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NEBRASKA SUPREME COURT
COURT OF APPEALS

No. S-24-901

IN THE NEBRASKA SUPREME COURT

JOHN KUEHN,
Appellant,

v.

ROBERT B. EVNEN, IN HIS OFFICIAL CAPACITY AS NEBRASKA SECRETARY OF STATE,
Appellee-Cross-Appellant,

ANNA WISHART, CRISTA EGGERS, AND ADAM MORFELD
Appellees-Cross-Appellees.

On Appeal from the District Court of Lancaster County
The Honorable Susan I. Strong

SECRETARY EVNEN'S BRIEF OF APPELLEE AND BRIEF ON CROSS-APPEAL

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<u>BRIEF ON CROSS-APPEAL</u>

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Statement of Jurisdiction

The district court denied post-trial motions to amend the pleadings on December 5, 2024. That same day, Appellant John Kuehn filed a notice of appeal and paid the docket fee. This Court has jurisdiction over the appeal under Neb. Rev. Stat. §§ 32-1412(3) and 25-1912, and over Secretary Evnen's cross-appeal against the Sponsors under Neb. Ct. R. App. P. § 2-101(E).

Statement of the Case

Nature of the Case. Notaries lied in notarizing across two initiative petitions. Due to the fraud, Secretary Evnen sought a declaration that the petitions failed to garner enough valid signatures to be placed on the ballot.

Issues Presented in the District Court. Under *Barkley v. Pool*, 103 Neb. 629 (1919), a petition's supporters must prove that signatures collected by dishonest circulators are genuine. The issues presented are whether *Barkley* applies to dishonest notaries, and whether the petitions here received enough valid signatures.

Resolution of the Issues Presented. The district court did not apply *Barkley* to notaries and would not shift the burden of proof even if it did. The court thus ruled that Secretary Evnen did not show that the petitions fell short of the signatures needed. The court dismissed the case after the first phase of a bifurcated trial.

Scope of Review. Whether *Barkley* applies to notaries is a question of law reviewed de novo. *See Stone Land & Livestock Co. v. HBE, LLP*, 309 Neb. 970, 973 (2021). The court's failure to shift the burden if *Barkley* applies to notaries was based on an error of law. When a court purports to exercise discretion based on an error of law, "it is of little practical consequence" whether this Court "label [its] review as abuse of discretion or de novo." *Id.*

Assignments of Error

1. The district court erred by not applying the burden-shifting rule of *Barkley v. Pool* to dishonest notaries.

2. The district court erred by not applying the burden-shifting rule of *Barkley v. Pool* to four dishonest notaries here.

3. The district court erred by finding no general practice of rule breaking by the campaign's notaries.

Propositions of Law

1. "A notary public shall not perform any notarial act" if the signer "[i]s not in the presence of the notary public at the time of the notarial act." Neb. Rev. Stat. § 64-105.

2. When notarizing an affidavit, a notary public must certify that "the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit." *Johnson v. Neth*, 276 Neb. 886, 890 (2008).

3. "[W]hen the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated." *Barkley v. Pool*, 103 Neb. 629, 635 (1919).

4. When an actor "is shown to have acted fraudulently, the value of his verification is destroyed, and the petition *must fall*, unless the genuine signatures are affirmatively shown." *Id.* at 636 (emphasis added) (quoting *State ex rel. McNary v. Olcott*, 125 P. 303, 307 (Or. 1912)).

BACKGROUND

I. Legal Background

A. The Nebraska Constitution reserves for the people the power of initiative. Neb. Const. art. III, § 2. The power of initiative is invoked by petition. *Id.* If seven percent of registered Nebraska voters validly sign a petition, the proposed law is submitted to the people for a vote. *Id.*

Circulators and notaries help weed out fraud in the petition process. Circulators collect signatures. Before someone signs, the circulator must read the object of the petition aloud. Neb. Rev. Stat. § 32-628(3). This prevents signers from misinterpreting a petition or from being tricked into signing a petition they disagree with. Circulators must also "personally witness the signatures on the petition." *Id.* § 32-630(2). This prevents signers from signing for multiple people. It also prevents signers from forging signatures by methods that would be apparent to an observer.

When a circulator finishes collecting signatures on a sheet, the circulator must sign an affidavit under oath. *Id.* § 32-630(2). The affidavit affirms that the circulator read the object of the petition to each signer, observed each person sign the petition, and believed that each signer was qualified to sign. *Id.* § 32-628(3). Falsely swearing a circulator's affidavit is a class IV felony. *Id.* § 32-1546(2). A notary public must administer the oath and personally witness the circulator sign the affidavit. *Id.* § 32-628(3).

B. Notaries are public officials who swear an "oath" to "faithfully and impartially discharge and perform the[ir] duties." *Id.* § 64-102. And they are vital to securing sworn circulator affidavits. When notarizing an affidavit, a notary must certify that "the affiant appeared before the notary, attested to the truth of

his or her statements, and signed the affidavit." *Johnson v. Neth*, 276 Neb. 886, 890 (2008). After witnessing the circulator sign, the notary signs the petition and affixes her seal. *Id.* § 64-107. "Without both the signature and the seal," the affidavit "cannot be considered sworn." *Stoetzel v. Neth*, 16 Neb. App. 348, 357 (2008).

Properly notarized affidavits give "prima facie validity [to] signatures on an initiative petition." *State v. Monastero*, 228 Neb. 818, 826 (1988). A notary's certificate is presumptive evidence that important documents—such as deeds, mail-in ballots, and initiative petitions—were honestly executed. But those instruments can be voided if the notary failed to follow the laws governing notarizations. *E.g.*, (T965); *Christensen v. Arant*, 218 Neb. 625, 628 (1984) (voiding contract when party "did not sign [it] before the notary"); *McMaster v. Wilkinson*, 145 Neb. 39, 49 (1944) (rejecting mail-in ballot where "notary entirely failed to fill out the certificate"); *State ex rel. Ditmars v. McSweeney*, 764 N.E.2d 971, 975 (Ohio 2002) ("initiative petition was insufficient and invalid because it did not comply with the affidavit requirement").

C. The common-law framework of *Barkley v. Pool*, 103 Neb. 629 (1919), governs disputes over the validity of circulators' affidavits. In 1917, the Legislature granted women the right to vote. *Id.* at 629. Anti-suffragists launched a referendum petition to repeal the law. *Id.* at 629–30. They submitted enough signatures to the Secretary of State to put the law to a vote. *Id.* at 630. A group of women sued to block the vote. *Id.* They argued that the anti-suffragists failed to collect enough valid signatures. *Id.*

The district court agreed. It found that three circulators forged signatures and lied about it. *Id.* at 633–34. Due to their dishonesty, the court refused to count signatures on *any* of their petitions unless the anti-suffragists could prove "the genuineness of the signatures." *Id.* On appeal, the anti-suffragists argued that

every signature "must be presumed genuine and counted" unless a "particular signature" is proven to be false. *Id.* at 635.

This Court rejected their argument. Given the "proof of fraud, of forgery, and of perjury," the Court confirmed that all affidavits "of the three circulators were impeached and unworthy of credence." *Id.* It then applied the "elementary" common-law rule that "when the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated." *Id.* The Court understood that "[n]o doubt some good-faith signatures were on the rejected petitions." *Id.* So instead of permanently excluding those signatures from being counted, it shifted the "burden of proof" to the anti-suffragists to show that signatures collected by the fraudsters were valid. *Id.*

II. Factual Background

A. Medical marijuana petitions barely qualify for ballot.

In May 2023, Crista Eggers, Adam Morfeld, and Anna Wishart (the "Sponsors") launched two initiative petitions. The Legalization Petition sought to remove state and local criminal bans on medical marijuana. (E5). The Regulatory Petition sought to regulate marijuana dispensaries. (E6). Eggers served as campaign manager for both petitions. (T715, T722).

Eggers was not new to the petition process. In 2022, she led a campaign to put medical marijuana on the ballot; that campaign failed to obtain enough valid signatures. (E273, pp. 33–35). This time, the petitions needed 86,499 signatures. (E155; E156). The deadline was July 3, 2024. *See* Neb. Rev. Stat. § 32-1407(1).

Through its first 11 months, the campaign again struggled to collect signatures. By April 2024, Eggers knew the campaign

was behind pace. Based on her experience, Eggers told campaign workers that they "needed to be at 50k [signatures] by may 1 at a minimum." (E172, p. 555). But just two days before her May 1 target date, Garrett Connely, Eggers's right-hand man, texted that "I don't see how we get to 50k by May 1." (E172, p. 553).

The campaign limped along, still off track by mid-June. On June 4, Eggers confided in Connely that the petitions needed 125,000 "raw" signatures for her to feel comfortable; each had only 64,000. (E172, p. 334). The next day, Eggers messaged campaign workers that they needed 16,000 more signatures in the next week, "[o]r we are done." (E172, p. 324). On June 11, the campaign publicly announced that it was still 30,000 signatures short on each petition. (T392). With just 22 days to go, the campaign desperately needed tens of thousands of signatures.

In the end, the campaign got what it wanted. Signatures nearly doubled in its final month. On June 4, the petitions had 64,000 signatures. On July 3, the Sponsors submitted over 114,000 signatures for each petition, about 28,000 signatures over the threshold. (E83, E84).

Yet this 28,000-signature cushion proved to be barely enough. County election officials rejected approximately 25,000 signatures (about 23 percent) from each petition due to improper notarizations, missing circulator affidavits, and other facial defects. (E155; E156; E157). Secretary Evnen certified 89,962 signatures for the Legalization Petition—only 3,463 over the threshold. (T937). He certified 89,856 signatures for the Regulatory Petition—only 3,357 over the threshold. (*Id.*). When Secretary Evnen certified that the Petitions satisfied the seven-percent threshold, he also publicly announced that an investigation into suspected fraud could ultimately lead to a judicial rescission of that certification. (T188).

B. Investigation exposes irregularities, fraud.

1. Circulator forges names out of phonebook.

Hall County election officials were the first to notice irregularities. They found signatures of deceased Nebraskans, misspelled names, and incorrect birthdates. Sean MacKinnon, *Nebraska Attorney General Announces Charge Filed in Petition Fraud Case*, KETV 7 (Sep. 13, 2024), https://perma.cc/934C-8QDR. The State of Nebraska and Hall County opened a criminal investigation into these anomalies. (*See* T192–93).

During the criminal investigation, state and county officials interviewed Michael Egbert, a circulator for the campaign. (T192–93). Egbert admitted to forging signatures based on names in the phonebook. (T193). Egbert also admitted that he never appeared before a notary to sign his circulator affidavits. (*Id.*). He instead dropped off his pre-signed petitions to be notarized outside his presence. (*Id.*). After learning that notaries had aided Egbert's fraud, the State opened a civil investigation. (T177–79).

2. Notaries falsely notarize petitions.

The investigation uncovered a practice of falsely notarizing petitions. The trial evidence showed, and the district court found, that at least four notaries notarized circulator affidavits without the circulator present to swear the oath.

Crista Eggers. Crista Eggers served as a notary on top of running the campaign. Eggers let multiple circulators sign affidavits outside her presence and not under oath. Eggers confessed in an interrogatory that "she notarized [circulator affidavits] for Michael Egbert" even though "Egbert did not sign the documents in

her presence." (E102, p. 3). The petitions Eggers notarized for Egbert are dated between June 16 and June 28, 2024, when signature collection spiked in the campaign's final weeks. (*Id.*).

Eggers also falsely notarized petitions circulated by Jennifer Henning. Henning testified at trial that she would pick up petitions from a vape shop in Seward and sign the circulator affidavits even though she did not circulate those petitions. (Vol. I, 575:6–576:16). She would then drop off those petitions at Eggers's house when Eggers was not home. (*Id.*). Eggers encouraged this practice, even texting Henning that "[a]s long as you just sign your petitions, I am comfortable notarizing them." (E94). In addition to improperly notarizing Egbert's and Henning's petitions, Eggers also notarized at least one petition *with no signature* on the circulator's affidavit. (T979).

Garrett Connely. Besides serving as Eggers's right-hand man, Garrett Connely worked as the campaign's "statewide grassroots coordinator" and its most prodigious notary. (E273, 44:23–45:2). Connely, like Eggers, notarized circulator affidavits with no circulator signature. (T983). He also confessed that "there must have been some instances" where he notarized outside the circulator's presence. (E273, 85:3). Connely stated in his deposition (which was admitted at trial) that many of his false notarizations were "towards the end of the campaign" when "there was a lot going on." (E273, 148:13–20).

Connely and Eggers both notarized petitions outside the circulator's presence—and both knew that doing so was wrong. On May 30, when the campaign's eleventh-hour rush for signatures was in full swing, Eggers coached Connely on how to deal with a circulator who may have gotten wind of their scheme:

SMS - Sent on 5/30/2024 at 7:15 PM.

Just stay very clean

SMS - Sent on 5/30/2024 at 7:15 PM.

Not lead him to question that we ever notarize things that aren't in person and such

SMS - Sent on 5/30/2024 at 7:15 PM.

We should probably be very careful

(E107, pp. 1–2).

Kimberly Bowling-Martin. Kimberly Bowling-Martin notarized petitions without a circulator's signature as well. (T988–89). Group text messages also "strongly suggest" that additional "petition pages were notarized [by Bowling-Martin] outside of the circulator's presence." (T973). In the telling exchange—on June 29, in the campaign's final hours—a field worker reported that a "courier is picking up" petitions from "Seward, York and Beatrice and delivering them" to a vape shop in Lincoln where "Kim [Bowling-Martin] will notarize and pick up." (E274). The district court found that the courier scheme "suggests that un-notarized petitions from the Seward, York, and Beatrice stores were picked up and notarized outside of the circulator's presence." (T973).

Patricia Petersen. Patricia Petersen notarized petitions without a circulator's signature. (T988). She also re-notarized petitions when circulators self-notarized a petition. (T987). But some circulators did not re-sign the petition in front of Petersen, and she re-notarized those petitions "on a later date and in a different city than the original notarization." (*Id.*). This "evidence suggests that the circulator was not present when Petersen re-notarized the petition." (*Id.*). In total, Petersen notarized petitions containing over 18,000 accepted signatures. *See* p. 34, *infra.*

Other Notaries. The district court found that several other notaries improperly notarized petitions. Marcie Reed, for example, notarized petitions well after the circulator had signed them. (T986; E108, pp. 2–3). Jacy Todd notarized a petition without a circulator's signature and another without his. (T983–85). And Shari Lawlor engaged in improper self-notarization. (T985–86).

III. Procedural History

John Kuehn sued Secretary Evnen and the Sponsors in September 2024 seeking to stop the petitions or election results from being certified. (T1). Secretary Evnen cross-claimed. He asked the court to declare the number of valid signatures and to declare the petitions legally insufficient. (T181).

The district court planned to bifurcate the trial under *Barkley v. Pool*. (Vol. I, 38–40). During phase one, Secretary Evnen would need to "prove[] that the circulator ['or the notary'] of the petition engaged in fraud." (Vol. I, 38:15–16). During phase two, "the burden will be shifted to the defendant sponsors to prove the genuineness of the signatures on the petition." (Vol. I, 38:16–17).

The district court dismissed the case after phase one. The "dispositive" issue was whether *Barkley* applies to notaries. (T966). The court said no and limited *Barkley* to circulators. (T967). Alternatively, it did not find the false notarizations "widespread" enough to shift the burden if *Barkley* applied. (T968).

The court ultimately found that Eggers, Connely, Bowling-Martin, and Petersen falsely notarized scores of petitions and rejected over 700 accepted signatures on each Petition. (T977–89). Because the court stripped the presumptive validity of fewer than 3,400 signatures on each, it dismissed all claims. Secretary Evnen cross-appeals. Neb. Ct. R. App. P. §§ 2-101(E), 2-109(D)(4).

Summary of the Argument

Barkley v. Pool is clear: Petitions handled by dishonest actors "must fall, unless the genuine signatures are affirmatively shown." 103 Neb. 629, 636 (1919) (quoting *State ex rel. McNary v. Olcott*, 125 P. 303, 307 (Or. 1912)). All affidavits of circulators who lie in collecting signatures are "impeached and unworthy of credence." *Id.* at 635. All certificates of notaries who lie in certifying circulator affidavits should receive the same treatment. In both situations, a factfinder lacks evidence that the circulator or notary honestly certified *any* petition.

That lack of evidence is a major problem for election integrity. Without proof that the notary administered the oath and witnessed the circulator sign, the circulator's affidavit is not an "affidavit" at all, and a factfinder has no reason to believe the facts stated therein—most importantly, that the circulator read the object statement to every signer and watched each person sign. When a notary's certificates are impeached, *Barkley* thus shifts the "burden of proof" to the petition's supporters to prove that signatures on pages notarized by the dishonest actor are "genuine" and were lawfully solicited. 103 Neb. at 635.

The district court found that at least four notaries falsely notarized petitions here. Each notarized outside the circulator's presence (thus lying about administering the oath and witnessing the circulator sign), and each notarized petitions bearing no circulator's signature (thus lying about the same). Stripping the presumptive validity of signatures on petitions notarized by the dishonest actors leaves both the Legalization and Regulatory Petitions well short of the signatures needed to qualify for the ballot. On the district court's own factual findings, therefore, this Court should reverse and remand for a second phase of trial.

ARGUMENT

I. *Barkley*'s Burden-Shifting Rule Applies to Notaries.

The district court correctly identified the "dispositive" issue as whether the burden-shifting rule of *Barkley v. Pool* applies to notaries. (T966). If it does, then the case should proceed to a second phase of trial on the district court's own factual findings. If it does not, then dismissal was proper. Because *Barkley* applies to notaries, this case should proceed to a second phase of trial.

A. *Barkley* dictates burden shifting.

Barkley describes as "elementary" the common-law rule that "when the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated." *Barkley v. Pool*, 103 Neb. 629, 635 (1919). That evidentiary rule was nothing novel. The U.S. Supreme Court long ago charged that courts "are bound, upon principles of law, and morality and justice" not to believe a witness who states a "deliberate falsehood." *The Santissima Trinidad*, 20 U.S. 283, 339 (1822). Just after statehood, this Court held "that where a witness in a material matter swears wilfully and knowingly to that which is false, no credit should be given to any alleged fact depending upon his statement alone." *Dell v. Oppenheimer*, 9 Neb. 454, 457 (1880). And still today, a witness who lies on the stand is impeached. *E.g.*, *State v. Young*, 279 Neb. 602, 605, 610–11 (2010).

Barkley simply applied this common-law evidentiary rule in the petition context. When a circulator lies under oath, all his circulator affidavits are "impeached and unworthy of credence." *Id.* at 635. Once impeached, no affidavit signed by that circulator can prove that the circulator read the object statement or personally witnessed voters sign the petition. *See* Neb. Rev. Stat. § 32-

628(3). And without evidence of those facts, the prima facie validity of every signature on every petition circulated by the oath-breaker is "destroyed." 103 Neb. at 636 (quoting *State ex rel. McNary v. Olcott*, 125 P. 303, 307 (Or. 1912)). When that happens, every petition circulated by that circulator "must fall, unless the genuine signatures are affirmatively shown." *Id.* (quoting same). *Barkley* thus shifts the "burden of proof" to the petition's supporters to show that signatures on those petitions are "genuine." *Id.* at 635.

B. *Barkley*'s logic reaches dishonest notaries.

A valid circulator's affidavit turns on the honesty of both the circulator and the notary. Under *Barkley*, when a circulator falsely certifies that he always read the object statement and witnessed every signer sign a petition, the factfinder has no reason to believe any of that circulator's affidavits. Likewise, when a notary falsely certifies that a circulator "appeared before the notary, attested to the truth of his or her statements, and signed the affidavit," the factfinder has no reason to believe any of that notary's certificates. *Johnson*, 276 Neb. at 890. In both cases, the elementary common-law rule applied in *Barkley* dictates that an actor's dishonesty in the petition process impeaches all his official acts.

Once a notary's certificates are impeached, *Barkley* demands that the burden shifts to a petition's supporters to prove the genuineness of signatures on petitions notarized by that person. The reason is that only a valid notarization creates the required "circulator's affidavit." Neb. Rev. Stat. § 32-630(2). "An affidavit is a written declaration under oath[.]" *Id.* § 25-1241. And the circulator's oath is administered by a notary. *Id.* §§ 32-628(3), 64-107.01. So no "affidavit" exists unless a notary put the circulator under oath and the circulator signed before the notary.

In the district court's words, "an affidavit signed outside of the notary's presence is simply not an 'affidavit.'" (T964). "Nor is the failure to make an affidavit a 'clerical' or 'technical' error" that can be ignored. (*Id.*) (quoting Neb. Rev. Stat. § 32-1409(3)).

The "oath of a circulator" is "prima facie validity for signatures on an initiative petition." *State v. Monastero*, 228 Neb. 818, 826 (1988). The facts in a circulator's affidavit—that the circulator read the object statement and watched each person sign—are presumably true. But *Barkley* teaches that when circulators swear a false oath, the prima facie validity of signatures they collected is destroyed because a factfinder cannot rely on the affidavit. The same should be true when a circulator fails to sign before a notary and swears no oath at all. *E.g.*, *In re Initiative Petition No. 365,* 55 P.3d 1048, 1051 (Okla. 2002) ("failure of an affiant to appear personally before a notary destroys the verification and invalidates the signatures on those sheets"); *Bowe v. Chicago Electoral Bd.*, 404 N.E.2d 180, 181 (Ill. 1980) ("failure of the circulator to personally appear before the notary public invalidates the petition"); Op. Att'y Gen. No. 92-104 at 6–7 (Aug. 24, 1992).

Modern rules of evidence provide one more reason to apply *Barkley* to notaries. At trial, witnesses are impeached—and their testimony disbelieved—based on "[s]pecific instances" of conduct "if probative of truthfulness or untruthfulness." Neb. Rev. Stat. § 27-608(2). In the same way, specific instances of falsely notarizing petitions impeach a notary's honesty—and all his certificates. *Barkley* thus complements the modern evidentiary rule: When a notary lies in notarizing some petitions, the factfinder must assume that the notary lied in notarizing *all* petitions. Without a valid notarization, there is no "affidavit" and no prima facie evidence that circulators lawfully solicited signatures. The burden then shifts for petitions notarized by dishonest notaries.

C. The district court erred by limiting *Barkley* to circulators.

Despite grasping the importance of a sworn circulator's affidavit, the district court declined to apply *Barkley* to notaries for two reasons. First, the court claimed that notarizing an affidavit outside the presence of a circulator does not implicate *Barkley*. Second, the court thought that applying *Barkley* to notaries would violate the Constitution. Neither is correct.

1. *Barkley* is triggered by dishonest conduct.

The district court started in the right place. It explained that the circulators in *Barkley* "forged signatures" and "lied about it under oath." (T967). Given their "false testimony," all signatures they collected were "rejected unless corroborated." (*Id.*). The court went off track when it turned to notaries. "A notary," said the court, "is not placed under oath." (*Id.*). The court thus concluded that "notarizing an affidavit outside of the circulator's presence is not false testimony" under *Barkley*. (*Id.*).

The district court's narrow view that only "false testimony" implicates *Barkley* finds no support in that case. *Barkley* held that "fraud," "forgery," or "perjury" impeach a circulator's affidavit. 103 Neb. at 635. But fraud and forgery would not qualify as "false testimony" under the district court's restrictive definition. Whether dubbed fraud or false testimony, the point is that *Barkley*'s burden-shifting rule is triggered when a circulator or notary acts dishonestly. For circulators, that might look like falsely certifying that voters signed the petition in the circulator's presence. For notaries, it means falsely certifying that the circulator signed the affidavit in the notary's presence.

But even if *Barkley* were limited to "false testimony," the district court's conclusion that notaries do not testify does not

follow because its minor premise is wrong: notaries *are* placed under oath. Upon commission, notaries swear an "oath" to "faithfully and impartially discharge and perform the duties of the office of notary public." Neb. Rev. Stat. § 64-102. By statute, notaries may not notarize a document outside the presence of the signer. *Id.* § 64-105. And notaries must certify (i.e., testify) that the document was signed in their presence. *Id.* § 32-628(3). A notary who falsely certifies that the circulator signed the petition in his presence violates his oath and gives false testimony, just as a circulator who falsely certifies that he witnessed each person sign the petition violates his oath and gives false testimony.

In fact, a notary's false certificate is even *worse* than a circulator's false affidavit. Unlike circulators, notaries are supposed to be disinterested public officials duty-bound to follow the law. The law in turn gives special deference to notaries. "The certification of a notary public's official duties, over his or her signature and official seal, is received by the courts as presumptive evidence of the facts certified therein." *Johnson*, 276 Neb. at 890. Indeed, the "notarial process works because we presume that the notary is fulfilling his or her notarial duties." *Id.* at 900 (Heavican, C.J., dissenting). When notaries breach their duties by falsely certifying that a document was signed in their presence, they betray the trust of the public—and the courts.

Nowhere is confidence in public officials like notaries more important than in the election context. This Court has called public officials "fiduciaries and trustees of the public" who must "above all . . . display good faith, honesty and integrity." *State v. Douglas*, 217 Neb. 199, 225 (1984) (quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221 (N.J. 1952)). The Arkansas high court has explained that "[i]f an officer of the election is detected in a wilful and deliberate fraud upon the ballot-box," the

"integrity of his official acts" is destroyed because "an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors." *Sturdy v. Hall*, 143 S.W.2d 547, 551 (Ark. 1940) (quoting George W. McCray, *American Law of Elections* § 574 (4th ed. 1897)). A certificate of a notary who falsely notarized a petition "is, therefore, good for nothing." *Id.*

If a notary lies in the petition process, why assume *any* of his certificates accurately reflect that any circulator signed in the notary's presence? Given their privileged status as public officials, notaries should be held to at least as high of a bar as circulators under *Barkley*.

2. Applying *Barkley* to notaries would not violate the Constitution.

The district court also thought that applying *Barkley* to notaries would defy the Constitution. Article III, Section 4, says that "legislation may be enacted to facilitate" the power of initiative. The district court interpreted this grant of legislative authority to preclude it from applying *Barkley*'s burden-shifting rule to notaries. The court claimed that doing so would require it to "create new rules for the initiative process." (T968). That reasoning collapses for two reasons.

First, Barkley did not create a new rule for the initiative process. So applying *Barkley* to notaries would not either. *Barkley* instead invoked the "elementary" common-law rule that testimony of an impeached witness is not believable unless corroborated. 103 Neb. at 635. The district court used that rule in this very case, finding Jennifer Henning's trial testimony uncredible except where corroborated by text messages. (T962).

It is also squarely within the Court's power to apply a common-law rule until abrogated by positive law. Statutes and

constitutional provisions in derogation of the common law are to be construed "strictly." *Dykes v. Scotts Bluff Cnty. Agr. Soc., Inc.*, 260 Neb. 375, 382 (2000). And the "common law will be abrogated no further than expressly declared or than is required from the clear import of the language employed by the statute." *Id.* Article III, Section 4, does not come close to expressly disapproving the common-law rule that a dishonest actor's testimony should be rejected unless corroborated.

Second, the district court declined to apply a "rule of imputation," wherein a court "should presume" that all petitions circulated or notarized by a fraudster should be invalidated. (T967). But Secretary Evnen understands *Barkley* to be much narrower. Rather than a substantive rule of "imputation," *Barkley* is an evidentiary burden-shifting rule triggered when an actor's character for truthfulness is impeached. To be sure, other States go further than *Barkley* and hold that no signatures on petitions improperly circulated or notarized may be counted. *E.g.*, *Knutson v. Sec'y of State*, 954 A.2d 1054, 1056 (Me. 2008); *Monts. for Just. v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006); *Citizens Comm. v. D.C. Bd. of Elections & Ethics*, 860 A.2d 813, 818 (D.C. 2004); *State ex rel. Comm. for the Referendum of Lorain Ord. No. 77-01 v. Lorain Cnty. Bd. of Elections*, 774 N.E.2d 239, 249 (Ohio 2002). One court even tossed an initiative petition "in its entirety" to "protect the integrity of the initiative process." *In re Initiative Petition No. 379*, 155 P.3d 32, 36 (Okla. 2006).

Barkley is not so extreme. It does not prevent a petition's supporters from proving the validity of signatures on petitions circulated or notarized by an impeached witness. It merely gives them the burden of proof.

The district court's reliance on *Hendrix v. Jaeger*, 979 N.W.2d 918 (N.D. 2022), to limit *Barkley* to circulators is

therefore incorrect. (T968). There, the North Dakota Secretary of State suspected that a notary notarized affidavits outside the circulators' presence. 979 N.W.2d at 920. Based on little more than a hunch, the Secretary "invalidated" all signatures on petitions notarized by that notary. *Id.* The North Dakota Supreme Court found "no precedent supporting invalidation of a class of documents notarized by an individual notary on the basis of imputing fraud relating to some of the documents." *Id.* at 924. It held that the Secretary erred in irredeemably "disqualifying" all signatures on petitions notarized by the suspected fraudster. *Id.* at 927.

Hendrix is correct and would be correct under Nebraska law too. *Hendrix* disavowed the wholesale rejection of signatures on petitions notarized by a dishonest notary. Consistent with that holding, *Barkley* does not require wholesale rejection. It simply shifts the burden of proving a signature's validity when a circulator's affidavit is impeached or when a notary's dishonesty undermines his certification that circulators signed under oath. Like the *Hendrix* court, Secretary Evnen agrees that all valid signatures should be counted. *See* Neb. Rev. Stat. § 32-1409(3); (T371). *Barkley* is not to the contrary.

*   *   *

To recap: Under *Barkley*, a circulator's affidavit—signed under oath—is prima facie evidence that signatures on a petition are genuine. Notarization proves that a circulator swore the required oath. But when notaries lie to advance the petition, their dishonesty casts doubt on every affidavit they notarized, and a factfinder has no reason to believe those affidavits. The burden thus shifts to a petition's supporters to produce other evidence that signatures on petitions notarized by dishonest notaries are genuine and were lawfully solicited.

II. *Barkley*'s Burden-Shifting Rule Applies to Four Notaries Here.

The district court incorrectly limited *Barkley* to circulators. It then gave an alternative reason for dismissal. The court said that even if *Barkley* reached dishonest notaries, it would not shift the burden absent proof of widespread notarial malfeasance.

The court's alternative basis for dismissal is wrong because it is based on a faulty reading of *Barkley*—an error of law. When a district court purports to exercise discretion based on an error of law, "it is of little practical consequence" whether this Court "label [its] review as abuse of discretion or de novo." *Stone Land & Livestock Co. v. HBE, LLP*, 309 Neb. 970, 973 (2021). "A district court by definition abuses its discretion when it makes an error of law." *Vyhlidal v. Vyhlidal*, 311 Neb. 495, 509 (2022).

A. Dishonesty, not widespread wrongdoing, shifts the burden.

The district court misunderstood what shifts the burden of proof. The answer is dishonest conduct in the petition process. In *Barkley*, the anti-suffragists argued that a plaintiff's "burden of proof is not satisfied by evidence that a circulator was guilty of a particular fraud." 103 Neb. at 634. This Court rejected that view. Given specific examples of dishonesty, the Court found that the "probative value" of all the circulators' affidavits was "destroyed." *Id.* at 635. The circulators' dishonesty on some petitions shifted the burden of proof for all their petitions. This Court did not require proof that the circulators' deceit was so extensive that every petition they touched was likely tainted by fraud.

Yet the district court here did. Before it would shift the burden, the court tasked Secretary Evnen with showing "that

improper notarization was so widespread that the Court should impute these errors to all petitions touched by that notary." (T968). But *Barkley* does not "impute" falsities from one petition to another. *See* pp. 25–26, *supra*. It strips the presumptive validity from petitions circulated or notarized by individuals who lied in the petition process. *Barkley*, in other words, deals with a notary's or circulator's character for truthfulness. And a "particular fraud" is enough to prove that character lacking. 103 Neb. at 634.

Requiring proof that malfeasance was "widespread" before shifting the burden would swallow *Barkley* itself. The whole point of *Barkley* is that fraud—and the true scope of a dishonest actor's wrongdoing—is often well concealed. When some dishonest conduct is brought to light, a court must shift the burden to a petition's supporters to show that petitions touched by those dishonest actors contain genuine signatures. Secretary Evnen was "only required to assume the burden of proof of those elements necessary" to shift the burden, and the court erred in writing into *Barkley* an extra element that false notarizations be "widespread." *Empire State Bldg. Co. v. Bryde*, 211 Neb. 184, 191 (1982).

B. The district court's findings show that four notaries dishonestly notarized petitions.

1. With *Barkley* sidelined, the district court considered whether individual petitions bore false notarizations. It found plenty of examples. And from four notaries in particular: Crista Eggers, Garrett Connely, Kimberly Bowling-Martin, and Patricia Petersen. The district court's own factual findings show that these four notaries acted dishonestly in the petition process.

The district court found that Crista Eggers notarized at least 13 petitions outside the circulator's presence. (T979–80). (That number jumps to 18 if petitions invalidated by the counties

are included. (T977, 979)). In answering an interrogatory, Eggers confessed that on multiple occasions a circulator "did not sign the documents in her presence." (E102, p. 3). Eggers texted a circulator that she was "comfortable notarizing" her affidavits without her present. (E94). And Eggers notarized at least one petition with *no signature* on the circulator's affidavit. (T979). These examples of Eggers's false notarizations occurred after mid-May 2024, when the campaign's struggles were obvious. (*Id.*). The Sponsors introduced no evidence at trial as to how Eggers could have innocently notarized petitions without the circulator present or without the circulator's signature.

The district court found that Garrett Connely notarized at least 33 petitions outside the circulator's presence. (T982–83). Like Eggers, Connely admitted that "there must have been some instances" where he notarized outside the circulator's presence. (E273, 85:3). Connely also notarized at least two petitions with *no signature* on the circulator's affidavit. (T983). And at one point, Eggers texted him to be "very careful" that others do not "question that we ever notarize things that aren't in person and such." (E107, pp. 1–2). Connely's false notarizations occurred "towards the end of the campaign" when, in his words, "there was a lot going on." (E273, 148:13–20). The Sponsors introduced no evidence as to how Connely could have innocently notarized petitions without the circulator present or without the circulator's signature.

The district court found that Kimberly Bowling-Martin notarized at least two petitions with *no signature* on the circulator's affidavit. (T988–89). But it did not stop there. The court also found that group messages "strongly suggest" that additional "petition pages were notarized [by Bowling-Martin] outside of the circulator's presence." (T973). The campaign had a "courier" who picked up petitions from "Seward, York and Beatrice and

deliver[ed] them" to a vape shop in Lincoln where "Kim [Bowling-Martin] will notarize and pick up." (E274). The court found that this scheme "suggests that un-notarized petitions from the Seward, York, and Beatrice stores were picked up and notarized outside of the circulator's presence." (T973). The "courier" discussion occurred on June 29—in the campaign's desperate final days. The Sponsors introduced no evidence as to how Bowling-Martin could have innocently notarized petitions without the circulator present or without the circulator's signature.

Finally, the district court found that Patricia Petersen notarized at least five circulators' affidavits outside the presence of the circulator. (T988). Like the others, Petersen notarized four petitions with *no signature* on the circulator's affidavit. Petersen falsely notarized many petitions in the final month of the campaign. (*E.g.*, E30, pp. 185–86, 203–05). The Sponsors introduced no evidence as to how Petersen could have innocently notarized petitions without the circulator present or without a circulator's signature.

2. Secretary Evnen agrees with these factual findings. This Court need not second-guess the notary fraud the district court found. Secretary Evnen asks only that this Court apply the law, correctly understood, to the facts the court found. And when it does, reversal is warranted.

The district court's factual findings—and the fraudulent conduct underlying them—show that Eggers, Connely, Bowling-Martin, and Petersen were dishonest in the petition process. Their false notarizations fall into two main camps: (1) notarizing circulator affidavits outside the circulator's presence, and (2) notarizing circulator affidavits without a circulator's signature. To pull off either form of fraud, notaries must lie, defy state law, and break their oaths. A notary willing to deceive election officials

some of the time should not be trusted any of the time. "Falsely notarizing a signature is manifestly dishonest and an absolute ethical transgression." *In re Beeson*, 997 N.E.2d 336, 337 (Ind. 2013) (Dickson, C.J., dissenting).

Notarizing affidavits outside the circulator's presence requires dishonesty. When notarizing an affidavit, the notary must certify three things: "that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit." *AVG Partners I, LLC v. Genesis Health Clubs of Midwest, LLC*, 307 Neb. 47, 83 (2020). A notary who certifies a circulator's affidavit outside the circulator's presence necessarily lies about all three. The notary also flouts state law, which requires that notarial acts be performed in the notary's presence and only after the signer's identity is confirmed. Neb. Rev. Stat. § 64-105(1). And in breaking state law, dishonest notaries also violate their oaths to "faithfully and impartially discharge and perform the duties of the office of notary public." *Id.* § 64-102. Notarizing an affidavit outside the presence of the affiant embodies "knowingly dishonest conduct." *In re Wysolmerski*, 237 A.3d 706, 716 (Vt. 2020).

Notarization "is not a trifle, and the failure to do so properly is a fraud on anyone who later relies on the document." *Disciplinary Counsel v. Roberts*, 881 N.E.2d 1236, 1239 (Ohio 2008). That is why someone convicted of a "crime involving fraud or dishonesty within the previous five years" cannot serve as a notary public—honesty is *essential* to the job. Neb. Rev. Stat. § 64-101(6). Lawyers have been suspended from practicing law for far less than notarizing outside the signer's presence dozens of times. *E.g.*, *Ohio State Bar Assn. v. Trivers*, 917 N.E.2d 261, 261 (Ohio 2009) (imposing one-year suspension on lawyer who "notarized nine documents without personally witnessing the signatures"); *In re Tiefenthaler*, 358 N.W.2d 292, 294 (Wis. 1984)

(imposing six-month suspension when lawyer "falsely notarized two affidavits as having been sworn to and subscribed before him").

Notarizing a blank circulator's affidavit is even more dishonest. "[I]f the notary attests an affidavit which is still blank when he signs it, . . . the notary cannot possibly assure himself that the signature of a purported affiant will be validly placed on the document." *Johnson v. State*, 238 N.E.2d 651, 654 (Ind. 1968). That is why "notarizing a document for an absent signatory constitutes fraud without further evidence of fraudulent intent." *Bergeron v. Bergeron*, 377 So.3d 817, 818 (La. App. 2023). "A notary betrays the public trust when he signs a certificate of acknowledgment with knowledge that the blanks will be filled in later[.]" *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514 (Idaho 1980). "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1190 (Wash. 2013) (quoting Amicus Br. of Wash. Bar Ass'n at 1).

The Sponsors offered no evidence that might explain how a notary could innocently notarize petitions with no circulator's signature. None exists. Consider the notary's certificate that appears below the circulator's affidavit:

Circulator ______________________________

Address ______________________________

Subscribed and sworn to before me, a notary public, this __________ day of __________ 20___
at____________________, Nebraska.

Notary Public ______________________________

Neb. Rev. Stat. § 32-628(3). If the circulator line is blank, the circulator could not have "subscribed" his or her signature. Yet Eggers, Connely, Bowling-Martin, and Petersen each certified that a circulator signed the affidavit when the petition itself proved otherwise. (E180, pp. 1675, 9548, 9682, 10411, 10478; E181, pp. 1035, 2038, 7843, 8382, 9705). Why should a factfinder assume that notaries who commit such an obvious fraud notarized any petition honestly?

3. The district court suggested that even amid notary dishonesty, *Barkley* gave it discretion to decide whether to shift the burden. But the district court cannot refuse to shift the burden based on a perceived lack of "widespread fraud" or whatever factor it fancies. Instead, "the rule is well stated" that when a circulator" is shown to have acted fraudulently, the value of his verification is destroyed, and the petition ***must fall***, unless the genuine signatures are affirmatively shown." *Barkley*, 103 Neb. at 636 (emphasis added) (quoting *Olcott*, 125 P. at 307).

Applied to notaries, the district court's discretion begins and ends with deciding whether improper notarizations show a notary's character of dishonesty. If they do, petitions notarized by that notary "must fall" unless corroborated. Here, the district court's own factual findings prove that four notaries lied many times in notarizing petitions. Those findings impeach their character for truthfulness. The Sponsors offered *no evidence* to rehabilitate the notaries' dishonest character. Given the undisputed evidence of false notarizations, *Barkley* shifts the burden to the Sponsors to show that signatures on all petitions notarized by Eggers, Connely, Bowling-Martin, and Petersen are genuine.

C. This Court should remand for a second phase of trial.

Shifting the burden of proof as to petitions notarized by Eggers, Connely, Bowling-Martin, and Petersen warrants remand for a second phase of trial. Secretary Evnen certified that both the Legalization Petition and the Regulatory Petition cleared the seven-percent threshold by roughly 3,400 signatures. *See* p. 13, *supra*. Stripping the presumptive validity of signatures on petitions notarized by the dishonest notaries leaves the Sponsors well short of the 86,499 valid signatures they needed for dismissal after the first phase of trial on each petition:

Notary	Signatures on Legalization Petition	Signatures on Regulatory Petition
Eggers	1,671	2,032
Connely	11,906	8,817
Bowling-Martin	3,342	772
Petersen	10,510	7,673
Total	**27,429**	**19,294**

(*See* E30, E31) (summarized). When subtracted from the certified signatures, the Legalization Petition is left with **62,533** signatures, and the Regulatory Petition is left with **70,562** signatures. The Court should therefore reverse the district court's order and remand the cause for a second phase of trial where the Sponsors will bear the burden of proving that they submitted at least 86,499 valid signatures for each petition.

The dishonest notarizations the district court found call for rejecting all petitions notarized by the four dishonest notaries, "unless the genuine signatures are affirmatively shown." *Barkley*, 103 Neb. at 636 (quoting *Olcott*, 125 P. at 307). But if this Court in its de novo review chooses not to shift the burden with respect to all four notaries, it should at least shift the burden for petitions notarized by Eggers and Connely.

Eggers and Connely notarized petitions outside the circulator's presence—and they knew that doing so was wrong. When a circulator got wind of their scheme, Eggers texted Connely to "be very careful" to "[n]ot lead him to question that we ever notarize things that aren't in person and such." (E107, p. 1–2). So not only did Eggers and Connely knowingly certify events they never witnessed; they were also careful to cover the tracks of their lies.

But Eggers and Connely were not careful enough. When their fraud was exposed, both confessed to lying while notarizing. Connely stated that "there must have been some instances" where he notarized outside the circulator's presence. (E273, 85:3). And Eggers admitted in an interrogatory that she "notarized [circulator affidavits] for Michael Egbert" even though "Egbert did not sign the documents in her presence." (E102, p. 3). The district court found that Egbert's petitions contained forgeries. (T958). How many other petitions notarized by Eggers and Connely do too? Without shifting the burden of proof as to petitions notarized by Eggers and Connely, we may never know.

At a minimum, therefore, the burden of proof should shift for petitions notarized by Eggers and Connely. If it does, the Sponsors would still be left with fewer than 86,499 valid signatures on each petition. *See* p. 34, *supra*. This Court should thus reverse and remand for a second phase of trial.

III. The District Court Should Have Found Even More Fraud and Dishonest Conduct.

A. The analysis should start and end with the district court's own factual findings. But if this Court considers those facts insufficient to shift the burden under *Barkley*, it should reconsider what the district court did *not* find. It found no "general practice of rule-breaking" by the campaign's notaries. (T969). That factual finding was clearly erroneous. *Smalley v. Neb. Dep't of Health & Hum. Servs.*, 283 Neb. 544, 549–50 (2012) (standard of review). Like its misapplication of *Barkley*, however, that finding was preceded by an error of law reviewed de novo. *Id.*

At trial, Eggers and Connely invoked the Fifth Amendment in response to nearly every question asked. Kimberly Bowling-Martin and other notaries and circulators did the same during depositions. (*E.g.*, E134, p. 71). Connely, for example, pleaded the Fifth when asked if he notarized petitions outside the presence of circulators or directed others to do so. (Vol. I, 876–77, 895). And he would not say whether anyone else notarized outside the circulator's presence. (Vol. I, 895). For her part, Bowling-Martin would not answer whether she knowingly notarized petitions without the circulator present. (E134, p. 71:17–24).

B. "Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–54 (1923). And the "Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). This Court has repeatedly affirmed that when a witness "in a civil case refuses to testify on the ground that the evidence may incriminate him or her, the trier of fact may draw an adverse inference from the refusal." *In re Est. of Jeffrey B.*, 268 Neb. 761, 773

(2004); *see Wilson v. Misko*, 244 Neb. 526, 548–49 (1993); *Schuler v. Dunbar*, 208 Neb. 69, 74–75 (1981). The district court declined to apply this clear precedent on the grounds that Neb. Rev. Stat. § 27-513(1) controls instead. (T950–53). That statute provides: "The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom."

Section 27-513(1) does not control because this Court has consistently allowed factfinders to draw an adverse inference in a civil case when a witness invokes the Fifth Amendment. And it has done so at least three times since the statute passed in 1975. *See Jeffrey B.*, 268 Neb. at 773; *Misko*, 244 Neb. at 548–49; *Schuler*, 208 Neb. at 74–75. If section 27-513(1) did not permit an adverse inference in a civil case, this Court would have said so. Citing *Jeffrey B.* and *Mikso*, Professor Mangrum has explained that "[w]hile it is constitutionally impermissible in a criminal case to comment upon the invocation of the privilege against self-incrimination, that prohibition does not constitutionally extend to civil cases, and has been held inapplicable in Nebraska." R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-513 (2025 ed.). The district court erred because it disregarded this binding precedent. "Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system[.]" *State v. Barranco*, 278 Neb. 165, 172 (2009).

C. Next, the district court said that it would not draw an inference in Seretary Evnen's favor (even if it could) because the Secretary's lawyer, the Attorney General, was leading a criminal investigation into suspected election fraud. (T952). The court suggested that this "problem" could be mitigated if only Secretary Evnen agreed to continue the trial until after the Attorney General finished prosecuting election law violators. (*Id.*). In other

words, the district court prejudiced one constitutional officer—the Secretary of State—based on the independent actions of another constitutional officer—the Attorney General—because the Attorney General was investigating election crime, a duty the Legislature expressly gave him. Neb. Rev. Stat. § 84-205(2).

A district court abuses its discretion when its decision is "based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence." *Sherrets Bruno & Vogt LLC v. Montoya*, 318 Neb. 532, 541 (2025). "It would stultify enforcement of law to require a governmental agency" to "choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *United States v. Kordel,* 397 U.S. 1, 11 (1970). The district court essentially forced the Attorney General to choose between exercising his statutory duty to represent the Secretary of State in litigation, Neb. Rev. Stat. § 84-202, and his statutory duty to enforce the election and criminal laws, *id.* § 84-205(2). The Attorney General carried out both tasks simultaneously. The district court punished his client, the Secretary of State, for his doing so. The district court acted unreasonably and thus abused its discretion in failing to draw an adverse inference against the Sponsors on that constitutionally suspect basis.

D. Because it refused to draw an adverse inference based on the witnesses' pleading the Fifth, the district court clearly erred by finding no "general practice of rule-breaking" by the campaign's notaries. (T969). Connely admitted that he "must have" notarized petitions outside the circulator's presence. (E273, 85:3). When considered with the adverse inference, this admission is more than enough to strip the presumptive validity of every petition Connely notarized. Likewise, the district court

found that text messages “strongly suggest” that Kimberly Bowling-Martin notarized an unknown number of petitions outside the circulator’s presence as part of the “courier” scheme. (T973). When the adverse inference from Bowling-Martin’s silence is added, the presumptive validity of every petition she notarized should be stripped too. Shifting the burden with respect to petitions notarized by only Connely and Bowling-Martin leaves the Sponsors well below the threshold needed to affirm. Indeed, shifting the burden for petitions notarized by Connely alone would be enough to reverse.

CONCLUSION

The Court should reverse and remand for a second phase of trial.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 9,641 words excluding this certificate. This brief was prepared using Microsoft Word 365.

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Certificate of Service

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