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ARGUMENT

[1] The North Dakota Constitution specifically reserves certain “powers to the people” of the State of North Dakota, including the power “to approve or reject legislative Acts, or parts thereof, by the referendum.” N.D. Const. art. III, § 1. A strong desire to protect these powers is evidenced by the express language of the constitutional provision: “Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.” N.D. Const. art. III, § 1.

[2] The role of the Secretary of State with respect to referred measures is clearly specified and limited in the North Dakota Constitution. Article III, § 2 provides in pertinent part: “The secretary of state shall approve the petition for circulation if it is in proper form and contains the names and addresses of the sponsors and the full text of the measure.” N.D. Const. art. III, § 2. The Secretary of State is required to act as an impartial administrator. If the petitions are proper in form and contain the requisite number of valid signatures, “the secretary of state shall place the measure on the ballot.” N.D. Const. art. III, § 6. In Municipal Services Corp. v. Kunzler, 490 N.W.2d 701, 706 (N.D. 1992) the North Dakota Supreme Court stated: “We hold that the Secretary’s constitutional responsibility under Article III, section 2, N.D. Const., to approve the form of a petition, is limited to ascertaining whether the petition complies with the statutory requirements for form and whether the petition contains impermissible, extraneous statements. In reviewing a petition for form, the Secretary must not be concerned with the merits of the petition or with the substances of its text.”

[3] “All decisions of the secretary of state in the petition process are subject to review by the Supreme Court in the exercise of original jurisdiction.” N.D. Const. art. III, § 7. For all these reasons, the role of the Secretary of State is limited in this action. The

Secretary of State is required to act as an impartial official performing a ministerial function when reviewing these petitions for a referred measure. If the petitions are proper in form and contain the requisite number of valid signatures, the Secretary of State is required to place the measure on the ballot. The Secretary of State is not to consider the substance or determine constitutionality of the referred measure.

[4] The power to enjoin the Secretary of State from placing a measure on the ballot rests solely with this Court in its exercise of original jurisdiction. N.D. Const. art. III, § 7.

I. The Secretary of State has Limited, Specifically Enumerated Duties with Respect to Passing on the Sufficiency of Petitions, and He Cannot Determine whether the Measure is Constitutional.

[5] The Secretary of State's responsibilities with respect to a referred measure are to approve the measure "as to form" and to "pass upon each petition." N.D. Const. art. III, §§ 2 & 6. The precise scope of the Secretary of State's duties when approving as to form and passing upon the sufficiency of a petition are limited by Article III of the North Dakota Constitution and sections 16.1-01-09 and -10 of the North Dakota Century Code.

[6] The duties vested in the Secretary of State grant him a limited role at the beginning of the referred measure process, after the sponsoring committee has drafted the measure, and at the end, after signatures are collected on petitions. See, e.g., N.D. Const. art. III, §§ 2 & 3; N.D.C.C. § 16.1-01-09. The sponsoring committee must first present the petition to the Secretary of State for approval as to form. N.D. Const. art. III, § 2. After the sponsoring committee collects the requisite number of signatures, the Secretary of State's limited duties include ensuring that each signature is dated, that the petition contains the names and addresses of the sponsors, and that there are a sufficient number

of valid signatures. N.D. Const. art. III, §§ 2 & 3 & 4; N.D.C.C. § 16.1-01-10; see also Thompson v. Jaeger, 2010 ND 174, ¶ 4, 788 N.W.2d 586 (rejecting petitions because they lacked the names and addresses of the sponsors); Dawson v. Meier, 78 N.W.2d 420, 424 (N.D. 1956) (rejecting undated signatures). This Court has described these duties as strictly “ministerial” in nature. Schmidt v. Gronna, 281 N.W. 57, 60 (N.D. 1938).

[7] The limited nature of the Secretary of State’s role does not include the authority to review the substance or merits of the measure. Municipal Servs. Corp., 490 N.W.2d at 705. “The secretary of state is not required nor permitted to determine whether the proposed measure is constitutional in substance. He is not required to hazard an opinion as to whether, if adopted, it would be subject to constitutional objections.” Preckel v. Byrne, 244 N.W. 781, 784 (N.D. 1932) (“Preckel II”). If the measure is approved by the voters, then the issue of whether the measure is constitutional is determined in the same manner as the constitutionality of an act of the Legislature is determined. Preckel v. Byrne, 243 N.W. 823, 825 (N.D. 1932) (“Preckel I”).

[8] As the North Dakota Constitution, the North Dakota Century Code, and this Court make clear, the Secretary of State’s neutral role is limited to passing only on the form and sufficiency of the petitions. It is beyond the Secretary of State’s authority to determine whether a particular measure is constitutional. Municipal Servs. Corp., 490 N.W.2d at 706; Preckel, 244 N.W. at 784.

II. This Court has Previously Enjoined the Secretary of State when there were Errors in Form or Errors in Signatures.

[9] The North Dakota State Board of Higher Education (the “Board”) cites to no errors in the form or sufficiency of the petitions, which are the only areas within the Secretary of State’s purview. Instead, the Board attacks the substance of the measure by

arguing that it is unconstitutional. The Secretary of State cannot determine constitutionality. Preckel, 244 N.W. at 784.

[10] The Board cites four cases as its authority for the proposition that this Court may enjoin the Secretary of State. The first of these cases, Lips v. Meier, 336 N.W.2d 346 (N.D. 1983), involved the approval of a petition that included extraneous material. The measure at issue sought to place the three North Dakota junior colleges under the control of the Board. Id. A “Statement of Intent” on the petition alleged that the effect of the measure would be to place “[t]he burden of financing these three institutions” on the State of North Dakota. Id.

[11] This Court explained that

were we to approve the placing of extraneous material not required by the constitution or statutes upon petitions or ballots relating to initiative, referendum or recall proceedings, would open the process to misleading information and even to mudslinging and partisan tactics. We are satisfied that this was not, and is not, the intent of our constitution. It was therefore improper for the secretary of state to decline to consider the extraneous statement contained in the Statement of Intent in this case. As we have indicated herein, he should have considered it and he should have disapproved it.

Id. at 347 (quoting Haugland v. Meier, 335 N.W.2d 809, 811 (N.D. 1983)). The Secretary of State’s duty in Lips was one that related to form and not substance. Id. at 348. This requirement that a petition not include extraneous material is now codified as one of the Secretary of State’s specifically enumerated duties. N.D.C.C. § 16.1-01-09(4).

[12] The issue in Lips had nothing to do with whether the particular measure was constitutional. 336 N.W.2d 346. The deficiency in Lips was one regarding the form of the petition. This matter of form issue was not much different from the requirement that a petition contain an enacting clause. Preckel, 243 N.W. at 825.

[13] The second case cited by the Board is the Dawson case. In the Dawson case, there were numerous errors with respect to the sufficiency of the petitions. Id. at 424-27. These errors included undated signatures, duplicative signatures, and signatures from individuals who were not North Dakota residents. Id. at 424-26. All of these errors relate to the issue of the sufficiency of the petitions and not the substance of them. None of the errors in Dawson related to whether the substance of the measure was unconstitutional.

[14] The third case cited by the Board is the Preckel I decision. In that case, the petition was deficient because it lacked an enacting clause. Preckel, 243 N.W. at 825. As with the Lips and Dawson cases, the issue in Preckel I was one regarding a defect in the form of the petition. Id.

[15] The last case cited by the Board is one that does not involve the Secretary of State. In State ex rel. Kusler v. Sinner, 491 N.W.2d 382 (N.D. 1992), the Governor scheduled a special election to fill a vacancy in the office of United States Senator. The Governor failed to take into account two statutes regarding deadlines for elections, which resulted in the date of the special election failing to provide candidates with enough time to file certificates of nomination and failing to provide enough time to make absentee voter ballots available. Id. at 386-87. Therefore, this Court ordered the date of the special election to be moved to accommodate all of the mandatory election deadlines. Id. at 389.

[16] The foregoing cases involved this Court stepping in to enjoin or direct government officials to act in accordance with their specifically enumerated duties. None of these cases involved whether the substance of the measure was constitutional. The Secretary of State is properly performing his duties with respect to this petition.

III. This Court is Endowed with Broad Authority to Direct the Secretary of State with Respect to Referral Petitions.

[17] The North Dakota Constitution grants this Court the authority to review all decisions made by the Secretary of State with respect to a petition and during the petition process. N.D. Const. art. III, §§ 6 & 7. In conducting this review, the North Dakota Supreme Court independently examines the actions of the Secretary of State to “determine whether he has complied with the law.” Municipal Servs. Corp., 490 N.W.2d at 702. This Court’s authority to review the Secretary of State’s decisions is “without limitation or qualification.” Id. at 701-02.


[18] This Court has broad authority to enjoin the Secretary of State from placing referred or initiated measures on the ballot. N.D. Const. art. III, §§ 6 & 7; Municipal Servs. Corp., 490 N.W.2d at 701-02. In addition to issuing an injunction when there are errors in form or errors with respect to signatures on petitions, this Court may also enjoin the Secretary of State when the particular matter is one that is not referable at all. Askew v. Meier, 231 N.W.2d 821, 823 (N.D. 1975).

[19] The Secretary of State is in the process of performing his limited review of the petitions for the referral measure on Senate Bill 2370. His ministerial role at this point is limited to determining whether there are a sufficient number of valid signatures. If there are a sufficient number of valid signatures, unless this Court directs otherwise, the Secretary of State must place the referred measure on the ballot.

CONCLUSION

[20] Assuming there are a sufficient number of valid signatures on the petitions, the Secretary of State lacks the authority to refuse to place this referred measure on the ballot. If the Secretary of State is to be restrained from placing the measure on the ballot, that direction must come from this Court.

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