STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#95005

NO.
STATE OF NEBRASKA
OFFICIAL
JAN 26 1995
DEPT. OF JUSTICE

DATE: January 26, 1995

SUBJECT: Constitutionality of a Two-tiered Signature Requirement For Initiative and Referendum Petitions

REQUESTED BY: Senator M.L. Dierks, Nebraska Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's Opinion as to the constitutionality of a two-tiered signature requirement for initiative and referendum petitions in Nebraska whereby one number of signatures would be required for volunteer petition efforts, and a higher number for petition efforts utilizing paid circulators. Such a proposal is of no small import, since under the Nebraska Constitution the people, by means of the initiative and referendum, are of equal status as a legislative body with the Unicameral. ***Klosterman v. Marsh***, 180 Neb. 506, 511, 143 N.W.2d 744, 748 (1966) ("the Legislature . . . and the electorate . . . are coordinate legislative bodies, and there is no superiority of power between the two."). We have now reviewed the actual Legislative Resolution introduced to place a two-tiered signature requirement before the voters (LR 22CA), and our analysis is set forth below.

Background

Prior to May 13, 1994, the Nebraska Constitution was interpreted as requiring that petitions seeking to enact laws by initiative be signed by registered voters equal in number to seven percent of the whole number of votes cast for Governor at the last general election. ***See*** Neb. Const. art. III, § 4. Petitions seeking to propose Constitutional amendments required the signatures of ten percent of such voters, and petitions invoking

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Lauren Lee Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Alan E. Pedersen
Paul N. Potadle
James D. Smith
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

Printed with soy ink on recycled paper

the referendum required five percent (or ten percent to suspend the law pending the vote) of such voters. However, in ***Duggan v. Beermann***, 245 Neb. 907, 515 N.W.2d 788 (1994), the Nebraska Supreme Court held that the above referenced signature requirements must be calculated using the total number of all registered voters in the State, notwithstanding the express language of article III, § 4 to the contrary.[1]

---

[1]Article III, § 2, which specifies the percentage of voters needed to place an initiative on the ballot, has never, since its inception in 1912, referred to the percentage of all Nebraska voters, but rather refers to the percentage of those voters who cast ballots for Governor at the last general election (regardless of whether the term used was "legal voters" [1912-1920], "electors" [1920-1988] or "registered voters" [1988-present]).

From 1912 to 1920 both provisions (now § 2 and § 4 of Article III) referred to "legal voters." In 1920, "legal voters" was changed to "electors" in § 2, while section 4 was changed to its current form. The records of the constitutional convention proceedings from 1919-1920 specifically state that no substantive change was intended when these words were substituted. At the convention, William Jennings Bryan urged the delegates to liberalize the constitutional provisions governing the initiative process. Journal of the Nebraska Constitutional Convention, Vol. 1, pp. 326-327 (Jan. 12, 1920). Delegates to the constitutional convention subsequently considered proposal No. 108, which revised Neb. Const. art. III, § 1. During debate, delegate Norton stated, "We should not make it difficult for the people to use this machinery. Whenever you increase the percentages, and make them too large, you defeat the very purpose of the initiative and referendum because you make it difficult for the people to use." *Id.* at 504.

As amended by the Committee on Initiative, Referendum and Recall, Proposal No. 108 proposed to amend Neb. Const. art. III, § 1A to state that "proposed Constitutional Amendments shall require a petition of ten per cent of the legal voters of the State. . . ." *Id.* at 457. (Emphasis added). Section 1d of art. III was left unchanged, and read "The whole number of votes cast for governor at the regular election last preceding the filing of any initiative or referendum petition shall be the basis on which the number of legal voters required to sign such petition shall be computed." Thus, the only substantive change was to reduce the percentage of required signatures from 15% to 10%.

This proposed amendment to article III then went to the Committee on Arrangement and Phraseology, which recommended the "arrangement and phraseology" of Section 1a be changed to read "if the petition be for the amendment of the Constitution, the petition therefore shall be signed by ten per cent of such electors."

Subsequent to the Nebraska Supreme Court's decision in ***Duggan***,

---

(Emphasis added). ***Id.*** at 1130. The Committee also changed the phraseology of Section 1d to read, "The whole number of votes cast for governor at the general election next preceding the filing of an initiative or referendum petition shall be the basis on which the number of signatures to such petition shall be computed." ***Id.*** at 1131. (This is the current form of Neb. Const. art. III, § 4).

Thus, the phraseology was changed from "legal voters" to "electors" in Section 1a, and the reference to "legal voters" was eliminated from Section 1d, thereby creating the facial discrepancy which exists to this day as to Neb. Const. art. III, § 2 and § 4. The record of the constitutional convention proceedings could not be more clear, however, that these changes were not intended to be substantive. The Committee on Arrangement and Phraseology concluded its report on Proposal No. 108 by stating, "In conclusion, your Committee begs to say that while it has recommended many changes in the wording and arrangement of this proposal, it **has not intentionally recommended any alteration that would affect any essential feature of the proposal**." ***Id.*** at 1132 (emphasis added). Thus, it is clear that, despite the facial discrepancy between the two sections, the number of signatures required was to be based on 10% of the gubernatorial vote, and not 10% of all electors.

Proposal No. 108 was approved by the convention, id., Vol. II, p. 2651, and submitted for voter approval under the title "To amend Sections 1-a, 1-b, 1-c and 1-d, Article III," with the descriptive matter `Initiative and Referendum. Reduces percentages in number of signatures required.'" ***Id.*** at 2822 (emphasis added). Thus, the 1920 amendment (which created the same facial discrepancy between the two provisions which exists today) was clearly intended to reduce the number of required signatures, despite the fact that section 1a facially required signatures from 10% of all electors of the State.

The 1988 amendment to article III, § 2 simply replaced the word "electors" with "registered voters." This change in no way affected the method of calculating the number of signatures required, as provided in § 4. Section 4 had been harmonized with section 2 for many decades, in accordance with the original intent of the provisions, until the ***Duggan v. Beermann*** decision. The 1988 amendment, when read together with Section 4 in the context of its history, changed nothing with respect to the number of petition signatures required. The history of the 1988 amendment also clearly shows no change was intended with regard to the calculation of the required number of signatures. Since the inception of the initiative petition process in Nebraska in 1912, it had always been the Gubernatorial vote from which the required number of petition signatures was to be calculated.

a committee developed recommendations for changes in the relevant constitutional provisions. These recommendations were introduced as LR 22CA, which provides, in pertinent part:

> If the petition be for the enactment of a law, it shall be signed by ~~seven percent of the~~ registered voters of the state~~, and if~~ equal in number to at least eight percent of the number of registered voters on the date of the most recent general election. If the petition be for the amendment of the Constitution, the petition ~~therefor~~ shall be signed by ~~ten percent of such~~ registered voters equal in number to at least twelve percent of the number of registered voters on the date of the most recent general election.
>
> . . . .
>
> The special challenges of relying solely on volunteer petition circulators is explicitly recognized. To accommodate these special challenges, petition signatures gathered during a nonpaid petition drive shall be granted a tabulation bonus of one additional signature counted for each valid signature submitted. Paid petition drive means a drive for signatures in which one or more circulators receive payment to collect signatures. Payment means compensation for collecting signatures other than reimbursement for travel and meals.
>
> . . . .
>
> III-4 "~~The whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition shall be the basis on which the number of signatures to such petition shall be computed~~. . . ."

Similarly, LR 22CA raises the signature requirement for invoking a referendum from 5 to 6% (from 10% to 12% to suspend a law pending the vote). More significant, in terms of signatures needed, LR 22CA calculates the number of signatures required based on all registered voters rather than the number of votes cast in the preceding gubernatorial election. The changes proposed by LR 22CA can be seen more clearly in the following chart:

Petition Signatures Required (example based on 1992 statistics)

	Pre-Duggan	LR 22CA Paid	LR 22CA Volunteer
Initiative (law)	41,058	70,809	35,405
Initiative (Const. Amend)	58,654	106,213	53,107
Referendum	29,327	53,107	26,554
Referendum (Suspend law)	58,654	106,213	53,107

Thus, under LR 22CA, petition efforts utilizing paid circulators would need twice as many signatures as those using all volunteer circulators. The payment of a single dollar to a single petition circulator in an otherwise volunteer effort would double the number of signatures required and could effectively nullify the signatures of more than enough voters to otherwise place an initiative on the ballot.

Standard of Review

The circulation of initiative and referendum petitions constitutes core political speech protected by the First and Fourteenth Amendments of the United States Constitution. The United States Supreme Court has held uniformly that expression of political ideas is the highest form of protected speech and is entitled to strict judicial scrutiny to prevent state infringement. ***See Meyer v. Grant***, 486 U.S. 414, 421, 108 S.Ct. 1886, 1892 (1988); ***State v. Monastero***, 228 Neb. 818, 825, 424 N.W.2d 837, 843 (1988), appeal dismissed, ***Monastero v. Nebraska***, 488 U.S. 936, 109 S.Ct. 358 (1988) ("[s]peech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes."); ***Riley v. Nat'l Fed'n of the Blind of North Carolina***, 487 U.S. 781, 789, 108 S.Ct. 2667, 2673 (1988) ("Restrictions on First Amendment interests pass constitutional muster only when they are narrowly tailored to serve a legitimate state interest.").

The Court uses an equal protection standard of review when a government act classifies people in relation to a fundamental right, such as the exercise of core political speech. The strict scrutiny test means that "[t]he Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the

government to show that it is pursuing a `compelling' or `overriding' end." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.3, at 575 (4th ed. 1991). Furthermore, "the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary, or narrowly tailored, to promote that compelling interest." Finally, "[i]f the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee." ***Id.***

Discussion

A. Conclusion and Summary

A two-tiered signature requirement as proposed in LR 22CA violates the First and Fourteenth Amendments of the United States Constitution by impermissibly burdening the freedom of speech.

The United States Supreme Court has clearly indicated that unequal treatment of paid petition circulators, such as proposed in LR 22CA, violates the First Amendment. In ***Meyer v. Grant***, 486 U.S. 417, 108 S.Ct. 1886 (1988), the Court stated, "Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators (citation to Brief omitted) `But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" ***Id.*** at 1894 n.7 (quoting ***Buckley v. Valeo***, 424 U.S. 1, 48-49, 96 S.Ct. 612, 648-649 (1976)). "[T]he First Amendment protects [the people's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'" ***National Ass'n of Radiation Survivors v. Derwinski***, 782 F.Supp. 1392, 1411 (N.D. Cal. 1992) (quoting ***Meyer***, 486 U.S. at 424, 108 S.Ct. at 1893)). ***See also Riley v. Nat'l Fed'n of the Blind of N.C.***, 108 S.Ct. 2667, 2674 n.5 (1988); ***City Council v. Taxpayers for Vincent***, 466 U.S. 789, 804, 104 S.Ct. 2118 (1984) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

More specifically, a two-tiered system would be struck down by the Court because the purpose of the amendment is constitutionally impermissible. In our view, a court would almost certainly conclude the purpose is not to protect the State's interest in maintaining the integrity of the election process by preventing fraud and misrepresentation among petition circulators, ***Libertarian***

Party of Nebraska v. Beermann, 598 F.Supp. 57, 60 (D. Neb. 1984), but rather to penalize and discourage the use of paid circulators.[2]

Likewise, a court would not likely conclude the purpose of the proposed amendment is to ensure sufficient grassroots support for initiative measures, since the number of signatures needed may actually be reduced slightly for those efforts using only volunteer circulators (see chart page 5). Furthermore, the United States Supreme Court and the Nebraska Supreme Court have both rejected similar "grassroots" arguments. ***See Radcliffe***, 228 Neb. at 871, 424 N.W.2d at 610 (discussing the U.S. Supreme Court's refusal to accept such an argument in ***Meyer***, 108 S.Ct. at 1894). ***See also Ficker v. Montgomery County Bd. of Elections***, 670 F.Supp. 618, 621 (D.Md. 1985).

B. Wealth and Political Speech

Requiring paid circulators to gather double the signatures of volunteer circulators impermissibly introduces wealth as a barrier to political speech. In ***State ex rel. Stenberg v. Beermann***, 240 Neb. 755, 485 N.W.2d 151 (1992), the Nebraska Supreme Court struck down a law that would have prohibited petition circulators from accumulating signatures outside their own counties. The Court explained:

> In a participatory system of government the voices pressing their views on their elected officials reflect the broad spectrum of the total society. It is an obvious truth that no one view is more entitled to be expressed than another. The judgement of the majority or the economically privileged as to the accepted and proper view of an issue, and the suppression of the minority's

---

[2]Of course, arguments can be made that the amendment's purpose is to prevent fraud and misrepresentation. However, the Court will then analyze whether the means used are narrowly tailored to achieve that end. Clearly, less drastic means are available to the state to protect against fraud and misrepresentation among paid circulators than restricting their first amendment right to political speech. Several state statutes already exist to protect the public from fraud and misrepresentation from either volunteer or paid circulators. Neb. Rev Stat. §32-628(2) (Cum. Supp. 1994) specifically requires a warning to be printed on every signature page "for the purpose of preventing fraud, deception, and misrepresentation." Neb. Rev. Stat. §§ 32-629 - 32-630 (Cum. Supp. 1994) provides the qualifications and prohibited acts of signers and circulators.

> right of expression, is tyranny, no matter how wise and reasoned the majority opinion.

Id. at 757.

Wealth cannot be a restricting factor in the dissemination of political discussion. Wealth "is not germane to one's ability to participate intelligently in the electoral process" ' and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote.'" ***Buckley v. Valeo***, 424 U.S. 1, 49, 96 S.Ct. 612, 649 n.55 (1976) (quoting ***Harper v. Virginia Bd. of Elections***, 383 U.S. 663, 668, 86 S.Ct. 1079, 1082 (1966)). In ***Buckley***, the United States Supreme Court struck down federal statutes that limited expenditures by someone on his own behalf as violative of freedom of speech. They further stated, "[b]ut the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.'" ***Buckley***, 424 U.S. at 49, 96 S.Ct. at 649 (quoting ***New York Times Co. v. Sullivan***, 376 U.S. 254, 266, 84 S.Ct. 710, 718 (1964)). Furthermore, "[t]he First Amendment's protection against government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." ***Buckley***, 424 U.S. at 49, 96 S.Ct. at 649 (quoting ***Eastern R. Conf. v. Noerr Motors***, 365 U.S. 127, 139, 81 S.Ct. 523, 530 (1961)).

The point is that a two-tiered system makes the signatures of voters who sign petitions circulated by paid circulators of less force and value than others. Although the two-tiered signature requirement proposed in LR 22CA is characterized as a "tabulation bonus", it takes more than a gimmicky euphemism to survive strict scrutiny under the First Amendment.[3] The practice of counting some petition signatures at half the value as others is constitutionally indistinguishable from a "voting bonus" scheme under which votes cast in favor of an initiative for which paid advertising has been

---

[3]The "volunteer bonus" approach to a two-tiered petition signature requirement was proposed by Daniel H. Lowenstein and Robert M. Stein in The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal 17 Hastings Const. L.Q. 175 (Fall 1989). We find the authors' arguments in favor of constitutionality to be weak and unconvincing. *Id.* at 222-23. The First Amendment is not so feeble in its protection as to be circumvented by fancy packaging and illusory "bonuses."

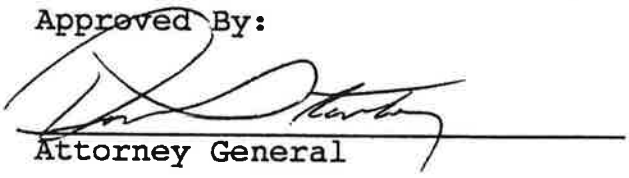
run by the petition sponsors count only half as much as votes cast where no paid ads are run.[4] Although a two-tiered system does not necessarily limit the audience reached by petition circulators, it does devalue the audience's views whenever one or more paid circulators are involved. Requiring paid circulators to gather double the signatures of volunteer circulators restricts First Amendment rights and is clearly unconstitutional.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

3-1886-3

---

[4]The Supreme Court has long required adherence to the principle of "one person, one vote." ***See Reynolds v. Sims***, 377 U.S. 533, 84 S.Ct. 1362, 1380 (1964). In ***Reynolds***, the Court stated, "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." ***Id.*** at 1381. The Court further stated, "[I]t is inconceivable that a state law to the effect that, in counting votes. . . , the votes of citizens in one part of the State would be multiplied by two, five or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. . . One must be ever aware that the Constitution forbids `sophisticated as well as simple-minded modes of discrimination.'" ***Id.*** at 1381 (quoting ***Lane v. Wilson***, 307 U.S. 268).