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ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steven Zaiser, as Chairman of the Sponsoring Committee for the Statutory Initiative Relating to the North Dakota Medical Marijuana Act, Applicant, v. Alvin A. Jaeger, as Secretary of State of North Dakota, Respondent.	**Supreme Ct. No.**

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION UNDER ORIGINAL JURISDICTION

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STATEMENT OF THE CASE

Respondent Alvin A. Jaeger, as Secretary of State of North Dakota (Secretary Jaeger), accepts the Statement of the Case in the Brief in Support of Application for Writ of Injunction Under Original Jurisdiction (Application Br.), as supplemented below.

In accordance with N.D.C.C. § 16.1-01-10, the Secretary of State's office reviewed the petitions submitted by the Sponsoring Committee to determine their sufficiency. Staff at the Office of Secretary of State looked at every signature on the petitions. The review of purported signatures on several of the petitions raised serious suspicions as to the validity of the signatures. Ex. 1 at 1. Some of the concerns include: page after page contain similar looking signatures all in blue ink; every line is filled in completely; every name is printed neatly; there are no abbreviations or illegible portions; and none of the signatories is from out of state. This is not typical of a legitimate petition, where there is different colored ink, different styles of writing, abbreviations, illegible writing, etc.[1]

Secretary Jaeger requested the assistance of the North Dakota Office of Attorney General in investigating possible fraud regarding the petitions. Id. The Bureau of Criminal Investigation (BCI) conducted an investigation. See Exs. 1, 2, 3, 4, 5, 6, 7, 8. The purpose of the investigation was two-fold: (1) investigate potential criminal activity; and (2) assist Secretary Jaeger in his responsibility to verify the legitimacy of the signatures on the petition.

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[1] Secretary Jaeger believes the Court's review of the original forged petitions would be enlightening and would assist it in reviewing his determination.

The investigation revealed that seven[2] petition circulators forged signatures on the petitions (forged petitions). See Ex. 2 at 2; Ex. 3 at 2; Ex. 4 at 2; Ex. 5 at 2; Ex. 6 at 2; Ex. 7 at 2; Ex. 8 at 2. One circulator forged every signature on the petitions he submitted. Ex. 6 at 2. Other petitions purportedly contained some valid signatures. The sworn affidavits on the petitions are false.[3] See Ex. 2 at 2; Ex. 3 at 3; Ex. 4 at 2; Ex. 5 at 2; Ex. 7 at 3; Ex. 8 at 2.

In accordance with N.D.C.C. § 16.1-01-10, the Office of Secretary of State sent postcards to 2,000 names randomly selected from the petitions.[4] The postcards were sent to names on both the forged petitions and other petitions. Not all of the postcards have been returned.

The postcards include the following questions, followed by a spot to mark "Yes" or "No", and a place for the person to sign, date, and put a daytime phone number:

1) On or after June 4, 2012, did you sign your name to a petition relating to the North Dakota medical marijuana act?

2) To be eligible to sign a petition a signer must (a) be a citizen of the United States; (b) be at least 18 years of age; (c) have lived in a

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[2] Seven, not six, circulators admitted forging signatures on petitions. Thus, the number of signatures invalidated due to forgery is 6,845, not 6,045.

[3] The Sponsoring Committee appears to concede that at least some of the signatures on the petitions were false, and hence must also concede that the accompanying affidavits of the circulators were false.

[4] The Sponsoring Committee asserts the Secretary of State is always required to conduct the random sampling of signatures under N.D.C.C. § 16.1-01-10. Secretary Jaeger disagrees that he is required to conduct a random sampling of signatures when the total number of signatures falls below the required number for a measure to be placed on the ballot. To conduct the random sampling of signatures under those circumstances would be a futile act. However, despite this position, Secretary Jaeger conducted the random sampling of signatures. The postcards returned to date confirm the faulty addresses and forged signatures on the forged petitions.

precinct for at least 30 continuous days and (d) not have otherwise lost his/her right to vote. Did you meet all the above requirements on or before the day you signed the petition?

3) Did you sign the petition in the presence of a petition circulator and to the best of your knowledge was that circulator a North Dakota resident 18 years or older?

Ex. 9.

To date, 196 returned postcards had "Yes" marked in response to all questions. None of these postcards were returned from names listed on the forged petitions.

To date, 237 postcards have been returned as undeliverable. Of the 237 postcards returned as undeliverable, 149 were mailed to names on forged petitions. The number of returned postcards already far exceeds the number typically returned, and will likely increase with time.

To date, 73 returned postcards had "No" marked in response to at least one of the questions. 50 of those 73 were returned from names listed on the forged petitions.[5]

On September 10, 2012, Secretary Jaeger certified the measures that will appear on the ballot for the November 6, 2012 General Election. Ex. 10.

ARGUMENT

The Court has mandatory original jurisdiction to review decisions of the Secretary of State with regard to initiative and referendum petitions. N.D. Const.

[5] Because of the short time in which to submit this brief, and because the key issue in this case is whether Secretary Jaeger can properly reject petitions with admitted false circulator affidavits, not application of N.D.C.C. § 16.1-01-10, an affidavit has not been prepared and submitted regarding the mailed and returned postcards. If requested by the Court, one will be prepared.

art. III, §§ 6, 7; see also RECALLND v. Jaeger, 2010 ND 250, ¶ 6, 792 N.W.2d 511; Husebye v. Jaeger, 534 N.W.2d 811, 813 (N.D. 1995); Mun. Sers. Corp. v. Kusler, 490 N.W.2d 700, 701-02 (N.D. 1992).

I. The Application is untimely.

State law requires the Secretary of State certify the ballot fifty-five days before the election. See N.D.C.C. § 16.1-01-07; N.D.C.C. § 16.1-12-04. Even under the best of circumstances, certification fifty-five days before the general election only provides a small window for state and county officials to build, proof, print, and approve ballots for an upcoming election. This is especially true when one considers that both federal and state law require ballots to be ready for distribution by the forty-sixth day before the election. See 42 U.S.C. 1973ff-1; N.D.C.C. § 16.1-07-23. This is in part so ballots can be distributed to military and overseas voters. The forty-sixth day before the election is Friday, September 21, 2012.

On September 10, 2012, Secretary Jaeger certified the measures that will appear on the ballot for the November 6, 2012 General Election. Ex. 10.

Section 6 of Article III provides that if the sufficiency of a petition is being reviewed by this Court "at the time the ballot is prepared, the secretary of state shall place the measure on the ballot . . . ." N.D. Const. art. III, § 6. Section 7 of Article III similarly provides that if the Secretary of State's decision regarding a petition "is being reviewed at the time the ballot is prepared, he shall place the measure on the ballot . . . ." N.D. Const. art. III, § 7.

Sections 6 and 7 do not apply to the present case because the ballot is

already prepared. The ballot was complete when Secretary Jaeger certified it on September 10, 2012, or, at the latest, when Secretary Jaeger was statutorily required to certify it on September 12. Significant chaos will occur and costs be incurred if Secretary Jaeger is now required to certify a new ballot. Moreover, it is extremely unlikely federal and state statutory deadlines can be met if Secretary Jaeger is now required to certify a new ballot and state and county officials are required to build, proof, print, and approve the new ballots.

To remove any uncertainty regarding whether the Medical Marijuana Act measure must be placed on the General Election ballot, Secretary Jaeger requests the Court expeditiously exercise its mandatory original jurisdiction and address and resolve the Sponsoring Committee's Application.

II. Secretary Jaeger has discretion in determining the sufficiency of the petitions.

The Secretary of State has the constitutional and statutory duty to pass upon the sufficiency of the petitions. See N.D. Const. art. III, § 6; N.D.C.C. § 16.1-01-10. "Signatures determined by the secretary of state to be invalid may not be counted . . . ." N.D.C.C. § 16.1-01-10. One purpose of the Secretary of State's review of petitions is to prevent fraud and abuse and maintain the integrity of the initiative process. See N.D.A.G. 95-L-201; N.D.A.G. 82-60.

Secretary Jaeger exercised discretion in reviewing and passing upon the sufficiency of petitions. This Court has explained:

> The Constitution does not prescribe the procedure for the Secretary of State to follow when petitions are presented to him. Just what he shall do in examining the petitions or how he shall determine the sufficiency of the petitions is not specifically set out. So the Constitution places upon the Secretary of State the duty of

> determining, in the first place, whether the petitions conform to the requirements of the Constitution and the laws of this State. In the discharge of such responsibility placed upon him, the Secretary of State must exercise a certain amount of discretion.

Hernett v. Meier, 173 N.W.2d 907, 918 (N.D. 1970); see also State v. Hall, 186 N.W. 284 (N.D. 1921) (stating the Secretary of State exercises discretion concerning the sufficiency of recall petitions).

III. Secretary Jaeger's exercise of discretion in determining the sufficiency of petitions is entitled to deference.

To the extent Secretary Jaeger exercised discretion in reviewing and passing upon the sufficiency of the petitions, his exercise of discretion is entitled to deference. To the extent Secretary Jaeger's determination involved a question of law, the Court's review is de novo.

In Hernett, the Court applied the abuse of discretion standard when reviewing the Secretary of State's determination of sufficiency of petitions. It stated: "Can we say that he has abused this discretion in passing upon the petitions here under consideration? We do not believe that an abuse of discretion has been shown." 173 N.W.2 at 918

The Sponsoring Committee's reliance on McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979), for the proposition Secretary Jaeger's determination is not entitled to deference is misplaced. McCarney involved a ministerial act, not a use of discretion. 286 N.W.2d at 783. However, as plainly stated in Hernett, Secretary Jaeger exercised "a certain amount of discretion" when determining the sufficiency of petitions. 173 N.W.2d at 918. It is that exercise of discretion that is entitled to deference.

In McCarney, the Court did address the burden of proof when dealing with questions of law. It wrote: "We do not agree that there is a burden of proof upon anyone in this case where the principal question is entirely one of law, and to the extent that there are disputes as to the facts, they are not material to our determination." 286 N.W.2d at 783. Thus, to the extent this Court's review of Secretary Jaeger's determination involves a question of law, the review is de novo and neither party has the burden of proof.

Finally, contrary to the Sponsoring Committee's assertion, Secretary Jaeger does not have the burden to prove the petitions are insufficient. Article III, § 6 provides, in part: "If proceedings are brought against any petition upon any ground, the burden of proof shall be upon the party attacking it." N.D. Const. art. III, § 6. Secretary Jaeger has not brought an action against the petitions, and is not attacking them; rather, the Sponsoring Committee has brought an action challenging Secretary Jaeger's determination. As previously shown, to the extent Secretary Jaeger's determination involved the exercise of discretion, the Sponsoring Committee has the burden to prove he abused that discretion. To the extent the determination involved a question of law, the Court's review is de novo and neither party has the burden of proof.

IV. Secretary Jaeger properly rejected the forged petitions because they do not conform to the constitutional and statutory requirements.

Secretary Jaeger properly exercised his discretion and applied the law in determining the petitions do not conform to the requirements of the Constitution and the laws of this State.

Section 3 of Article III provides the petition circulators "shall swear thereon

that the electors who have signed the petition did so in their presence." Similarly, N.D.C.C. § 16.1-01-09(3) provides that each petition "must have attached an affidavit executed by the circulator" which swears

> that each signature contained on the attached petition was executed in [the circulator's] presence; and that to the best of [the circulator's] knowledge and belief each individual whose signature appears on the attached petition is a qualified elector; and that each signature contained on the attached petition is the genuine signature of the individual whose name it purports to be.

The constitutional and statutory requirement of the circulator's sworn affidavit is mandatory. See N.D. Const. art. III, § 1 (providing the provisions of Article III "are mandatory"); James Valley Grain, LLC v. David 2011 ND 160, ¶ 12, 802 N.W.2d 158 ("Use of the words 'must' and 'shall' in a statute normally indicate a mandatory duty.").

If a petition does not meet a substantive, mandatory requirement, the Secretary of State properly rejects the petition and the signatures thereon. That is what Secretary Jaeger did in this case.

The circulators of the forged petitions, after being mirandized, acknowledged to a law enforcement official that their mandated sworn affidavits were false. They recanted all aspects of their affidavits, even stating they could not and would not sign an affidavit indicating a single signature was legitimately obtained, i.e., that the signature was executed in their presence, that the individual whose signature appears on the petition is a qualified elector, and that the signature is the genuine signature of the individual whose name it purports to be. See Ex. 2 at 2; Ex. 3 at 3; Ex. 4 at 2; Ex. 5 at 2; Ex. 7 at 3; Ex. 8 at 2.

The circulator affidavit is a substantive constitutional and statutory

requirement. It was within Secretary Jaeger's discretion to reject petitions that lacked the constitutional and statutorily required circulator affidavit.

In Dawson v. Meier, 78 N.W.2d 420 (N.D. 1956), the Court determined the signatures on a petition could not be counted where the jurat on the petition bore no signature. Id. at 426. If signatures on a petition cannot be counted (i.e., the entire petition is invalidated) when a circulator does not sign the affidavit, signatures on a petition also cannot be counted (i.e., the entire petition is invalidated) when a circulator falsely signs the affidavit and admits the petition contains forged signatures.

In Hernett, the Court stated it "became [the Secretary of State's] duty to refuse to count" signatures when "the date of signing given by electors on certain petitions was subsequent in time to the date" the circulator signed the affidavit. 173 N.W.2d at 914. It explained those "signatures would of course be invalid and could not be counted," even though the date of an acknowledgement does not affect the validity of the document and "is not regarded as a material fact." Id. If it is the Secretary of State's duty not to count signatures on a petition based on the circulator's affidavit date, which does not affect the validity of the document, how much more is it his duty (or at least within his discretion) not to count signatures on a petition when the affidavit is admittedly false, which does affect the validity of the document?

That a false affidavit is worse than no affidavit at all, and that both invalidate the petition, was explained in State ex re. Gongwer v. Graves, 107 N.E. 1018 (Ohio 1913). The court wrote:

It must be conceded that any part of a petition to which no affidavit whatever is attached would have to be rejected in toto. The Constitution requires an affidavit to each part of a petition, and without that affidavit it would be as worthless as blank paper, no matter if every signature thereon were genuine. An affidavit proven to be willfully, corruptly, and intentionally false is worse than no affidavit at all, for it brands the whole part of the petition to which it is attached with the indicia of fraud. If no affidavit is fatal to the whole petition or any separate part thereof, although the lack of such affidavit is due to innocent mistake, oversight or inadvertence of the person circulating the same, and if all the signatures appearing thereon must be rejected without reference to whether they are genuine or not, upon what rule can it be said that it is the duty of the secretary of state, where it appears that the affidavit to any part of a petition is willfully, corruptly, and intentionally false, to determine upon other evidence the genuineness of signatures appearing thereon and, if he finds that there are some genuine signatures upon that particular part, to include them in the count? Such a holding would be an invitation to commit fraud and perjury.

It is not sufficient that some of the signatures on some of the parts of a petition are genuine, nor is it absolutely necessary to the validity of the petition or any part thereof that every signature thereon should be genuine; but it is absolutely necessary to the validity of the petition or any part thereof that the circulator, when he makes affidavit certifying the signatures on these petitions, should believe that he is stating the truth. If it later appear[s] that some one has imposed upon him and signed or forged the name of another, the circulator may still believe in the truth of his affidavit and it will support every genuine signature upon it, and only the ones not genuine will be stricken therefrom. But if the circulator knew that a signature appearing on such part of a petition is not genuine, if he knew that such signature was not written on the petition in his presence, if he knew that the person whose signature it purports to be was not an elector, if he knew that the person signing said petition did not sign it with knowledge of its contents, yet, notwithstanding his knowledge, he willfully, corruptly, and intentionally makes a false and perjured affidavit to the contrary, then such affidavit is worthless, and the petition or part of a petition to which it is attached does not fill the requirement of the Constitution, and the genuine signatures thereon cannot be counted for the reason that that part of the petition lacks the affidavit required by the Constitution.

Id. at 1022 (emphasis added)

The Sponsoring Committee asserts Secretary Jaeger must accept the signed affidavits and consider the petitions to be proper, despite the circulators' subsequent acknowledgments their sworn statements were false. To do so would elevate form over substance. After being mirandized, while being questioned by a law enforcement official as part of a criminal investigation, each circulator recanted his sworn affidavit and admitted signatures on the petitions were not the genuine signatures of the individuals whose names they purport to be. The circulators' statements, made to a law enforcement agent after being mirandized, admitting criminal activity, are reliable. Secretary Jaeger's acceptance of the circulators' statements to a law enforcement official did not go beyond the "certain amount of discretion" he is entitled to exercise when reviewing and passing upon the sufficiency of petitions. Hernett, 173 N.W.2d at 918.

The purpose of the circulator affidavit is to provide evidence of the genuineness of the attached signatures. When the circulators affidavit is admittedly false, the evidence of the genuineness of the attached signatures no longer exists. Secretary Jaeger cannot count signatures on petitions where the circulator did not sign the jurat, or where the circulator wrote the wrong date. See Dawson, 78 N.W.2d at 420, 426; Hernett, 173 N.W.2d at 914. To require him to count signatures on petitions where the affidavit was falsely signed "would improperly allow form to triumph over substance." In re Adoption of S.E., 2012 ND 168, ¶ 15. Such a holding "would elevate form over substance in the worst possible way, and it would unduly confine the intent of the statute." State v.

Albaugh, 571 N.W.2d 345, 350-51 (N.D. 1997).

Secretary Jaeger's determination to exclude the entire petitions, once he found the affidavits were false, is supported by substantial case law. In Parks v. Taylor, 678 S.W.2d 766, 768 (Ark. 1984), the court held that a judge who found affidavits false "was not wrong as a matter of law in excluding entirely the petitions of those affiants."

Brousseau v. Fitzgerald, 675 P.2d 713 (Ariz. 1984), thoroughly addressed this issue of the validity of falsely verified petitions. The court wrote:

> Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.

Id. at 715. The court then stated that "[c]ases in several jurisdictions support the proposition that fraud by the circulator voids the petitions associated with the fraud." Id. After citing a host of cases, the court concluded:

> The authorities agree that statutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law. . . . We believe that there is a real difference between mere omissions or irregularities and fraud.

Id. at 716. The court then held "that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot." Id.

In re Glazier, 378 A.2d 314, 315–16 (Pa. 1977), the Pennsylvania

Supreme Court addressed the legality of petitions where the attesting individual did not obtain the signatures on the petition. Id. at 315. Stating "there has been a gross perversion of [the] statutory mandate," not only did the court invalidate the petitions, it held the petitions could not be rehabilitated by amendment. Id. at 315-16. It found "the disputed sheets to be invalid, thus invalidating the signatures contained thereon and reducing the number of valid signatures to below the minimum number required." Id. at 316.

Initiative petition signatures were invalidated in Montanans for Justice v. State ex rel. McGrath, 146 P.3d 759 (Mont. 2006). In reaching its decision, the court concluded "that the filing of a false affidavit by a signature gatherer is 'more than a technicality' in that it destroys the primary procedural safeguard for ensuring the integrity of the signature gathering process." Id. at 777.

In Citizens Committee for D.C. Video Lottery Terminal Initiative v. District of Columbia Board of Elections and Ethics, 860 A.2d 813, 813 (D.C. 2004), the court held the Board of Elections and Ethics was entitled to strike petition sheets generated based on fraud. As in this case, the fraud included the admitted false signing of circulator affidavits. Id. at 814, 815. The court upheld the Board's determination that striking the petition sheets "was necessary to preserve the integrity of the ballot process." Id. at 817. It wrote: "In cases of proven false signing of affidavits, the Board thus has undeniable authority to strike whole petition sheets associated with that impropriety." Id. at 818; see also Sturdy v. Hall, 143 S.W.2d 547, 552 (Ark. 1940) (petitions rejected where circulators made false affidavits); Knutson v. Dep't of Sec'y of State, 954 A.2d 1054, 1062 (Me.

2008) (acknowledging "the *presence* of fraud will invalidate petitions wholesale"); Me. Taxpayers Action Network v. Sec'y of State, 795 A.2d 75, 80 (Me. 2002) ("As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an 'indispensable accompaniment of a valid petition,' and, accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative and referendum process."); McCaskey v. Kirchoff, 152 A.2d 140 (N.J. Super. Ct. App. Div. 1959) (holding false affidavit rendered petition invalid); Lombardi v. State Board of Elections, 386 N.Y.S.2d 718 (N.Y. App. Div. 1976) (invalidating two entire sheets of signatures when they were "permeated with fraud"); State ex rel. Waltz v. Michell, 177 N.E. 214, 215-16 (Ohio 1931) (finding rejection of entire petitions proper when affidavit of circulator found to be untrue); Clawson v. Wilgus, 160 N.E.2d 294 (Ohio Ct. App. 1957) (holding petition invalid where the affidavit was not in accord with the facts).

It was within Secretary Jaeger's discretion to determine the fraudulent petitions did not meet the constitutional and statutory requirements because the circulators' affidavits were false, and to invalidate the entire petitions because of the false circulator affidavits.

V. It was within Secretary Jaeger's discretion to determine the signatures on the forged petitions do not conform to the constitutional and statutory requirements.

With regard to electors who sign petitions, Section 3 of Article III provides "[e]ach elector signing a petition shall also write in the date of signing and his post-office address." N.D.C.C. § 16.1-01-09(2) provides:

> An individual may not sign any initiative or referendum petition circulated pursuant to article III of the Constitution of North Dakota unless the individual is a qualified elector. An individual may not sign any petition more than once, and each signer shall add the signer's complete residential address or rural route or general delivery address and the date of signing. Every qualified elector signing a petition shall do so in the presence of the individual circulating the petition.

It almost goes without saying that these constitutional and statutory requirements can only be met if an elector does in fact sign the petition. In other words, signatures forged by a circulator or other individual cannot meet the constitutional and statutory requirements. Accordingly, forged signatures are not valid and may not be counted when determining whether the necessary signatures were obtained to place the measure on the ballot.

The circulators of each of the rejected petitions admitted the petitions contain forged signatures. See Ex. 2 at 2; Ex. 3 at 2; Ex. 4 at 2; Ex. 5 at 2; Ex. 6 at 2; Ex. 7 at 2; Ex. 8 at 2. The number of forged signatures on the petitions varies.

One circulator admitted that "every signature he turned in for the North Dakota Medical Marijuana Initiative was a forged signature." Ex. 6 at 2. He stated "he did not obtain one (1) legitimate signature on his petitions." Id. That circulator turned in over 30 pages of signatures. Ex. 3.

The other petitions purportedly contained some legitimate signatures. One circulator "stated that most of the signatures that he turned in for the North Dakota Medical Marijuana Initiative were forged signatures." Ex. 5 at 2. Another estimated 65-70% "of the signatures he turned in on his petitions were forged signatures." Ex. 8 at 2. Another circulator "stated that he had no idea the

number of signatures he forged versus the number of legitimate signatures he obtained." Ex. 3 at 2. Another indicated he "could not come up with an exact percentage, but stated that over half (1/2) of the signatures he turned in were forged signatures." Ex. 7 at 2. Yet another "estimated that about half (1/2) the signatures he turned in were legitimately obtained signatures." Ex. 4 at 2. And another circulator indicated he "could not come up with an estimate of what percent of the signatures he turned in were legitimate versus forged, but did indicate that he thought he turned in more legitimate signatures tha[n] forged signatures." Ex. 2 at 2.

The circulators admitted that from approximately half to every signature on the petitions were fraudulently obtained signatures. The circulators also admitted they could not identify, with any level of confidence, which signatures were legitimate signatures. See Ex. 2 at 2; Ex. 3 at 3; Ex. 4 at 2; Ex. 5 at 2; Ex. 7 at 3; Ex. 8 at 2.

Staff at the Office of Secretary of State looked at every signature on the petitions. Based on their review of each signature on the forged petitions, staff believes the circulators substantially underestimated to the BCI agent the number of forged signatures.

In light of the fact the circulators could not identify, with any level of confidence, a single legitimate signature on their petitions, and in light of his staff's review of the signatures, Secretary Jaeger was within his discretion to reject all of the signatures on the forged petitions.

Citing Hernett, and noting the presumption signatures are genuine, the

Sponsoring Committee argues Secretary Jaeger is required to accept all signatures on the forged petitions until he proves they were forged. But any presumption of validity was overcome when the circulators acknowledged their affidavits were false and that from half to all of the signatures on the forged petitions were forged. As explained by one court, "'when it is shown that the affidavit attached to a particular petition is false, that petition loses the presumption of verity.'" Parks, 678 S.W.2d at 768 (quoting Sturdy, 143 S.W.2d at 547).

The Montana Supreme Court also addressed the presumption of validity, and wrote:

> In this regard, it has long been established that initiative petitions signed and filed in accordance with applicable law are presumptively valid. However, that presumption of validity may be rebutted and overcome by affirmative proof of willful fraud or procedural noncompliance. Once evidence is presented to rebut the presumption of validity, it is incumbent upon the party endorsing the validity of the signatures—in this case the Proponents—to come forward with evidence to rebut or counter the damaging evidence.

Montanans for Justice, 146 P.3d at 775 (citations omitted); see also Mays v. Cole, 289 S.W.3d 1, 7 (Ark. 2008) ("If it is shown that the affidavit attached to a particular petition is false, that petition loses the presumption of verity. The burden will then shift to the proponent of the petition to establish the genuineness of each signature."); Harris v. City of Bisbee, 192 P.3d 162, 169 (Ariz. Ct. App. 2008) (stating "failure to comply strictly with the statute's requirements destroyed

the presumption that the signatures on the petitions were valid").[6]

In Hernett, the issue was not the genuineness of the signatures or the truthfulness of the circulators' affidavits. "Nowhere in these proceedings do the petitioners contend that the signatures which they claim are invalid are not the genuine signatures of the persons whose names they purport to be." 173 N.W.2d at 911. There was no allegation, evidence, or admission that the circulators had personally forged or had other individuals forge signatures on the petitions, and then falsely signed the affidavit. The presumption of validity stated in Hernett does not exist when the circulator acknowledges his affidavit attached to the petition is false, that the petition contains forged signatures, and that the circulator is unable to attest to the validity of a single signature on the petition.

It was within Secretary Jaeger's discretion not to count the signatures on petitions with false circulator affidavits.

VI. Public policy dictates that the forged petitions be determined insufficient.

"The people's power to initiate or refer legislation is a fundamental right . . . ." Thompson v. Jaeger, 2010 ND 174, ¶ 11, 788 N.W.2d 586. The "self-executing" and "mandatory" provisions of Article III, including the requirement that petition circulators swear "that the electors who have signed the petition did so in their presence," exist to safeguard the initiative and referendum powers. N.D. Const. art. III, § 3. "This statutory provision for the affidavit of a circulator who attests under penalty of perjury that the signer affixed his or her information

[6] The presumption was further rebutted when staff at the Office of Secretary of State examined each signature and found numerous indictors of forged signatures.

in the circulator's presence clearly addresses prevention of fraud in the petitioning process and is plainly intended to bolster the validity of the signature entries." Montgomery County Volunteer Fire-Rescue Ass'n v. Montgomery County Bd. of Elections, 15 A.3d 798, 807 (Md. 2011); cf. Dawson, 78 N.W.2d at 424 ("The statute was intended by the legislature to safeguard and facilitate the use of the initiative and referendum for the benefit of the people of the state by discouraging fraud and abuse and minimizing mistakes that might occur in the use of the right.").

There is a delicate balance between the voters' interest to have a measure on the ballot and the need to follow the law, avoid fraud, and maintain the integrity of the initiative process. A number of courts have addressed those competing public interests and found the integrity of the process and need to follow mandatory, substantive requirements of the law trump the interest of having a measure on the ballot.

For example, in Montanans for Justice, the court explained that "the filing of a false affidavit by a signature gatherer is 'more than a technicality' in that it destroys the primary procedural safeguard for ensuring the integrity of the signature gathering process." 146 P.3d at 777. Balancing the competing public interests, the court wrote:

> We acknowledge that many voters feel strongly that they should have the opportunity to vote on one or more of these initiatives, and that these people will feel disenfranchised by our decision. This is extremely regrettable. The fact remains, however, that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature. We can neither excuse nor overlook violations of these laws, for to do so here would confer free reign for others to

> do so in other matters. We must enforce the law as written and as the Legislature intended.

Id. at 778.

In Maine Taxpayers Action Network, the Maine Supreme Court also addressed the competing public interests. In doing so, it wrote:

> [I]t is evident that the circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator. In reviewing the signatures gathered by the circulators, the Secretary [of State] has the ability to verify . . . that a signing voter is actually registered and therefore permitted to vote. In contrast, the Secretary has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition. . . .
>
> . . . In addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures. As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an "indispensable accompaniment of a valid petition," and, accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative and referendum process.

795 A.2d at 80 (citations omitted).

The Pennsylvania Supreme Court invalidated petitions where the attesting individual did not obtain the signatures on the petition. It then strongly rejected the assertion the people's right to the initiative process overrides substantive procedural safeguards. It stated: "In the name of open elections and justice, we are asked to ignore the law or emasculate it. We will not do so . . . ." In re Glazier, 378 A.2d at 316.

The circulator affidavit is a substantive constitutional and statutory

requirement, not a mere technicality. Although the Court approaches "the scrutiny of the petition and the individual signatures thereon from a liberal viewpoint avoiding disqualification in many instances where compliance with the statute [is] questionable," it strikes "from the list of signers those signatures that clearly violate[] the constitution or the statute." Dawson, 78 N.W.2d at 424. In this case, the petitions and circulator affidavits clearly violate substantive constitutional and statutory requirements, requiring they be determined invalid. "The surest way to keep [the petitions] free from fraud is to let it be known that any taint of fraud will wholly invalidate them . . . ." Weisberger v. Cohen, 22 N.Y.S.2d 1011, 1012 (N.Y. Sup. Ct. 1940), aff'd, 22 N.Y.S.2d 835 (N.Y. App. Div. 1940)).

The power to initiate or refer legislation, and the integrity of the initiative process, is subverted when signatures are forged and circulators falsify their affidavits. To safeguard the initiative process, public policy dictates that forged signatures and petitions with falsified affidavits not be counted when determining whether enough signatures exist for a measure to be placed on the ballot.

CONCLUSION

Respondent Alvin A. Jaeger, as Secretary of State of the State of North Dakota, requests the Court expeditiously exercise its mandatory original jurisdiction and deny the Sponsoring Committee's Application for Writ of Injunction Under Original Jurisdiction.

Dated this 17th day of September, 2012.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steven Zaiser, as Chairman of the Sponsoring Committee for the Statutory Initiative Relating to the North Dakota Medical Marijuana Act, Applicant, v. Alvin A. Jaeger, as Secretary of State of North Dakota, Respondent.	)	**AFFIDAVIT OF SERVICE BY HAND-DELIVERY** **Supreme Ct. No.**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 17th day of September, 2012, I served the attached **BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION UNDER ORIGINAL JURISDICTION,** upon Zachary E. Pelham and Christina A. Sambor, by hand-delivering a true and correct copy thereof to the

following address:

Zachary E. Pelham
Christina A. Sambor
Pearce & Durick
314 East Thayer Avenue
PO Box 400
Bismarck, ND 58502-0400

Donna J. Connor

Subscribed and sworn to before me
this 17th day of September, 2012.

Jenney J. Schatz
Notary Public

JENNEY J. SCHATZ
Notary Public
State of North Dakota
My Commission Expires April 18, 2015