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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

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Steven Zaiser, as Chairman of the Sponsoring Committee for the Statutory Initiative Relating to the North Dakota Medical Marijuana Act,	)	Supreme Court No. 20120346
Applicant,	)	
vs.	)	
Alvin A. Jaeger, as Secretary of State of North Dakota,	)	
Respondent.	)	

REPLY BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF INJUNCTION UNDER ORIGINAL JURISDICTION

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TABLE OF CONTENTS

ARGUMENT 1

A. Application Timely 1

B. Discretion Does Not Equal Disregarding the State Constitution 2

C. The Burden of Proof is Squarely on the Secretary 5

D. Public Policy Favors Placement of the Initiative on the Ballot 7

E. The North Dakota Constitution Does Not Apply Outside of North Dakota 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Blankenship v. Blackwell, 341 F. Supp. 2d 911 (S.D. Ohio 2004) 8

Brosseau v. Fitzgerald, 675 P.2d 713 (Ariz. 1984) 7

Dawson v. Meier, 78 N.W.2d 420 (N.D. 1956) 8

Hernett v. Meier, 173 N.W.2d 907 (N.D. 1970) 8

McCarney v. Meier, 286 N.W.2d 780, 792 (N.D. 1979) 3

State ex re. Gongwer v. Graves, 107 N.E. 1018 (Ohio 1913) 8

State ex rel. Citizens for Responsible Taxation v. Scioto County Board of Elections, 602 N.E.2d 615 (Ohio 1992) 8

State ex rel. Comm. for the Referendum of City of Lorain Ordinance No. 77-01 v. Lorain County Bd. of Elections, 774 N.E.2d 239 (Ohio 2002) 8

Williams v. District of Columbia Bd. of Elections and Ethics, 804 A.2d 316 (D.C. 2002) 8

North Dakota Century Code

N.D.C.C. § 16.1-07-23 1

N.D.C.C. § 16.1-01-07 2

N.D.C.C. § 16.1-01-10 3

N.D.C.C. § 16.1-01-10. 4

N.D.C.C. § 16.1-07-04 2

Constitutional Provisions

N.D. Const. Art. III, Sec. 3 5

N.D. Const. Art. III, Sec. 6 1

N.D. Const. Art. III, Sec. 7 2

Other Authorities

42 U.S.C. 1973ff-1(g)(2)(B)) 1

MICH. COMP. LAWS § 168.544c(9) 9

Ohio Rev. Code §§ 3501.38; 3501.39 8

The following is a reply that was hurriedly compiled given the timeframe. The Chairman relies on his prior brief and again requests argument over this important matter.

ARGUMENT

A. Application Timely

It is unclear whether the Secretary has requested a "hardship waiver" under N.D.C.C. § 16.1-07-23 (providing for hardship waiver exception to the statute in the event of a "legal contest" or "[t]he State Constitution prohibits the State from complying with such subsection" as set forth in 42 U.S.C. 1973ff-1(g)(2)(B)). Presumably, the Secretary has not attempted this as he has not even mentioned the possibility of this in his brief (even though the federal statute requires the election officer to request this exception "as soon as possible"). It would seem the Secretary's argument that he must have the ballots prepared and ready to go on Friday, September 21, 2012, is not entirely accurate. The Secretary cannot claim that he is *required* by statute to have the ballots prepared this Friday, September 21, 2012, when there is an available exception to this rule and the Secretary, apparently, has not attempted to take advantage of the exception.

The Secretary has not "prepared" the ballot. While he may have certified the ballot, he has not "prepared" the ballots. And to the extent the constitution conflicts with statutory requirements, they are to be construed by the Court to attempt to give both effect. But, to the extent such construction is not possible, the constitution of North Dakota prevails over any statute. The argument by the Secretary that the application is untimely has no support in the constitution or statute.

Section 6 of Article III of our state's constitution provides that if the Court is reviewing the decision of the Secretary "at the time the ballot is *prepared*, the secretary

of state shall place the measure on the ballot. . . ." (emphasis added). And, again, if the Court is reviewing the Secretary's decision "at the time the ballot is prepared," then the Secretary "shall place the measure on the ballot. . . ." N.D. CONST. Art. III, § 7. While the ballot may have been "certified" under N.D.C.C. § 16.1-01-07, it has not been "prepared" because it has not been printed or distributed as this is not required until forty days prior to the election under N.D.C.C. § 16.1-07-04.

The Secretary has offered reasons why he cannot prepare the ballots, but he has not said he cannot prepare the ballot to include the subject measure if ordered to do so. That "significant chaos" will supposedly result can be prevented as the Secretary can prepare for the possibility of having to prepare and distribute the ballot including the measure at present. There is nothing in the constitution about cost being a factor either. The cost to the Sponsoring Committee in preparing the measure and circulating it has been great—and this is the only opportunity at present the Sponsoring Committee has to preserve their work. The strategy of the Sponsoring Committee is to present this measure to the people of North Dakota because they have complied with all the constitutional and statutory requirements under North Dakota law—despite the alleged criminal actions of certain individuals. The Application is timely and the substantive arguments presented should be decided by the Court.

B. Discretion Does Not Equal Disregarding the State Constitution.

Even if the Secretary is entitled to discretion, and the Chairman does not concede he is, he has abused his discretion by failing to determine the sufficiency of the petitions. The Secretary clearly stated in his September 4, 2012, letter that he would not

be randomly sampling the petitions.[1] Apparently, after the Secretary made his decision not to certify the measure and not to comply with requirements contained in N.D.C.C. § 16.1-01-10, he attempted to comply with N.D.C.C. § 16.1-01-10 by sending out postcards. While the Secretary does not state in his brief when he mailed these postcards, at least one was postmarked on September 7, 2012— three days *after* the Secretary made his decision not to certify the initiative. *See* postcard, attached as Ex. A. The Secretary speaks of cost as a reason not to reverse his decision. But it would seem the Secretary has plenty of time, money, and resources to attempt to sample the petitions after he determined they were invalid. It seems the Secretary, perhaps, realized he did not fulfill the statutory requirement to randomly sample the petitions and attempted to do so.

Moreover, there is no way the Secretary could have satisfied his 35 day statutorily required deadline to determine the sufficiency of the petitions when he only sent out postcards on September 7, 2012 (assuming all postcards were sent out on September 7, 2012). The initiative was handed in to the Secretary on August 6, 2012, 35 days later was September 10, 2012 (the same date the Secretary "certified" the ballot). One can reasonably presume that the post cards would take at least one day (possibly more) for the post office to deliver, then, perhaps, one to three days for the person to return the postcard (assuming it arrives to the address), and then at least one more day (possibly more) for the post office to deliver the post card back to the Secretary. So, here, if the

[1] In his brief the Secretary seems to ignore his September 4, 2012, letter to the Chairman which this application is essentially based upon. The Chairman is entitled to rely on this letter as it is the only documentation provided to him by the Secretary. The Secretary's attempt to insert additional factoids and argument that are not contained in the document setting forth his decision to exclude the initiative from the ballot is improper and should not be permitted. *See, e.g.*, *McCarney v. Meier*, 286 N.W.2d 780, 792 (N.D. 1979) (VandeWalle, J., concurring).

postcard was mailed by the Secretary on Friday, September 7, 2012, it could have arrived the following date, Saturday, September 8, 2012, and conceivably could have been mailed back on Saturday, September 8, 2012 (though only the most diligent person would likely mail it back the same date), and conceivably could have arrived back to the Secretary on September 10, 2012. September 10, 2012, was the date the Secretary was statutorily required to complete his sufficiency review of the petitions. The Secretary had 35 days, but waited until the 32nd day (after he had denied certification no less) to attempt to comply with his statutorily defined duties. Then, presumably, someone at the Secretary's office must review returned postcards and enter the received data—apparently this is being completed at present even after the Secretary outlined his only rationale for denial to the Chairman in his September 4, 2012, letter. The Secretary has failed to comply with N.D.C.C. § 16.1-01-10. Because of this failure, the initiative should be placed on the November 6, 2012, general election ballot.

In attempting to determine the sufficiency of the signatures *after* his decision to deny the initiative, the Secretary has admitted he failed to comply with statutory and constitutional requirements. This admission is in the form of action—which always speaks louder than words. If the Secretary stated that the subject petitions were invalid based upon the reasons stated in his September 4, 2012, letter to the Chairman, then he would have no reason to mail out postcards. By mailing out the postcards, the Secretary has conceded that he failed to determine the sufficiency of the initiative.

It was not within the Secretary's discretion to disregard a sworn affidavit that had been submitted pursuant to constitutional requirements. The constitution simply requires that the circulator "swear thereon that the electors who have signed the petition did so in

their presence." N.D. CONST. Art. III, § 3. Here, this was done. That, later, the circulator's actions were called into question by a subsequent investigation does not give the Secretary discretion to throw out all of the signatures when the circulator has complied with his constitutional requirement, has not otherwise been convicted of any crime, and has not signed an affidavit stating anything to the contrary. It is noteworthy that the Sponsoring Committee was kept completely in the dark of these allegations until receiving the Secretary's September 4, 2012, letter.

C. The Burden of Proof is Squarely on the Secretary.

The Secretary attempts to shift the burden of proof of determining the sufficiency of the petitions on the Chairman. This is clearly contrary to the constitutional requirement that the Secretary determine the sufficiency of the petitions. That there is evidence that some of the signatures may have been forged does not equate to all of the signatures being forged. Indeed, the Secretary himself must concede that some of the signatures on the subject petitions are valid. Instead of a collaborative effort, the Secretary took it upon himself to unilaterally decide that all subject petitions should be held insufficient despite evidence that many signatures were valid. Those individuals who signed the petition did so exercising their constitutional rights under our constitution. It is the very function of the Secretary under our constitution to determine the sufficiency of the petitions. The Chairman is challenging the decision of the Secretary in failing to determine the sufficiency of the petitions.

Since when does a statement made by a citizen who is "mirandized" account for additional deference in a legal action? The Secretary seems to argue that statements given by citizens after they are "mirandized" raises the level of what they have

said. There is no support in the law for such an argument. But even if there were, then the Secretary must concede under such logic that the statements that many of the signatures were legitimate are entitled to the same deference.[2] The investigation evidence presented is hearsay.

The Secretary's own argument is form should overcome substance. It is undisputed that at least three of the six individuals the Secretary states in his September 4, 2012, letter stated, upon being "mirandized," that more of the signatures were legitimate than not. But the Secretary ignores this substance in favor of form. And it is this form that the Secretary has used to conclude all of the subject petitions are invalid. What we know from the Secretary's September 4, 2012, letter is that the petitions of six circulators were thrown out completely because an investigation showed some of the signatures were forged, some were valid, and the six circulators would not re-affirm their prior sworn affidavit.

That the Secretary believes the six circulators he listed in his September 4, 2012, letter "underestimated" the number of legitimate signatures is not based on any actual attempt by the Secretary to verify this statement. A belief is not fact and is not competent or admissible evidence – it is speculation. Without pointing to anything in his brief, the Secretary cannot rely on his bare belief that the circulators underestimated the number of legitimate signatures. Certainly the constitution requires something more than a "belief" that signatures are insufficient.

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[2] The Secretary states there are seven circulators alleged to have fraudulently obtained signatures. But his September 4, 2012, letter states there were six. Apparently the seventh circulator the Secretary speaks of was Charles Smith III, who was not an elector because he apparently resides in Minnesota. *See* Secretary's Ex. 8, p. 28.

The Secretary states at page 15 of his brief that "[t]he number of forged signatures on the petitions varies." If this is so, then this is a concession by the Secretary that legitimate signatures exist. And the burden is on the Secretary to determine the sufficiency of the petitions.

D. Public Policy Favors Placement of the Initiative on the Ballot.

The North Dakota Constitution *is* the public policy. That the Secretary has decided not to determine the sufficiency of the petitions is the problem. The Secretary has within his arsenal the ability to determine the sufficiency, he simply chose not to because of his belief that many of the signatures were forged. The constitution, however, requires him to determine the sufficiency and this is the public policy that must be followed. Without checking the signatures, the Secretary cannot arbitrarily decide that the initiative failed to obtain the requisite amount of signatures.

E. The North Dakota Constitution Does Not Apply Outside of North Dakota.

The Secretary relies on decisions from other jurisdictions involving similar situations. But the distinguishing factor as to each case cited from these foreign jurisdictions are each state's constitutional and statutory framework differs from North Dakota's. In most of the cited cases cited by the Secretary the fraudsters sought protection against self-incrimination under the Fifth Amendment or significantly obstructed the investigation. With a complete refusal to be questioned about the conduct in the circulation process, there obviously were no statements made that some signatures were valid. In *Brosseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984), a distinguishing factor is the person who executed the affidavit did not actually witness *any* valid signatures. In another cited case, there was a specific regulation that the court deferred to. *Williams v.*

District of Columbia Bd. of Elections and Ethics, 804 A.2d 316 (D.C. 2002). The cases cited by the Secretary can be simply distinguished because they do not apply North Dakota law and the circumstances are unique as to each case.

The Secretary quotes an Ohio case holding that an affidavit attached to a petition that is intentionally false or fraudulent is fatal to the entire petition, causing all of the attaching signatures to be considered void. *State ex re. Gongwer v. Graves*, 107 N.E. 1018, 1022 (Ohio 1913). However, Ohio law has long required the invalidation of *all* signatures on a petition if it has been found that the circulators falsely swore to any fact on the petition and the method of signing. *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 923 (S.D. Ohio 2004) (citing Ohio Rev. Code §§ 3501.38; 3501.39; *State ex rel. Comm. for the Referendum of City of Lorain Ordinance No. 77-01 v. Lorain County Bd. of Elections*, 774 N.E.2d 239 (Ohio 2002); *State ex rel. Citizens for Responsible Taxation v. Scioto County Board of Elections*, 602 N.E.2d 615 (Ohio 1992)). North Dakota, on the other hand, has no such precedent, and specifically, has no statutes that require the invalidation of an entire petition based upon an allegedly false affidavit. Rather, North Dakota precedent holds quite the opposite, requiring that parties attacking the validity of signatures carry the burden of proof, and that "the scrutiny of the petition and the individual signatures thereon [is approached] from a liberal viewpoint avoiding disqualification in many instances where compliance with the statute was questionable but striking from the list of signers those signatures that clearly violated the constitution or the statute." *See Hernett v. Meier*, 173 N.W.2d 907, 911 (N.D. 1970); *Dawson v. Meier*, 78 N.W.2d 420, 424 (N.D. 1956). Thus, the approach of the Ohio court is

inapplicable to this case, as its precedent rests upon statutes and jurisprudence that have not been adopted in this jurisdiction.

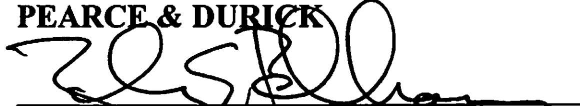
Michigan law is consistent with the Chairman's argument that the Secretary actually determine the sufficiency of petitions. The election statute allows the Michigan board of state canvassers to disqualify fraudulent signatures after a canvass and hearing on the petition. MICH. COMP. LAWS § 168.544c(9). The board in Michigan has the authority to "[d]isqualify obviously fraudulent signatures . . . without checking the signatures against local registration records." *Id.* While North Dakota does not have a detailed statute that provides the Secretary guidance on what to do like Michigan does, this Court has liberally construed our constitution and statutes in favor of allowing initiatives to be placed on the ballot. And the Michigan statute shows that some jurisdictions do allow valid signatures to count after disposing illegal signatures. Our constitution and statutory law favor placement of the initiative on the ballot.

CONCLUSION

As tainted as the subject petitions may be, the fact remains even the circulators affirm that many of the signatures are valid. And the Secretary cannot provide any evidence that all of the 6,045 subject signatures are insufficient. The Chairman is asking the Court to require the Secretary to comply with his constitutional duty to determine the sufficiency of the petitions. The Court should issue an injunction requiring the Secretary to place the initiative on the November 6, 2012, general election ballot.

Dated this 18th day of September, 2012.

PEARCE & DURICK



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INDEX TO EXHIBITS

Exhibit A Dave Moser Postcard, Postmarked 9/7/12

EXHIBIT A

Dear Voter:

Please complete the following questions and sign your name:

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

YES (   ) NO (   )

(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 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?

YES (   ) NO (   )

(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?

YES (   ) NO (   )

Date: __________ Signature of Voter: ______________________________

Daytime Telephone Number: ______________________________

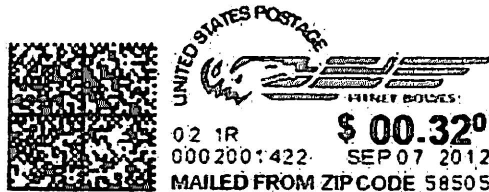
PLEASE DETACH ALONG THE PERFORATION AND MAIL. NO POSTAGE STAMP IS NECESSARY. YOUR COOPERATION IS GREATLY APPRECIATED. THANK YOU.

DAVE MOSER

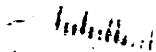
8 - 87 - 5

POSTMASTER: If not delivered in five days, please return to:

SECRETARY OF STATE
STATE OF NORTH DAKOTA
600 E BOULEVARD AVE DEPT.108
BISMARCK ND 58505-0500



DAVE MOSER
1710 HUNTINGTON CT
WEST FARGO ND 58078



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AFFIDAVIT OF SERVICE – HAND DELIVERY

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

Kari Dutchuk, being first duly sworn, deposes and says that on the 18th day of September, 2012, she hand delivered true and correct copies of *Reply Brief in Support of Application for Writ of Injunction Under Original Jurisdiction* to the following:

Doug Bahr
Office of the Attorney General
500 N 9th Street
Bismarck, ND 58501-4509

Kari Dutchuk

Subscribed and sworn to before me this 18 day of September, 2012.

CARI TIMMONS
Notary Public
State of North Dakota
My Commission Expires Aug. 27, 2014

Notary Public