the allegation that the notary's commission had expired is without merit because right next to the handwritten date is the notary's properly authorized and affixed stamp with the accurate expiration date thereby, voiding

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<sup>8</sup> Ex. 5, Section 121. Cited as Ex. 18 at A10 in Pl.'s Br. at 7.

any claim of an unauthorized affidavit. The signature and circulator's affidavit substantially complies with the law since it meets all of the legal requirements.

The affidavit also fulfills the purpose of C.R.S. § 31-11-106 since it provides legitimacy and assurances that the signatures were obtained in accordance with the law. "A requirement of third-party authentication of circulator signatures is justified as a measure to protect the integrity of the initiative process..." *Comm. for Better Health Care v. Meyer*, 830 P.2d 884, 894 (Colo. 1992)(en banc). The affidavit of Section 121 provides the necessary "authentication" and fulfills the provision's purpose. Additionally, Protester does not allege this Petition Section was prepared in bad faith. The notary and circulator acted in good faith to comply with the provisions of Article 11 because all of the requirements were met. Thus, the Clerk correctly determined that the challenged signature in Section 121 is valid, and the Court should defer to the Clerk's validation of this signature.

**c. The Clerk's Determination that 85 Signatures Are Valid Is a Proper Exercise of Her Discretion Because the Notary Stamp was Affixed to the Affidavit.**

The Clerk determined that the 85 signatures challenged by Protester in Sections 41 and 92 are valid because the notary stamp was affixed to the top of the affidavit page and should not be invalidated on the basis that the seal was not stamped below the notary's signature.<sup>9</sup> Protester alleges that, "the notary stamp was not affixed in compliance with C.R.S. § 12-55-112(2)." Protester's challenge to these signatures is a weak attempt to invalidate 85 signatures on a technicality that does not threaten in any way the integrity or validity of the signatures. C.R.S. § 12-55-112(2) only requires that the notary stamp be affixed "under or near his or her signature on every notary certificate," it is not the plain meaning of the statute to construe "near" narrowly. If the General Assembly intended that the notary stamp strictly be placed under the signature, the term "near" would not have been included. Protester's assertion blatantly ignores the plain language of the statute in an attempt to invalidate these signatures and unduly hinder the right to initiative. Courts have limited invalidating signatures based on notary discrepancies only "to the most suspect situations, such as where a candidate notarizes his or her own notarization petition. "This interpretation results in the invalidation of fewer signatures and provides more ready access to the ballot, in accordance with public policy in Colorado." *Griff*, 262 P.3d at 912. These affidavits were affixed with a notary stamp as required by law and they meet all other conditions under the statute. Thus, the Court should uphold the Clerk's determination that these 85 signatures are valid.

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<sup>9</sup> Ex. 5, Sections 41 & 92. Cited as Ex. 18 at A10 in Pl.'s Br. at 7.

Furthermore, the affidavits in Sections 41 and 92 again achieve the purpose of the circulator's affidavit as put forth in C.R.S. § 31-11-106 and C.R.S. § 12-55-119(1). The circulators' affidavits provide all of the assurance that the signatures were obtained in accordance with the law because each of the requirements of the affidavits were met, including the circulator's signed oath, dated and accompanied by their address, notary signature, and certified notary stamp. Protester does not bring any claim that these Petition Sections were prepared in bad faith, and indeed could not because all of the provision's requirements were met. Thus, the Clerk correctly determined that the challenged signature in Section 121 is valid, and the Court should defer to the Clerk's validation of this signature.

**d. The Clerk Correctly Validated 4 of the 16 Challenged Signatures Because the Signatories' Names Matched Those on the Registered Elector's List.**

Protester alleges that 16 signatures are insufficient to support the Petition because "the elector's name was not found on, or did not match" the list of Loveland's registered electors provided by the Larimer County Clerk and Recorder (the "List").<sup>10</sup> Pl.'s Br. at 8. In her Determination, the Clerk found 4 of the signatures valid because they contained the requisite information under C.R.S. § 31-11-108 and the signatories are listed as registered electors on the List. Clerk's Det. at 21-22. In doing so, the Clerk reasonably relied on the List. *See Comm. for Better Health Care*, 830 P.2d at 891 (describing the Secretary of State's reliance upon master voting list to validate signatures). Because the Clerk was justified in relying on the List, and Protester offers no explanation as to how the Clerk abused her discretion, the Court should affirm the Clerk's decision.

These 4 signatures substantially comply with the law because the Petition was signed by "registered electors who are eligible to vote on the measure." C.R.S. § 31-11-108. The Clerk was able to verify the validity of these signatures with the information provided and compare it with the List. Thus, the applicable provision, C.R.S. § 31-11-108, is fulfilled. The circulators and signatories of these sections acted in good faith to comply with the law as they are registered to vote in Loveland. The Court should affirm the Clerk's decision to validate these four signatures because they substantially comply with the law, and the Clerk's decision is not arbitrary or capricious.

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<sup>10</sup> Ex. 9, Section 88; Ex. 10, Sections 132, 109, & 116; Ex. 6, Section 23; Ex. 7, Sections 29, 31, & 38; Ex. 8, Sections 40, 57, & 53; Ex. 9, Section 63 & 103; Ex. 15 Section 96. Cited as Ex. 18 at A17 in Pl.'s Br. at 8.

**e. The Clerk’s Validation of 31 of the 32 Challenged Signatures Was a Proper Exercise of Her Discretion Because the Signatures Were Sufficiently Legible and Identifiable as Electors on the List.**

The Clerk determined correctly that 31 of the 32 challenged signatures are valid because they are legible and the signatories are included on the List.<sup>11</sup> Protester claims that the “signatures are incomplete or contain illegible information that impede the identification or determination of eligibility of the electors.” Pl.’s Br. at 8. Protester also states that “the record demonstrates that 32 signatures are not in compliance.” *Id.* Although the explicit error of each signature is not detailed by Protester, if the signatures are reviewed it is evident that there is sufficient identifying information for all 31 of the validation signatures. Contrary to Protester’s assertion, the record does **not** demonstrate that the signatures are not in compliance, the record demonstrates that they are in compliance. The Clerk determined again that the signatures substantially comply with the law, and the Court should find the Clerk’s determination to be valid.

These signatures include sufficient information such that the signatories can be verified by comparing the names to the List. The purpose of C.R.S. § 31-11-10, is to ensure there is enough information written by the signatories such that their signatures can be verified and to uphold the integrity of the initiative to prevent unregistered electors from signing. Given that these challenged signatures meet both the requirements and the purpose of this provision they were properly validated. Thus, the signatories and circulators acted in good faith to substantially comply with the law and these signatures should be reviewed with discretion to the Clerk’s validation. The Court should defer to the Clerk’s discretion in validating 341 of the 565 challenged signatures because they substantially comply with the law, meet the purposes of the specific provisions, and the entirety of the Petition was prepared in good faith to comply with the law of initiative.

**II. Protester Fails to Present “Clear Evidence” to Overcome the Presumption of Validity Supporting the County Clerk’s Official Act.**

The Larimer County Clerk and Recorder’s issuance, at the City Clerk’s request, of the number of registered electors in Loveland is an official act of a local official that is granted a

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<sup>11</sup> Ex. 10, Section 3; Ex. 11, Sections 5, 8, & 14; Ex. 12, Sections 30, 33, & 35; Ex. 13, Sections 40, 68, 69, & 56; Ex. 17, Section 88; Ex. 14, Section 90 & 81; Ex. 15, Sections 96, 97, 102, & 103; Ex.16, Sections 105, 116, 120, & 124; Ex. 17, Sections 126, 129, & 138. Cited as Ex. 18 at A17-18 in Pl.’s Br. at 8.

“presumption of validity,” and Protester fails to produce “clear evidence” to overcome that presumption. See Pl.’s Br. at 10-13. The Colorado Supreme Court has recognized that “a presumption of validity and regularity supports the official acts of public officials and in absence of **clear evidence** to the contrary, courts presume that they have properly discharged their official duties.” *Jensen v. City & Cnty. of Denver*, 806 P.2d 381, 386 (Colo. 1991)(en banc)(emphasis added). In considering this “clear evidence” standard, the protester has “the burden of demonstrating procedural noncompliance.” *In re Petition on Campaign & Political Fin.*, 877 P.2d 311, 316 (Colo. 1994) (en banc).

In this case, the Clerk obtained from the Larimer County Clerk and Recorder a List of Loveland’s registered electors on May 21, 2013. The issuance of the list constitutes an official act of a public official and carries with it a presumption of validity and regularity. Protester fails to produce any “clear evidence” sufficient to overcome the presumption of validity granted by courts and result in the invalidation of the Clerk’s acts.

Protester argues that a discrepancy exists between the List obtained by the Clerk on May 21, 2013, and the List Protester allegedly obtained on July 17, 2013, regarding the number of registered electors in Loveland. Pl.’s Br. at 11. Protester speculates that the discrepancy is a result of the Clerk’s failure to include inactive voters in her calculation. *Id.* In support of this theory, Protester offered the testimony of the Colorado Secretary of State Voter Registration Manager Michael Hagihara at the Hearing. Mr. Hagihara testified that there are multiple theories to explain why discrepancies in the two lists might exist, including transcription errors and a failure to include inactive voters in the calculation. Protest Hearing Tr. at 41-42. But Protester cannot point to any “clear evidence” in Mr. Hagihara’s testimony demonstrating that the Clerk abused her discretion. Instead, Mr. Hagihara explained that the Clerk acted reasonably within the scope of her duties. During cross-examination, he admits that the Clerk justifiably relied upon the number of registered electors provided by the Larimer County Clerk. Tr. at 48, ln. 14-19. Mr. Hagihara also agreed that the “county clerks’ . . . are the gate-keepers for the local jurisdiction in terms of how many registered electors are in a county.” Tr. at 46, ln. 20-23. Thus, Mr. Hagihara acknowledged that “the Municipal Clerk has a right to rely on” the County Clerk’s list because they are the “gatekeepers of that information.” Tr. at 48, ln. 4-7.

Moreover, even if Protester’s list was used and the requisite number of signatures was 5% of 48,000 signatures, Protect Our Loveland still satisfies the requirement with 2,519 valid signatures. As the Clerk noted, “the remaining number of valid signatures even exceeds by 96 signatures the 2,423 signature threshold argued by Protester.” Clerk’s Det. at 26.

### **III. The City Clerk Did Not Abuse Her Discretion in Finding That Protect Our Loveland's Proposed Ordinance Consists of a Single Subject.**

Contrary to Protester's assertion, the Clerk did not abuse her discretion in finding that the Proposed Ordinance presents a single subject and that all its provisions are necessarily and properly connected. *See* Pl.'s Br. at 13. The Loveland City Charter requires that proposed ordinances present a single subject in order to be submitted to the voters and grants the Clerk the authority to review such measures for compliance with this requirement. Charter Art. 7, §7-7(a)-(b).<sup>12</sup> The Charter specifies that the matters presented in the measure must be "necessarily or properly connected and ... not disconnected or incongruous." *Id.* §7-7(c).<sup>13</sup> After initially determining that the Proposed Ordinance presents a single subject in her June 3 Letter, the Clerk reaffirmed her decision in a well-reasoned discussion in her Determination. June 3 Letter (Ex. 20 at 47); Clerk's Det. at 6-11.

Before discussing the merits of the Clerk's decision on this issue, it should be noted that is not clear whether the Court even has jurisdiction to review Protester's single-subject challenge. "In the absence of ... statutorily conferred jurisdiction, the courts are forbidden from interfering with the referendum process before [a] measure has been adopted." *Polhill v. Buckley*, 923 P.2d 119, 121 (Colo. 1996)(en banc). Under the Loveland City Charter's terms, the Clerk is solely responsible for reviewing petitions for compliance with the single-subject requirement, and it does not confer jurisdiction on the courts. Thus, unlike Colorado Springs, which specifically contains a judicial review provision in its single-subject rule, it is not clear that Protester can judicially challenge the Proposed Ordinance under Loveland's single-subject requirement.

Despite the lack of statutory jurisdiction, if the Court finds it has jurisdiction to hear this argument, the Proposed Ordinance contains a single subject. The Proposed Ordinance plainly states that its purpose is "[t]o protect, property values, public health, safety, and

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<sup>12</sup> The Charter states: "[t]he City Clerk shall approve for petition circulation measures proposing referred ordinances or initiated ordinances only when such measures contain a single subject." Art. 7, § 7-7(b).

<sup>13</sup> Contrary to Protester's suggestion, the single-subject requirement contained in the Colorado Constitution and Colorado statutes does not apply to the Proposed Ordinance. *See* Pl.'s Br. at 13. "[T]he plain language of the single-subject rule set forth in article V, section 1(5.5) of the constitution and [C.R.S.] section 1-40-106.5 applies only to statewide measures and not to municipal initiatives." *Bruce v. City of Colo. Springs*, 200 P.3d 1140, 1145 (Colo. App. 2008).

welfare by placing a moratorium on the use of hydraulic fracturing to extract oil, gas, and other hydrocarbons within the City of Loveland in order to study the impacts of the process on the citizens of the City of Loveland.” Text of Proposed Initiative (Ex. 20 at 38). Protester, however, misconstrues this purpose and attempts to disassemble the Proposed Ordinance by parsing it out and alleging that several different subjects are addressed. Although “multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces,” [s]uch analysis... is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado’s Constitution.” *In re Ballot Title 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998)(en banc). This improper dismantling is precisely what Protester attempts here.

Protester alleges that the Proposed Ordinance violates the single-subject requirement because it contains the following “subjects:” “(1) property values and aesthetics; (2) public health, safety, and welfare; (3) inalienable civil rights; (4) environmental and wildlife protection; and (5) oil and gas technology.” Pl.’s Br. at 14. Contrary to Protester’s arguments, the Proposed Ordinance’s provisions are interconnected and relate to a single subject. The single-subject requirement must be “liberally construed so as not to impose undue restrictions on the initiative process.” *In re Ballot Title for 1997-1998 No. 74*, 962 P.2d at 929. To that end, “the single-subject requirement does not preclude the use of provisions that are not wholly integral to the basic idea of a proposed initiative.” *Id.*

The “multiple subjects” alleged by Protester are fundamentally related and connected to the Proposed Ordinance’s purpose: to place a two-year moratorium on hydraulic fracturing within Loveland. Property values and aesthetics, along with public health, safety, and welfare, are the main concerns that have long been associated with the use of hydraulic fracturing. Those topics are fundamentally connected with any proposed moratorium on hydraulic fracturing. Second, Protester identifies the broad category of “inalienable *civil* rights” as another subject addressed in the Proposed Ordinance. Pl.’s Br. at 14. The Proposed Ordinance, however, does not make any mention of “civil” rights. It instead addresses certain “inalienable rights” and does so in the context of the Colorado Constitution, which categorizes such rights as “the right of enjoying and defending their lives and liberties; or acquiring, possessing, and protecting property; and of seeking and obtaining safety and happiness.” COLO. CONST. art. II, § 3. This concept is fundamentally connected with the overall subject of the Proposed Ordinance: a moratorium on hydraulic fracturing to further learn and study its possible effects within the City of Loveland. Third, Protester argues that “environmental and wildlife protection” are another distinct subject

of the Proposed Ordinance. In actuality, the only mention of “environment and wildlife protection” comes directly from the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-102 (requiring that oil and gas resources be extracted in a “manner consistent with protection of public health, safety, and welfare including protection of the environment and wildlife resources.”). This reference merely describes the manner in which oil and gas resources must be extracted and is naturally connected to the Proposed Ordinance’s overall subject.

Protester further alleges that “oil and gas technology” is another subject of the initiative. Pl.’s Br. at 14. The only mention of the oil and gas extraction processes comes in a brief section describing hydraulic fracturing, which is what the initiative specifically deals with. The mere mention of this process and the fluid that is used is not incongruous to the subject of the Proposed Ordinance as a whole. As mentioned previously, the single-subject requirement is to be construed liberally and “[it] does not preclude the use of provisions that are not wholly integral to the basic idea of a proposed initiative.” *In re Ballot Title for 1997-1998 No. 74*, 962 P.2d at 929. Thus, all five of the purposes identified by Protester are interconnected and fundamental to the Proposed Ordinance’s central topic: a moratorium on hydraulic fracturing.

Lastly, Protester argues that the distinct subjects of: “(1) oil and gas development/extraction generally; (2) injection of son-native [sic] waters; (3) content of hydraulic fracturing fluid; (4) storage of hydraulic fracturing fluid; and (5) the disposal of hydraulic fracturing fluid” are also included in the Proposed Ordinance. Pl.’s Br. at 14. That statement is incorrect. The Proposed Ordinance specifically addresses “the use of hydraulic fracturing within the City of Loveland to extract oil, gas, or other hydrocarbons and the storage and disposal of the waste products from the process.” Text of Proposed Initiative (Ex. 20 at 38). The Proposed Ordinance does not, as Protester would have the Court believe, address oil and gas extraction “generally”. *See* Pl.’s Br. at 14. It is specific to the process of hydraulic fracturing and the necessity for more studies and knowledge before the process should be allowed within the City of Loveland. Additionally, there is a very brief bullet point which addresses the general injection and make-up of hydraulic fracturing fluid, its storage, and disposal. A proposal for a moratorium on hydraulic fracturing naturally includes and discusses the process, its byproducts, and their disposal. The inclusion of the specifics of the process is connected to the Proposed Ordinance’s subject and is not in any way disconnected or incongruous. In conclusion, the text of the Proposed Ordinance does not violate the Loveland City’s Charter’s single-subject requirement. Instead, all statements and purposes contained therein are both dependent and connected with each other.



#### **IV. A Determination as to Retroactivity and State-Law Preemption Is Inappropriate at This Time.**

Additionally, Protester challenges the validity of the Proposed Ordinance on the basis that it is retroactive and preempted by state law. Pl's Br. at 15-19. But these issues are not ripe for review, and the Court lacks subject matter jurisdiction to review the Proposed Ordinance prior to its enactment. The Colorado Supreme Court has spoken multiple times on this issue and has expressly stated that "[a] court may not interfere with the initiative process to address challenges to the substantive validity of an initiative before it is actually adopted." *Vagneur v. City of Aspen*, 295 P.2d 493, 503 (Colo. 2013); *see In re Title, Ballot Title for 2011-2012 No. 45*, 274 P.3d 576, 579 (Colo. 2012)(en banc)(stating that the court's "limited role in this process prohibits us from addressing the merits of a proposed initiative, and from suggesting how an initiative might be applied if enacted"). Contrary to this well-established principle of law, Protester asks the Court to do just that and pass judgment on the Proposed Ordinance before it has even been enacted into law. Again, the Colorado Supreme Court has been clear on this issue, stating "the courts [may not] interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted." *City of Rocky Ford v. Brown*, 616 P.2d 973, 975 (Colo. 1956)(en banc); *Speer v. People*, 122 P. 768, 769 (Colo. 1912). Then and only then, when actual litigants whose rights are affected are before it, may a court determine the validity of the legislation. *City of Rocky Ford*, 616 P.2d at 975. In sum, "[the courts] do not determine the initiative's efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal." *In re Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1076 (Colo. 2010)(en banc).

There are also important separation-of-powers principles underlying the constitutional right of initiative that prevent this Court from reviewing those claims prior to the people exercising their right to vote on a proposed ordinance that meets the signature requirements and has been found sufficient under Article 11. This Court does not have jurisdiction to adjudicate Protester's claims at this stage of the initiative process, any more than it would have jurisdiction to rule that a legislative proposal put forward in the state legislature is unlawful before the legislature actually passed the measure. *See Speer*, 122 P. at 775.<sup>14</sup>

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<sup>14</sup> Furthermore, such a claim is not yet ripe, as Protester's rights have not yet been affected. *See McKee*, 616 P.2d at 973 (stating that courts may determine a measure's validity after a

Even if the Court had jurisdiction, Protester's use of *American Compensation Insurance Co. v. McBride* to support his assertion that "Colorado courts strongly disapprove of retroactive application" is misplaced. See Pl.'s Br. at 15. What the *McBride* court actually says is "[a]lthough retroactive application of a statute is disfavored, such application is not necessarily unconstitutional. Where a statute effects a change that is procedural or remedial, it may be applied retroactively." 107 P.3d 973, 977. This hardly qualifies as courts "strongly disfavoring" retroactive application.

Finally, Protester improperly raises a preemption claim. See Pl.'s Br. at 17. Local government regulations, including moratoria, are considered valid as long as they do not create an "irreconcilable operational conflict" with the state's regulatory scheme, by "materially impeding or destroying" the State's interest. *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1055-58 (Colo. 1992)(en banc). Whether there is an irreconcilable operational conflict must be determined on a case-by-case basis under a fully developed evidentiary record. *Id.*; *Bd. of Cnty. Comm'rs of Gunnison Cnty. v. BDS Int'l*, 159 P.3d 773, 778 (Colo. App. 2006). For the reasons above, the Court lacks jurisdiction to hear it prior to the Proposed Ordinance's passage into law such that proper parties with ripe interests are before the Court.

### CONCLUSION

For the above mentioned reasons, Protect Our Loveland respectfully requests that the Court affirm the Clerk's Determination of petition sufficiency and enter judgment in favor of Defendants.

Dated this 3rd day of December, 2013.

Respectfully submitted,

/s/ Kelly Deanne Davis

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measure is adopted and "then only when actual litigants, whose rights are affected, are before them") (citing *Speer*, 122 P. at 774).

*Counsel for Protect Our Loveland*

*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 3rd day of December, 2013, a true and correct copy of the foregoing Answer Brief by Intervenor Protect Our Loveland was served via the Integrated Colorado Court's E-filing System (ICCES) on:

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