

Brownstein | Hyatt
Farber | Schreck

May 20, 2008

Brownstein Hyatt Farber Schreck, LLP
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106-4614
T 702.382.2101 F 702.382.8135

VIA FACSIMILE AND U.S. MAIL

Ross Miller
Nevada Secretary of State
101 N. Carson Street, Suite 3
Carson City, NV 89701

Todd L. Bice
Attorney at Law
T 702.464.7029
F 702.382.8135
TBice@bhfs.com

RE: **Funding Nevada's Priorities Act
Education Enhancement Act**

Dear Mr. Secretary:

We are counsel for the Las Vegas Convention and Visitors Authority (the "LVCVA"). We write to bring to your attention legal deficiencies in two initiatives: the Funding Nevada's Priorities Act and the Education Enhancement Act. According to media reports, the proponents of these initiatives have filed their petitions with the respective county clerks claiming to have the requisite number of signatures.

Both initiatives are defective on their face. The Affidavit of Circulator (the "Affidavit"), which is required to be attached to the signature pages, is plainly unlawful. First, the Affidavit violates NRS 295.0575(2), because it does not state "[t]he number of signatures thereon. . . ." Second, the Affidavit violates NRS 295.0575(4), because the circulator does not attest that "each signer had an opportunity before signing to read the full text of the act or resolution on which the initiative or referendum is demanded."

Both of these omissions are fatal. Indeed, the Affidavits comply with only one-half of the statute's requirements. Importantly, the Legislature enacted this statute last session in order to combat ballot fraud. Its terms are clear:

A petition for constitutional amendment or a petition for a statewide measure proposed by an initiative or referendum *may* consist of more than one document. Each document of a petition *must* have attached to it when submitted an affidavit executed by the circulator thereon stating:

1. That he personally circulated the document;
2. The number of signatures thereon;
3. That all the signatures were affixed in his presence; and

4. That each signer had an opportunity before signing to read the full text of the act or resolution on which the initiative or referendum is demanded.

NRS 295.0575 (emphasis added).

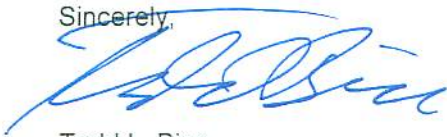
As I am sure you are aware, the Nevada Supreme Court has made clear that the Legislature's use of the word "must" is mandatory and must be complied with. *See Fouchier v. McNeil Const. Co.*, 68 Nev. 109, 122-23, 227 P.2d 429, 435 (1951) (court explained that the word "may" is permissive whereas "must" is mandatory); *see also Givens v. State*, 99 Nev. 50, 54, 657 P.2d 97, 100 (1983) (court explained that the word "may" is construed as permissive but that the word "shall" is construed as mandatory, noting that word is presumptively imperative).

The failure of a petition circulator to state the number of signatures that he or she collected on the affidavit is a complete failure to comply with the law, which cannot be excused. For instance, in *King v. Van Wart*, 67 Misc.2d 592, 593 (N.Y. 1971), the court affirmed the Board of Elections' action in rejecting a petition that did not have the subscribing witness attest to the number of signatures collected in the affidavit. The court reasoned that "the requirement that the number of signatures be inserted in the statement of the subscribing witness is one of the **major safeguards** against fraud contained on the face of each sheet." *Id.* at 592 (emphasis added). Similarly, in *Rust v. Lucas County Bd. of Elections*, 841 N.E.2d 766, 768 (Ohio 2005), the court also held that the requirement that the circulator's statement specify the number of signatures contained is a material requirement that if not strictly complied with, invalidates the entire petition.

Here, the defect in both petitions is clear and obvious. Nor can the proponents of these two initiatives escape their failure to comply with the law by asserting substantial compliance. *Nevadans for Nevada v. Beers*, 142 P.3d 339 (Nev. 2006). These are not technical or minor omissions. The deficiencies in these affidavits go to the very heart of the statutory requirements in order to protect the initiative process from ballot fraud.

Accordingly, we request that your office provide notice to each respective county clerk that these two proposed initiatives are invalid on their face. The county clerks should not be expending public resources to process signatures on a proposed initiative that is wholly deficient. Plainly, the number of signatures that the proponents purport to have collected is irrelevant, since the Affidavits are so fundamentally deficient and create the appearance of ballot fraud. Please provide us with written confirmation no later than May 23, 2008 that no action will be taken to verify the signatures on these two petitions. If we do not receive such confirmation, we reserve the right to commence legal action to enforce the requirements of NRS 295.0575.

Sincerely,



Todd L. Bice

TLB:mar

cc:

Luke Puschnig
Bill Henry
Carie Torrence
Shauna Hughes
Cheryl Hunt

Brad Jerbic
Mark Zolaris
Mary Anne Miller
David Olson