

MICHAEL W. DYER
SANDRA G. LAWRENCE*
JAMES W. PENROSE*
FRANCIS C. FLAHERTY
THOMAS J. DONALDSON



JESSICA C. PRUNTY
PAUL D. COTSONIS
THOMAS A. WILCZEK
MICHAEL K. CHAUDHURI

OF COUNSEL
MARGARET A. TWEDT*
HON. MICHAEL E. FOND1*

* ALSO ADMITTED IN CALIFORNIA

August 1, 2008

Via Hand Delivery

Hon. Ross Miller
Nevada Secretary of State
101 North Carson Street, Suite 3
Carson City, Nevada 89701

ROSS MILLER
SECRETARY OF STATE
2008 JUL 32 P 4:45
CARSON CITY
NEVADA
Stokes

Re: Property Tax Reform Initiative For Nevada

Dear Secretary Miller:

As you are aware, our firm represents the Nevada State Education Association ("NSEA"). This letter is written to bring to your attention substantial defects in the circulator affidavits attached to the Property Tax Reform Initiative For Nevada ("Initiative") petition documents submitted for verification in Clark County and Carson City, which will invalidate numerous signatures on those documents, resulting in the Initiative not being able to qualify for placement on the ballot. We are bringing these defects to your immediate attention because, according to your website, August 6, 2008, is the last day for County Clerks/Registrars to submit their certification of the Initiative to your office after signature verification.

We have personally reviewed copies of many of the Initiative documents submitted in Clark County and Carson City.¹ So far, that review has revealed two types of defects in the circulator affidavits: (1) numerous instances where the circulator never executed the required affidavit; and (2) instances where the affidavit was executed improperly.

¹ We have requested, but have not yet received, copies of the petition documents from Washoe County. Upon receipt and review thereof, we will supplement this letter with any findings of affidavit defects as to those documents and any others that we are able to obtain in various counties across the State.

Defects in Clark County

Specifically, of the 1,045 signature pages examined to date in Clark County, we found that the circulator affidavit was not notarized on at least 832 pages. In addition, the vast majority of these affidavits were not signed by the purported circulator or anyone else. Copies of those pages, marked for identification by the Clark County Registrar of Voters as pages 2437-2756, 2920-2998, 3364-3612 and 5128-5528, are attached as Exhibit A to the original of this letter. Most, if not all, of these pages contain 6 or 7 signatures. Thus, at a minimum, approximately 4,992 signatures out of 6,270 signatures in the attached documents were not attested to under oath, as required by Nevada law. These signatures are therefore invalid and must be discounted from the total number of valid signatures of registered voters on the Clark County Initiative documents. We suspect that this defect occurs throughout the remaining signature pages submitted in Clark County, approximately 7,151 in number, but we have not yet been able to complete our review of these documents.

Defects in Carson City

We discovered that the same defect existed during our review of the Initiative documents submitted to the Carson City Clerk. Specifically, of the 330 pages submitted, the affidavits on 71 pages were not signed or notarized. Therefore, of the total raw count of 2061 signatures that were submitted in Carson City for verification, by our count, 518 were not properly attested to, and thus are invalid and must be discounted. Copies of the 71 pages in question are attached as Exhibit B.

Secondly, pages 39 through 43 of the Carson City Initiative documents, containing a total of 33 signatures, are also defective because the affidavits were improperly executed. A copy of those pages are attached hereto as Exhibit C. In these instances, an individual identified as Sheila Ward signed the affidavits as the circulator, however, the name and address of an individual identified as Gena Plummer is written into the affidavit in the space provided for the circulator's name and address. To compound this deficiency, Gena Plummer then notarized the affidavit. Either Gena Plummer is the circulator, and notarized the affidavit after she circulated the document, which would render the affidavit void under Nevada law,² or Sheila Ward circulated the document, but improperly executed the affidavit. The net effect of either deficiency is to invalidate an additional 33 signatures in Carson City.

² NRS 240.065 provides in pertinent part that "(1) [a] notary public may not perform a notarial act if: (a) [h]e executed or is named in the instrument acknowledged or sworn to[.]"

Applicable Law

There is no doubt that adherence to the requirements governing circulator affidavits is strictly required in Nevada.

As NRS 295.0575 provides, in pertinent part:

Each document of a petition *must* have attached to it when submitted an affidavit executed by the circulator thereof 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.

(Emphasis added).

NAC 295.020 also provides, in pertinent part:

(2) If a petition for an initiative or referendum consists of more than one document, each document *must*, in addition to any other requirements, contain the full text of the proposed measure and:

...

(b) Have attached to it, when filed, an affidavit signed by the person who circulated the document in substantially the following form:

STATE OF NEVADA

COUNTY OF _____

I, _____ (print name), being first duly sworn under penalty of perjury, depose and say: (1) that I reside at _____ (print street, city and state); (2) that I am 18 years of age or older; (3) that I personally circulated this document; (4) that all signatures were affixed in my presence; (5) that I believe each person who signed was at the time of signing a registered voter in the county of his residence; (6) that the number of signatures affixed thereon is _____; and (7) that each person who signed had an opportunity before signing to read the full text of the act or resolution on which the initiative or referendum is demanded.

Signature of circulator

Subscribed and sworn to or affirmed
before me this day of,

Notary public or other person licensed
to administer an oath

...

Of course, for any affidavit to have any effect, it must be sworn to before a person authorized to administer oaths in the State of Nevada. *See* NRS 199.190 (“The making of a deposition, certificate or *affidavit* shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true.”) (Emphasis added.) Indeed, in the specific context of statewide initiative petitions, for a verifying affidavit to be valid under Article 19 §3 of the Nevada Constitution, it must be notarized.³

As the Nevada Supreme Court has held, “the content of the verifying affidavit must satisfy designated requirements, and it must state the truth[. t]his principle is sound because the assurances that legal requirements have been met rests upon the verity of the affidavit.” *Lundberg v. Koontz*, 82 Nev. 360, 366, 418 P.2d 808, 810 (1966). When presented with a factual situation very similar to the one at issue here, the Nevada Supreme Court invalidated a recall petition on the basis of the violation of the statutory requirement that the circulator had to sign each petition document and attest to that fact, but the circulator had signed only one petition document for all of the different pages to which he was attesting. *Fiannaca v. Gill*, 78 Nev. 337, 372, P.2d 683 (1962). As the Court stated, “[w]e cannot accept petitioners’ contention that where a number of copies are attached together and one signer of one copy verifies that copy, this satisfies the requirements of the statute as to all such joined copies.” *Fiannaca*, at 343, 685-686.

Also, in regard to the “number of signature” requirement, the “failure of a subscribing witness to set forth the number of signatures invalidates the entire page,[because of the potential for] unauthorized addition of signatures after the individual sheets have been attested to by the subscribing witness.” *Esse v. Chiavaroli*, 71 A.D.2d 1046, 420 N.Y.S.2d 798 (N.Y. 1979). In *Rust v. Lucas County Bd. of Elections*, 841 N.E.2d 766, 768 (Ohio 2005), the court held that the requirement that the circulators statement specify the number of signatures contained in the

³ Admittedly, the portion of Nev. Const., Art. 19 §3 requiring that the affidavit be made by a registered voter was held to be unconstitutional in *Heller v. Give Nevada a Raise*, 120 Nev. 481, 96 P.3d 732 (2004). Nonetheless, that section still requires that an “affidavit shall be executed before a person authorized by law to administer oaths in the State of Nevada.” While the Legislature is certainly entitled to prescribe the contents of the affidavit, as it did in NRS 295.0575, this provision of the Constitution shows that any affidavit used to verify initiative petition signatures must be made under oath to be valid.

document is a material requirement, that if not strictly complied with, invalidates the entire petition. Similarly, in *Ohio ex re. Applegate v. Franklin County Bd. Of Elections*, 2008 U.S. Dist. LEXIS 8886 (S.D. Ohio Feb. 6, 2008), the court found the circulator's failure to certify less than the actual number of signatures on the petition to be unlawful and held the invalidation of the entire petition to be proper.

Taking together the clear edict from the Nevada Supreme Court that affidavit requirements must be strictly adhered to, the mandatory language of NRS 295.0575 and Article 19 § 3 of the Nevada Constitution, and the case law for other jurisdictions, there is no doubt that the minimal requirement that a circulator affidavit be signed and notarized must be strictly complied with. If it is not, invalidation of the affected signatures is required. Such an interpretation is entirely consistent with the position taken by you, in exercising your enforcement authority under NRS 293.124 as the Chief Officer of Elections, when you determined that the affidavit requirement of NRS 295.0575 must be strictly adhered to in assessing the legal sufficiency of the Education Enhancement Act, Funding Nevada's Priorities Act, and Taxpayer Protection Act initiatives. A copy of your May 27, 2008, letter to Mr. Scott Scherer, setting forth your position on this issue, is attached as Exhibit D. Accordingly, the failure of a petition circulator to attest to the number and validity of *each* signature collected is a complete failure to comply with Nevada law, which cannot be excused as to those pages to which the circulator has not attested.

Legal Ramifications of the Defects Present Here

Compliance with the notarization requirement is not difficult, and the abject non-compliance demonstrated here cannot be excused. As set forth above, the vast majority of the affidavits we have reviewed were never executed under oath, and thus, there is no valid attestation as to any of the requirements set forth by NRS 295.0575. *See* Exhibits A and B. Moreover, the signatures on any page where the affidavit was improperly executed, such those in Exhibit C, cannot be deemed valid. It goes without saying that these deficiencies will also invalidate the results of the signature verification in any county that conducted random sampling.

We believe that these fatal defects in the affidavits will disqualify the Initiative in both Carson City and Clark County. In Carson City, the Initiative must receive at least 1,525 valid signatures. *See* Secretary of State 2008 General Election Voter Turnout Form, a copy of which is attached hereto as Exhibit E. However, by our count at least 551 of the 2061 signatures collected have not been properly attested to and are therefore void. Thus, the Initiative has failed to obtain at

least 10 percent of the required signatures in Carson City.⁴

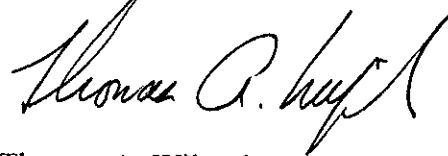
As for Clark County, from the signature pages we have examined to date, it is clear that the random sampling results cannot be an accurate reflection of the signature validity rate. As we have stated, at least 80 percent of the signatures reviewed are invalid due to the defective affidavits. This fact should, at a minimum, trigger signature-by-signature verification of the Initiative documents in Clark County.

We have every confidence that you will enforce Nevada law and determine that these signatures must be invalidated for failure to comply with the affidavit requirement. Accordingly, we request that your office provide notice to each respective county clerk or registrar of voters to conduct a signature-by-signature verification of the Initiative documents, with the directive that any signature which has not been properly authenticated must be invalidated in accordance with Nevada law.

If you have any questions or concerns, please do not hesitate to call.

Sincerely,

DYER, LAWRENCE, PENROSE
FLAHERTY & DONALDSON



Thomas A. Wilczek

⁴ It goes without saying that this number is not discounting any other signature that may be invalid as not being the signature of a Carson City registered voter, which will very well lower the validity rate even further.