IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

JOHN KUEHN **Plaintiff,** **v.** **ROBERT B. EVNEN, in his official capacity as the Secretary of State of Nebraska; and ANNA WISHART, CRISTA EGGERS, and ADAM MORFELD,** **Defendants.**	**Case No. CI 24-3244** **SECRETARY EVNEN'S POST-TRIAL BRIEF**

Defendant and Cross-Claimant, Secretary of State Robert B. Evnen, submits this Post-Trial Brief in support of his request for declaratory relief.

INTRODUCTION

Cheating is a choice. A choice that comes with consequences. Here, the decision to cheat came from the very top of the Nebraskans for Medical Marijuana (NMM) initiative campaign, from Sponsor and campaign manager Crista Eggers, and was then carried out by a host of petition circulators and notaries, all following her lead. Adhering to Eggers' declaration that "We don't follow the rules anymore," supporters of the petitions knowingly engaged in widespread wrongful conduct. Circulators engaged in fraud, notaries in malfeasance, and the upper echelons of the campaign hierarchy undertook efforts to sweep

this pervasive wrongdoing under the rug and prevent its full extent from ever being revealed.

The evidence presented by the Secretary establishes that tens of thousands of signatures submitted by NMM were either collected or notarized by dishonest actors. Far from just one or two isolated individuals, the dishonesty permeated the entire campaign. At least a dozen individuals—Crista Eggers, Garrett Connely, Michael Egbert, Jacy Todd, Jennifer Henning, Shari Lawlor, Shannon Coryell, Marcie Reed, Timothy Bell, Morgan Rye-Craft, Kimberly Bowling-Martin, and Patricia Petersen—all engaged in either circulator fraud, notarial malfeasance, or both. These names include individuals at the very top of the campaign and who, collectively, did the bulk of the work. Nor can their misconduct be dismissed as mere technical mishaps or unintentional mistakes. The evidence encompasses at least five categories of circulator fraud (including forgery) and at least four categories of notarial malfeasance, all of which require intentional misaction. In short, these twelve willfully disregarded and flagrantly violated the rules governing the initiative process. In so doing, their fraud and malfeasance has tainted over 77,000 signatures across both petitions. Furthermore, the sheer scope of their misconduct has made it practically impossible to determine how many genuine signatures were actually submitted by the Sponsors.

The evidence before this Court is overwhelming. *So overwhelming that a second phase of trial is entirely unnecessary.* Intentional wrongful conduct permeated the campaign from top to bottom. In rare cases such as this, where an initiative campaign is completely riddled with fraud and tainted by malfeasance, "the only effective way to protect the integrity of the initiative process and to uphold the constitutional and statutory rights and restrictions associated therewith is to strike the . . . petition in its entirety." *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 34 (Okla. 2006); *see also Brousseau v. Fitzgerald*, 675 P.2d 713, 716 (Ariz. 1984) ("The only way to

protect the [signature collection] process from fraud and falsehood is to make such conduct unprofitable.").

This consequence is severe, but it is justified. "[F]raud in invoking the initiative process is fraud perpetrated on Nebraska's Secretary of State and other public officials, who must determine the validity of the signatures on a petition, and ultimately on the people of Nebraska." *State v. Monastero*, 228 Neb. 818, 826 (1988). This Court cannot turn a blind eye to the Sponsors and NMM campaign members' willful disregard of the Nebraska Constitution and the statutory scheme that regulates the initiative process. *See Barkley v. Pool*, 102 Neb. 799, 169 N.W. 730, 731 (1918). When an initiative petition "not in compliance with the requirements of the law"—such as one that is "invalid for fraud"—is submitted to public officials, it presents a "judicial question[.]" *Id*. When faced with this sort of fraud, malfeasance, and wrongdoing, only the judiciary can protect the integrity of the initiative process.

Wrongdoing of this magnitude cannot be ignored. It is the perpetrators of that wrongdoing, the twelve individuals listed above (along with any others whose misconduct may have slipped by unnoticed), who are responsible for the consequence the law demands. Their abuse of the public trust, their willful disregard for the law, their willingness to let the ends justify the means have brought us here.

This case is not about the subject matter of the petitions. The merits (or lack thereof) of medical marijuana are not on trial. This case is about the evidence, staggering in its scope, that reveals the unprecedented degree of blatant wrongdoing engaged in by NMM, the Sponsors, and those under the Sponsors' direction and control as they undertook the campaign. The majority—nearly all—of that evidence presented by the Secretary sits before the Court entirely uncontradicted. The Sponsors had the opportunity to present countervailing evidence. They could have called co-Sponsors Adam Morfeld and Anna Wishart to rebut the evidence suggesting that NMM's campaign was built on a foundation of tolerating, encouraging, and engaging in fraud,

malfeasance, and other wrongdoing. The decision not to do so is telling. The Sponsors put forth no affirmative evidence that they conducted a clean campaign because that evidence does not exist. It does not exist because that is not the campaign that was run.

In light of the breadth and scope of the fraud, malfeasance, and other intentional wrongful conduct before the Court, only one remedy is appropriate. This Court should issue the declaration sought by the Secretary: That an insufficient number of genuine signatures have been submitted in support of these petitions. That declaration would render both initiatives legally insufficient, which, in turn, would require the results of the election (as to these petitions) be declared void. *Duggan v. Beermann*, 245 Neb. 907, 916 (1994).

In the alternative, the Court should hold that the Secretary has met the burden of production set forth in *Barkley v. Pool*. 103 Neb. 629, 173 N.W. 600 (1919). Having put forth substantial evidence of fraud, malfeasance, and other wrongdoing, the presumption of validity that normally attaches to submitted signatures is lost and the burden flips to the Sponsors to "affirmatively prove[]" that the tainted signatures they have submitted are genuine. *Id*. at 600 (syllabus by the Court). Here, given the magnitude of the fraud and malfeasance involved, any effort to rehabilitate would almost certainly be futile. That said, the Secretary acknowledges that *Pool* suggests (and this Court's bifurcation order contemplates) affording the Sponsors the opportunity to try.

At bottom, the Secretary urges this Court to act to protect the integrity of the petition process. The right of initiative is precious. The wrongdoing engaged in here threatens that right. Nebraskans deserve to have confidence that any initiative that appears on the general election ballot obtained its place in compliance with the law. Because of NMM's pervasive wrongdoing, that confidence is absent here. This Court should act to restore what has been lost. Issuing the declaration requested by the Secretary will accomplish that worthy goal.

BACKGROUND

I. Legal Background

The Nebraska Constitution reserves to the people the power of initiative to enact laws through a petition process. Neb. Const. art. III, § 2. The power is invoked in two steps: the petition (signature-gathering) step, followed by the popular vote. The Constitution requires that petitions for ballot initiatives "be signed by seven percent of the registered voters of the state," before advancing to the ballot for a popular vote. Neb. Const. art. III, § 2. The "[v]alidity of a petitioner's signature is an integral part of the initiative." *Monastero*, 228 Neb. at 826. "With the requisite number of valid signatures, the proposed law which is the subject of the initiative petition is submitted to a vote of the people. Without a sufficient number of valid signatures, the initiative petition fails." *Id*. (internal citation omitted). "Without signature validation . . . the initiative process might be invoked and placed in motion without any semblance of compliance with the constitutional provisions governing the initiative." *Id*.

The Constitution gives the Legislature power to pass "reasonable legislation to prevent fraud" and to "facilitate the operation of the initiative power." *State ex rel. Winter v. Swanson*, 138 Neb. 597, 294 N.W. 200, 201 (1940); Neb. Const. art III, § 4. It is worth noting here, at the threshold, that throughout this brief (and indeed, throughout the trial) "fraud" is and has been employed not as a legal term-of-art, but rather for its everyday meaning; "fraud" is a catch-all term for intentional, wrongful, deceitful conduct. *See* Fraud, Merriam-Webster Online Dictionary, https://perma.cc/786V-N3HL ("an act of deceiving or misrepresenting"). This is consistent with the meaning suggested by the text of the relevant Nebraska statutes, how relevant Nebraska precedent (like *Monastero* and *Pool*) have employed "fraud," and how that word is commonly used in the extra-jurisdictional authorities relied upon by the Secretary. In short, precedent discussing "fraud" in this context invariably invokes its colloquial, everyday meaning, rather

than examining and parsing the legal elements of fraud as a claim or cause of action. So too with "malfeasance."

The Sponsors' attempts to narrow these broad concepts to some smaller subset that falls within the narrow bounds of a legal term-of-art should be seen for what they are—misdirection. In this case, the Secretary alleged (and, at trial, has proven) that the Sponsors and other members of the NMM campaign engaged in fraud and malfeasance throughout the signature-gathering and notarization process. The Secretary has not advanced fraud or malfeasance as a *claim* or *cause of action*.

The initiative statutory scheme has fraud-defeating security checks that operate on four levels: the signer level, the circulator level, the notary level, and the sponsor level. Each serves to help prevent fraud and ensure that the Constitution's numerosity requirement is satisfied only by genuine signatures.

At the signer level, each signer of a petition is required to "affix the date, print his or her last name and first name in full, and affix his or her date of birth and address" alongside his or her signature. Neb. Rev. Stat. § 32-630(1). This information is later compared against voter registration records by county election officials to ensure the purported signer is a Nebraska registered voter. *Id.* § 32-1409(1). The counties also compare the signer's signature with a signature stored in the registered voter's records. *Id.* "The express purpose" of this step is "to prevent fraud, deception, and misrepresentation in the petition process." *Id.*

The next security check is at the petition circulator level. Petition circulators collect signatures from Nebraska voters on petition sheets. Statute requires that "[e]ach circulator of a petition shall personally witness the signatures on the petition and shall sign the circulator's affidavit." *Id.* § 32-630(2). Signatures gathered on a petition for when circulator did not personally witness the voter affixing their signature not counted. *Id.* Thus, circulators are not allowed to leave

petition pages at a location to be signed and then return to pick up those pages later. *Id.; see also* Ex. 145, pp. 6, 13.

By signing the circulator's affidavit (also known as the "circulator's oath"), the circulator swears "that each person whose name appears on the petition personally signed the petition in the presence of the [circulator]" on the date represented and "that the [circulator] believes that each signer was qualified to sign the petition, and that the [circulator] stated to each signer the object of the petition as printed on the petition before he or she affixed his or her signature to the petition." *Id.* The requirement that the circulator is present for each voter's signing discourages attempts by voters to sign for multiple people (e.g., a person signing for his whole family), to forge signatures, or to otherwise falsify information. The requirement that circulators read the object statement to signers ensures that signers are not deceived into signing petitions they do not actually support. And the requirement that paid circulators identify themselves as such helps signers identify initiatives that may be propelled by out-of-state money or special interests rather than representing a genuine grassroot Nebraska effort. *See* Neb. Rev. Stat. 32-628(4).

These requirements are not idle technicalities. An individual who engages in circulator fraud is subject to a Class IV felony charge. And petition pages, along with all the signatures affixed thereto, prepared by an individual who fails to adhere to these procedures are not included in the final count of signatures submitted by an initiative campaign.

Just as circulator-level security helps prevent signer fraud, notary-level security helps prevent circulator fraud. The circulator affidavit (circulator's oath) must be signed by the circulator in the presence of a notary public. *Id.* § 32-628(3). The notary is responsible for verifying that the person signing the circulator affidavit is who he says he is and has signed the affidavit on the date it purports to be signed. *See Johnson v. Neth*, 276 Neb. 886, 890 (2008). This prevents forgery, interference by ineligible circulators, and false dating. A circulator who

might otherwise consider engaging in fraud may be deterred by the potential exposure to criminal punishment that can arise from falsely swearing an oath. *See Monastero,* 228 Neb. at 826–27, 838–41. Requiring notarization therefore helps ensure that circulators take the oath that they swear seriously; it adds gravity and solemnity to the process. *See* Trial Tr. Vol I. at 100:21–25, 110:16–22;[1] *see also* Ex. 145, p. 6. Notaries are frequently "relied upon in business and law to minimize fraud in signed documents. Indeed, this responsibility is a very important one, for without it, a signature on an important document might not be worth the paper upon which it is written." Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. Rev. 873, 874 (1992).

The final level of security is the ballot sponsor level. After an initiative campaign collects its signatures, the sponsors of an initiative must sign an affidavit certifying that the petition contains a sufficient number and distribution of signatures. *Id.* § 32-1407(4). The sponsor affidavit ensures that election officials do not waste time reviewing petitions with insufficient numbers of signatures. The affidavit also discourages sponsors from submitting a petition knowing that a significant number of signatures were invalidly obtained. Indeed, by sponsoring the petition, the ballot sponsor "assum[es] responsibility for the initiative or referendum petition process," even "expos[ing] themselves to potential criminal charges if information is falsified." *Hargesheimer v. Gale*, 294 Neb. 123, 131–32 (2016) (alteration omitted) (quoting *Loontjer v. Robinson*, 266 Neb. 902, 911 (2003)); *see also* Neb. Rev. Stat. § 32-1502. The sponsor affidavit thus represents a final check on the entire initiative campaign, ensuring that to the best of the sponsor's

[1] The trial of this case lasted four days. Because the transcript is not yet finalized, the Secretary has characterized and cited to an incomplete version of the transcript, circulated to the parties as of 4:18 pm on November 12, 2024, that contains the first three days of trial and portions of the fourth as "Trial Tr. Vol. I." The court reporter has informed the parties that the pagination will not change when the final version of the transcript has been compiled.

knowledge, enough Nebraska registered voters knowingly and properly signed the petition.

When the checks at every level are honestly performed, it creates a presumption that the signatures submitted are signatures of unique Nebraska registered voters. *See State ex rel. Morris v. Marsh*, 183 Neb. 521, 530 (1968); *Barkley v. Pool*, 103 Neb. 629 (1919). But each check relies on the honesty and integrity of the person doing the checking. The process relies on circulators, notaries, and sponsors providing an honest witness in the performance of their duties. *Cf. Maine Taxpayers Action Network v. Sec'y of State,* 795 A.2d 75, 80 (Me. 2002) ("[T]he integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator[s]").

II. Factual Background

Initiatives 437 and 438 are two ballot initiatives that were placed on the 2024 general election ballot. Initiative 437, which is referred to as the Legalization petition, sought to legalize medical marijuana for individuals and some caregivers. Initiative 438, which is referred to as the Regulation petition, sought generally to legalize the distribution of medical marijuana. Crista Eggers, Adam Morfeld, and Anna Wishart (the "Sponsors"), signed papers to sponsor both initiatives on May 18, 2023. Ex. 81; Ex. 82. The deadline for the Sponsors to file the minimum required number of valid signatures was July 3, 2024. Ex. 155; Ex 156. Because the two initiatives proposed statutory amendments, each petition needed valid signatures from 86,499 registered voters in Nebraska to qualify for the 2024 ballot. *Id.*

An entity called Nebraskans for Medical Marijuana ("NMM"), controlled by the Sponsors, led the signature collection effort. Sponsor Eggers additionally served as campaign manager for both initiatives. Ex. 273, at 37:15–38:6. Garrett Connely, NMM's statewide grassroots coordinator, was Eggers' chief lieutenant. *See* Ex. at 44:23–45:1. In the end, the NMM campaign turned in 114,367 signatures for the Legalization initiative and 114,596 signatures for the Regulation initiative

on July 3, 2024. Ex. 155; Ex. 156. State and county election officials reviewed those signatures, and officials rejected approximately twenty-three percent (23%) of the signatures submitted in support of both petitions (for a variety of reasons). Ex. 1; Ex. 2; Ex. 155; Ex. 156. Ultimately, on September 13, 2024, the Secretary certified that a sufficient number of signatures had been submitted, although he noted in a public statement that (at the time nascent) investigation into fraud could ultimately lead to a judicial recission of that certification. *See* Ex. S, Am. Cross-Claim; Am. Cross-Claim ¶¶ 31–34, 37 –43; *see also* Sean MacKinnon, *Nebraska attorney general announces charge filed in petition fraud case*, KETV 7 (Sep. 13, 2024), https://perma.cc/934C-8QDR. At the time of certification, 89,962 signatures were deemed valid for the Legalization initiative (3,463 over the threshold) and 89,856 for the Regulation one (3,357 over the threshold). Ex. 155; Ex. 156.

The Secretary's public reservation regarding the ultimate legal sufficiency of these petitions was prompted by the discovery of significant irregularities in Hall County. *See* MacKinnon, *supra*. These irregularities included submitted signatures of deceased Nebraskans, misspelled names, and incorrect birthdates. *Id.* As the criminal investigation progressed, it became apparent that the irregularities were the product of overt fraud; a petition circulator, Michael Egbert, admitted to using a phone book to forge names of individuals who had not actually signed the petitions. *See* Ex. T, Am. Cross-Claim. Once Egbert told criminal investigators in Hall County that he had never appeared before a notary, and that he instead had dropped his pre-signed petition pages off for notarization (which therefore necessarily occurred outside his physical presence) the civil investigation into irregularities associated with both medical marijuana initiatives began.

That civil investigation, as reflected in the substantial evidence presented at trial, revealed intentional wrongdoing by the NMM campaign at every level. In addition to the overt forgeries in Hall County, the investigation uncovered numerous other examples of fraud by petition circulators. The investigation also revealed copious evidence of malfeasance and other intentional wrongful behavior by notaries.

Finally, the investigation uncovered a host of evidence indicating that one of the Sponsors, Crista Eggers, had encouraged this wrongdoing, participated in it herself, and undertook efforts to cover it up.

These categories of wrongdoing are discussed in turn.

A. Circulator Fraud (Forgery, False Oaths)

At trial, the Secretary introduced evidence establishing five different types of circulator fraud.

The *first* category concerned Michael Egbert's overt forgery. *See* Trial Tr. Vol. I at 521:6-19. Egbert testified that he used a phone book to write down names of Nebraskans who never signed the petition. *Id*. Although many of his fraudulent signatures were caught by county officials in Hall County, hundreds of signatures Egbert submitted were ultimately included in the final signature count underlying the Secretary's verification. *See* Ex. 1; Ex. 2; Ex. 168.

A *second* category came from the testimony of Jennifer Henning, a petition circulator for NMM. She testified to a different kind of circulator fraud—signing petitions that she did not circulate. Specifically, Henning testified that (at Eggers' direction) she drove to a vape shop in Seward where she picked up petitions she had not personally circulated. Nevertheless, she signed the circulator's oath on those petitions, and then took those petitions and dropped them off at Eggers' house. Trial Tr. Vol. I. at 422:6–432:16, 475:24–478:5. Henning's testimony, which is corroborated by contemporaneous text messages exchanged between her and Eggers, Ex. 183, at 00:03:51–00:03:54, establishes that when she picked up and signed those petitions, she violated Nebraska law (reflected in the circulator's oath) requiring circulators to personally witness voters affix their signature and identifying information. Neb. Rev. Stat. § 32-630(2).

Henning's testimony and corroborating text messages illustrate a *third* category with NMM's circulation of signatures: that, contrary to law, petitions were left out on a counter, unattended, for people to sign. Trial Tr. Vol. I at 422:6–423:16, 475:24–478:5; Exs. 94-96; Ex.

183, at 00:03:29-00:03:54. The law is clear that signatories must affix their signature in the presence of the petition circulator (who must, among other things, read the object statemen of the petition). This practice was plainly unlawful.

A *fourth* category was discovered and outlined in text messages exchanged between Eggers and Marcie Reed, a prominent campaign circulator and notary. In those messages, the two discuss Reed's alteration and addition of missing information on petition pages. Ex. 275, pp. 1-2. Eggers cautions an apologetic Reed, explaining that Reed's behavior threatened the validity of the signatures in question. *Id*. The messages further imply that it was not only Reed who had altered or added additional information on petition pages. *Id*.

Yet a *fifth* category involves the circulator's oaths examined by handwriting expert Mark Songer. Songer examined circulator's oath signatures purportedly submitted by five petition circulators. *See generally* Ex. 143. For three of those circulators—Michael Glenn, Tommy Davis, and Edward Matthews—Songer concluded that for each circulator, several of the circulator's oaths signatures lacked "common authorship" with the other circulator's oath signatures he had reviewed. Ex. 143, pp. 29-30. Although Songer could not say definitively whether Glenn, Davis, and Matthews signed any of the respective oaths, the implication of Songer's expert opinion is clear. Even if *most* of the reviewed circulator's oaths were genuine, at least one oath for each individual was signed by someone other than Glenn, Davis, and Matthews. Thus, Songer's testimony established additional instances of petition pages not signed by the person who circulated the page in question and collected the signatures that appear on that page. Just like Henning signing the pages from the vape shop in Seward, the falsely signed petitions associated with Glenn, Davis, and Matthews are instances of circulator fraud, even if it is not immediately clear *who* committed that fraud. (An effort was made to locate Glenn, Davis, and Matthews, so that additional evidence regarding their circulator's oath signatures could be obtained, but those efforts were unsuccessful.)

Finally, there is a piece of evidence presented at trial that was unquestionably fraud, but for which there is insufficient information to know conclusively whether it was *circulator* fraud or *signer* fraud. Dee Ann Nice, Saunders County Clerk, testified that she validated a signature but later discovered the voter in question had never signed either petition. Trial Tr. Vol. I at 492:6–493:16; 494:17-25. Nice explained that the signature, which was signed under the voter's previous (maiden) name, was validated because it satisfied the "two-out-of-three rule." *See* Trial Tr. Vol. I at 494:11-15. The "two-out-of-three" rule is a forgiving standard established by the Secretary of State's office to carry out the statutory requirement that "[c]lerical and technical errors in a petition shall be disregarded" if the requirements of the law are "substantially followed." Neb. Rev. Stat. § 32-1409(3). Thus, the "two-out-of-three" rule permits signatures to be counted despite presumptively unintentional errors and minor mistakes.

Because the last name signed on the petition did not match the last name in the individual's voter registration file, Nice validated the signature then sent a letter to the voter asking her to update her voter registration if the voter had changed her name. Trial Tr. Vol. I at 494:19-22. Nice explained that, after sending the letter, she learned the voter had not signed and did not support either petition. Trial Tr. Vol. I at 494:23-25. Nice's testimony was corroborated by Deputy Secretary of State Wayne Bena, who explained Nice reached out to him to report this incidence of likely fraud after the lawsuit received attention from the news media. Trial Tr. Vol. I at 93:7-19.

B. Notary Fraud & Malfeasance

The Secretary also presented extensive evidence of malfeasance and other wrongdoing by notaries. David Wilson, Associate General Counsel and Licensing Director for the Secretary of State, testified that for a notarization to be proper under Nebraska law, at least two things *must* take place: (1) the notary must be in the physical presence of the principal when the principal signs the document, and (2) the notary must confirm the identity of the principal prior to notarization.

Trial Tr. Vol. I at 103:1-15. These two fundamental requirements are important. As Wilson testified, these requirements are a prerequisite to a lawful and proper notarial act and adherence to them safeguards the public's trust in notarized documents. Trial Tr. Vol. I at 103:1-15, 100:21-25, 110:16-22.

Evidence adduced at trial shows that at least eight notaries engaged in improper notarizations. Their malfeasance taints (and ultimately nullifies) at least 48,137 signatures for the Legalization petition and at least 29,560 for the Regulation petition. *See* Ex. 30; Ex. 31; Ex. 32; Ex. 45; Ex. 168.

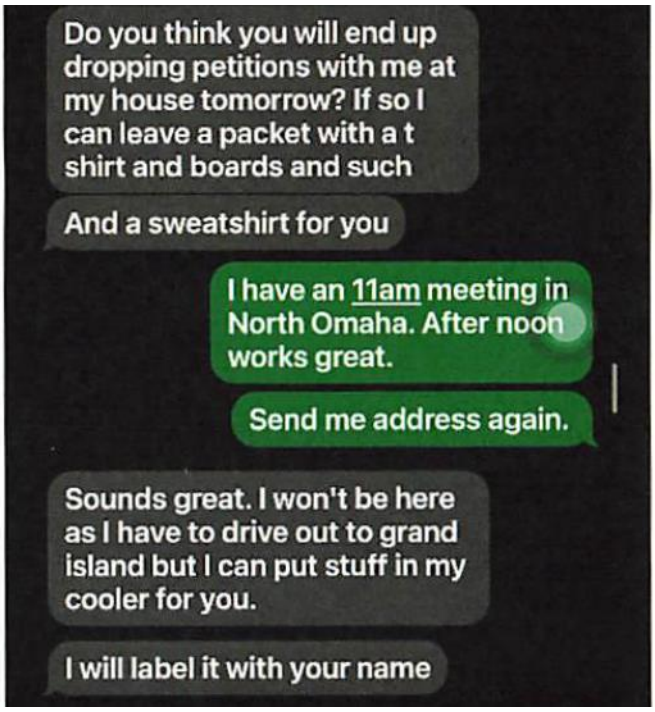
The malfeasance and other wrongdoing engaged in by notaries associated with the NMM campaign flowed down from the very top. Sponsor Eggers and statewide grassroots coordinator Garett Connely, both engaged in notary malfeasance.

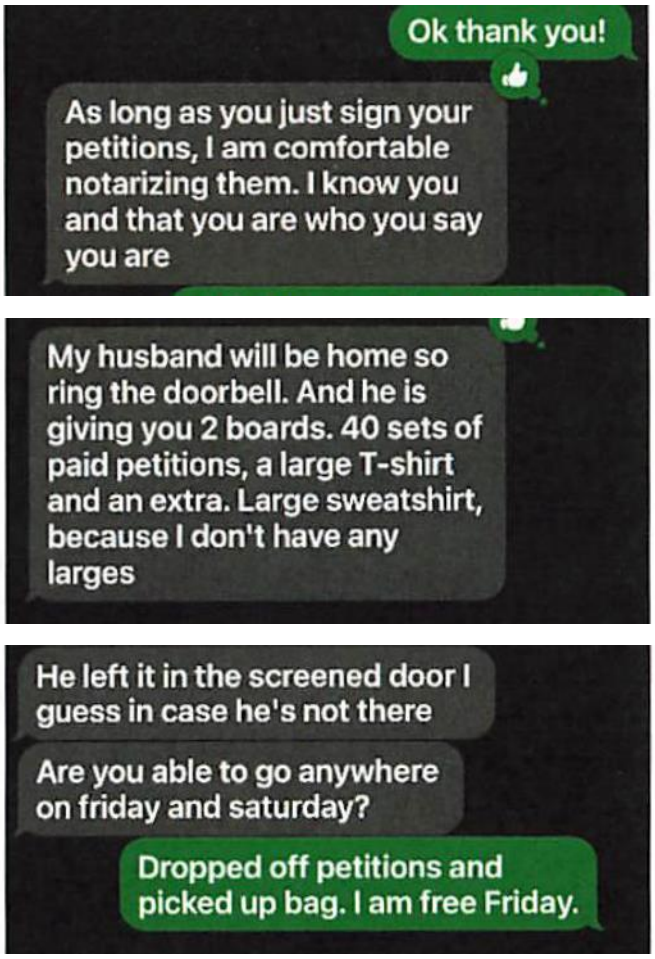
First, the evidence shows Eggers repeatedly notarized petitions outside the presence of the circulator. Her notary stamp appears on six (6) petition pages circulated by Egbert. Ex. 180, pp. 8511 & 13436; Ex. 181, pp. 249, 6347, 6761, & 13600. As noted above, Egbert testified he never appeared before *any* notary to have his pages notarized. Trial Tr. Vol. I at 521:20–522:2. And Eggers admitted, in response to an interrogatory propounded by the Secretary, that she had notarized pages submitted by Egbert outside his presence:

> **INTERROGATORY NO. 5:** Identify and describe every known or potential occurrence of petition pages being notarized outside the presence of a petition circulator for either Initiative.
>
> **ANSWER:** After receiving disclosures and discovery in this case, Crista Eggers became aware that she appears to have notarized for Michael Egbert on June 16, 2024, and June 28, 2024, but Mr. Egbert did not sign the documents in her presence. Ms. Eggers has no memory of notarizing Egbert's petitions and states these documents were notarized by mistake, likely because they were inadvertently mixed with a stack of petitions from circulators that properly showed Ms. Eggers their ID and signed in front of her.

Ex. 102, p.3.

Nor was Eggers' failure to follow notarial rules limited to Egbert. As discussed above, Henning testified that she dropped petition pages she collected and signed (but had not circulated) from a vape shop in Seward at Eggers' house when Eggers was not home. Trial Tr. Vol. I at 422:6–423:16; 441:24-25; 475:24-478:5. Eggers' notary stamp and signature appears on twelve pages circulated by Henning. *See* Ex. 170. Contemporaneous text messages exchanged between Eggers and Henning corroborate Henning's testimony. Exs. 94-96; Ex. 183, at 00:03:29-00:03:54. Additionally, Henning testified that she dropped off numerous petition pages she *did* circulate for Eggers to notarize but was not present when those notarizations occurred. Trial Tr. Vol. at 359:20–383:19. Text messages exchanged between Eggers and Henning again confirm that Henning dropped off petition pages while Eggers was not home:

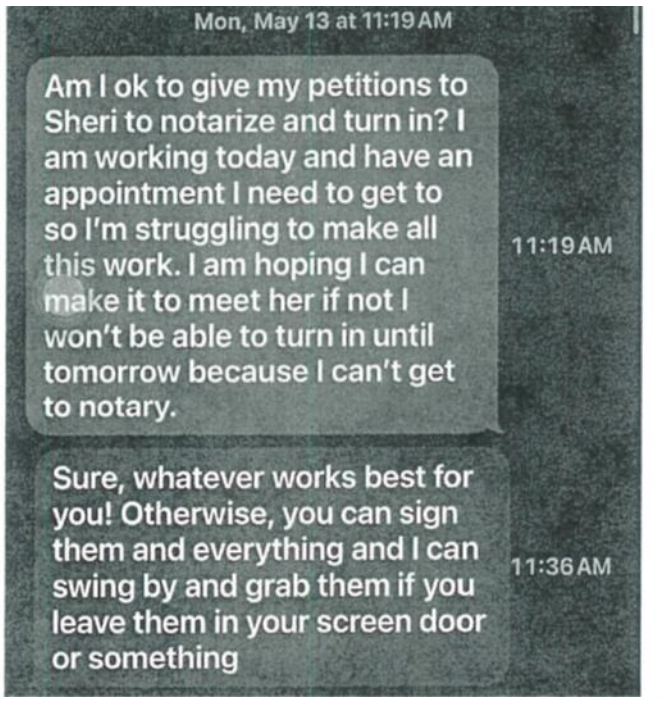




Ex. 94; Ex. 95; Ex. 183 at 00:03:29-00:03:39. Henning explained that she had not signed the circulator's oath in Eggers' presence because she routinely signed the petition pages she had circulated at the kitchen table in her (Henning's) home; she further confirmed she was not with Eggers on the dates her petition pages were notarized. Trial Tr. Vol. I at 359:20–383:19. The same pattern was likewise established between Henning and Garrett Connely: Henning signed her pages at home, dropped them off to Garrett, and he notarized them later (when Henning was not present). Ex. 273 at 87:22–90:16; 144:24–145:11; 152:1-15; Trial Tr. Vol. I at 384:13-20; 385:4-393:12; *see also* Ex. 51. And Henning's testimony to that effect—that she signed her petition pages at home before dropping them off to be notarized—was

corroborated by testimony from Ronnie Golyar, a caretaker for Henning's son, who directly observed Henning signing petitions in Henning's kitchen without a notary present. Trial Tr. Vol. I at 552:11-18, 557:25–558:17, 560:17-23.

Henning's testimony is corroborated by Connely's version of events. As set forth in deposition testimony (admitted into evidence because Connely invoked the Fifth Amendment at trial), Connely admitted that he did not require Henning to appear before him when he notarized some of the petition pages she circulated. Ex. 273 at 87:22–90:16, 144:24–145:11, 152:1-15; *see also* Ex. 170. That admission is further corroborated by contemporaneous text messages between the two. For example:



Ex. 51.

Connely also recognized the possibility that he did the same for other circulators. Ex. 273 at 84:24–86:4; 152:24–154:3. Notably, Connely notarized petition pages containing more validated signatures than any other notary involved with the campaign, totaling 19,996

signatures across both petitions. *See* Ex. 30; Ex. 31; Ex. 45; Ex. 168; *see also infra* p. 45. Connely also acknowledged the existence of evidence suggesting that he had engaged in "self-notarizations"—he acknowledged that his notary stamp and notary's signature appear on pages where he is listed as the petition circulator and for which he signed the circulator's oath. Ex. 273 at 65:12–72:22. Self-notarization is not permitted under Nebraska law. *See* Trial Tr. Vol. I at 111:18–112:2; *see also* Neb. Rev. Stat. § 64-105.01.

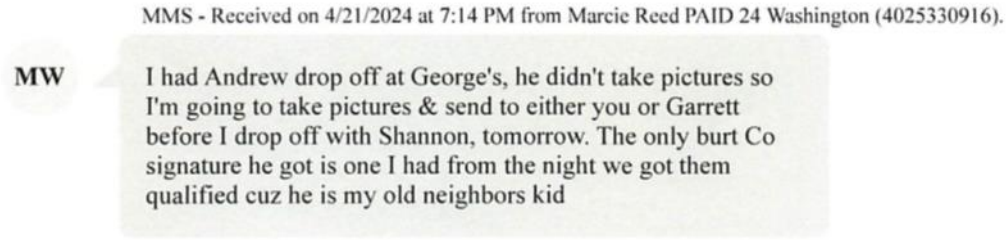
Given the notarial misconduct at the very top, it is no surprise that such misconduct permeated the entire campaign. Indeed, it appears the campaign's violations of notarial law were systemic.

For example, the campaign appears to have employed a system of couriers who collected unnotarized petition pages left out at vape shops who transported those pages elsewhere for a subsequent notarization outside the presence of the purported circulator. A series of Slack messages between Shari Lawlor, a prominent circulator and notary, Eggers, and Connely are evidence of this pattern and practice:

Ex. 274.

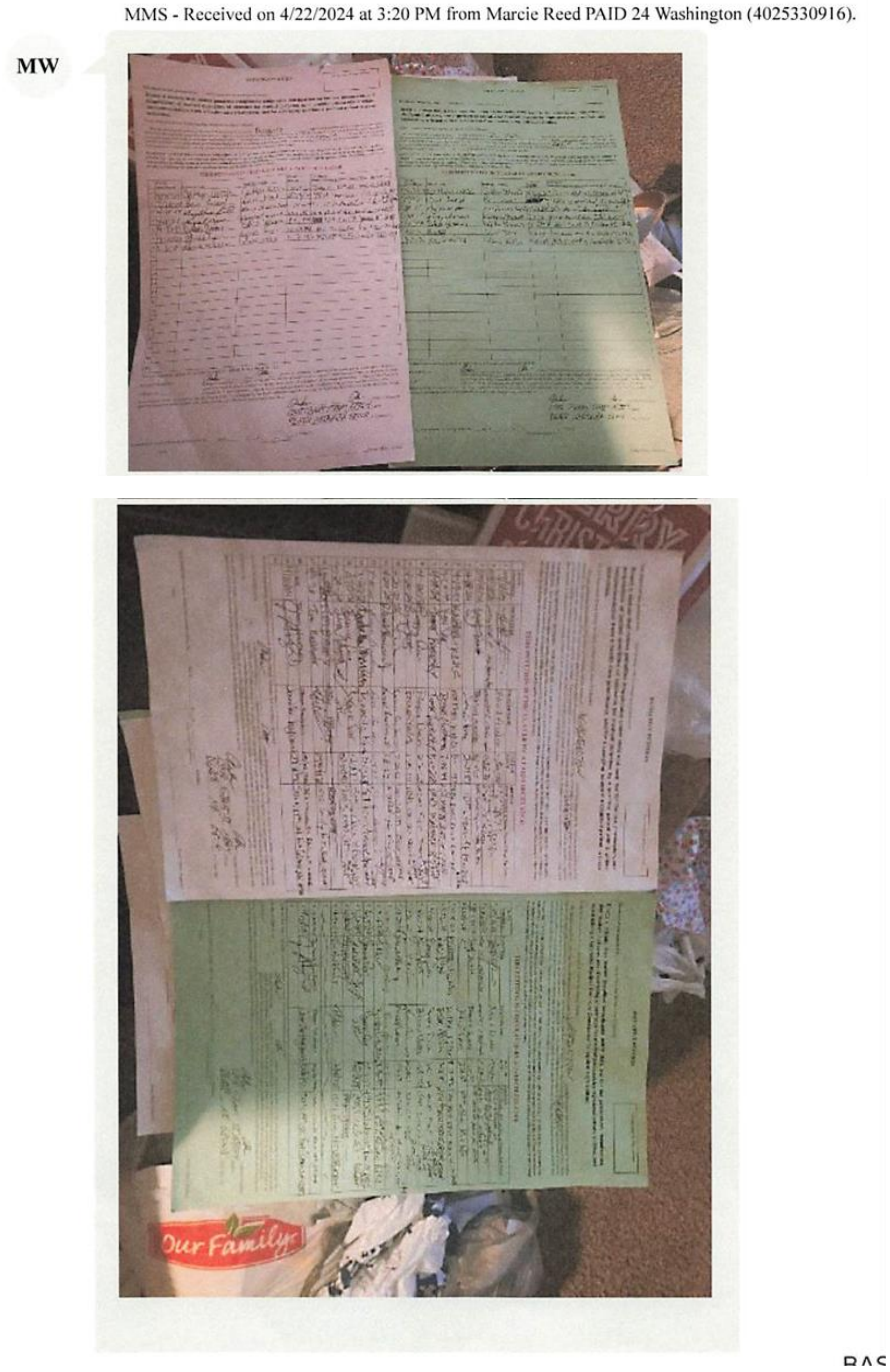
These Slack messages also establish that Kimberly Bowling-Martin notarized petition pages delivered to her from around the State, i.e., not in the presence of the circulator who signed the circulator's oath. *Id*. And, as Michael Egbert's testimony established, Jacy Todd notarized one hundred and forty-six (146) pages that Egbert dropped off at Todd's Grand Island business without Egbert ever appearing in Todd's presence. Ex. 168. Indeed, before he was confronted with the correct information by local law enforcement in Hall County, Egbert believed that Jacy Todd (a man) was actually a woman, because he interacted with a woman (likely Todd's wife) when he dropped off his pre-signed petitions at Todd's place of business. Trial Tr. Vol. I at 505:5-15. And the evidence belies Todd's claim that any irregularities on the Egbert-submitted pages he notarized were innocent mistakes. The Sponsors, for instance, submitted a petition page pre-signed by Egbert that contains no notarization. *See* Ex. 181, p. 12749.

Similarly, Marcie Reed improperly notarized petition pages outside the presence of the circulator. Text messages between Reed and Eggers from April 21-22, 2024 show that Reed had a circulator named Andrew drop off his petition pages with a man named George on April 21st:



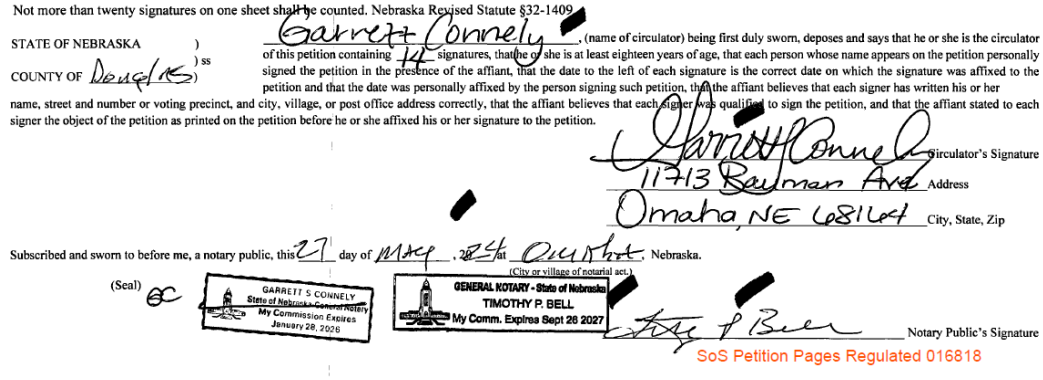
Ex. 108, p. 4. Reed subsequently took pictures of the petition pages (because the petition circulator, Andrew, had not done so) and sent them to Eggers so they could be included in the campaign's updated count. The pictures Reed sent to Eggers show that the petition pages were, at that time, already signed by the circulator but had not yet been

notarized:



See Ex. 108, p. 2-3. Reed subsequently notarized and submitted these petition pages. Ex. 180, pp. 2755 & 13163; Ex. 181, pp. 3093 & 13214.

Furthermore, multiple NMM notaries notarized petition pages that contained no circulator's oath signatures whatsoever. Notaries who did so include Eggers, Connely, Bowling-Martin, Todd, and Patricia Petersen. Ex. 45; Ex. 168. Lawlor, like Connely, also engaged in the self-notarization of two dozen petition that pages she purportedly circulated. Ex. 45; Ex. 168. Shannon Coryell, too, engaged in self-notarization. Ex. 45; Ex. 168. While several notaries, including Peterson, Bell, Rye-Craft, and Coryell, later attempted to correct and re-notarize previously self-notarized petition pages, the initial self-notarization strongly suggest that the campaign routinely notarized pages outside the presence of the circulator. Additionally, the circumstances surrounding the attempted correction of self-notarized pages suggests that those purported corrections also took place outside the presence of the original circulator, because the circulator's oath signature was not crossed out and re-signed. Timothy Bell and Morgan Rye-Craft engaged in malfeasance when they ostensibly "corrected" Connely's self-notarized petition pages, and for the same reason: Connely's circulator's oath signature was not crossed out and re-signed, which suggests that the attempted to correct the original malfeasant self-notarization took place outside Connely's presence. Ex. 45; Ex. 168; Ex. 180, p. 3114; Ex. 181, p. 3353. For example:



Not more than twenty signatures on one sheet shall be counted. Nebraska Revised Statute §32-1409

STATE OF NEBRASKA)
) ss
COUNTY OF Douglas)

Garrett Connely, (name of circulator) being first duly sworn, deposes and says that he or she is the circulator of this petition containing 14 signatures, that he or she is at least eighteen years of age, that each person whose name appears on the petition personally signed the petition in the presence of the affiant, that the date to the left of each signature is the correct date on which the signature was affixed to the petition and that the date was personally affixed by the person signing such petition, that the affiant believes that each signer has written his or her name, street and number or voting precinct, and city, village, or post office address correctly, that the affiant believes that each signer was qualified to sign the petition, and that the affiant stated to each signer the object of the petition as printed on the petition before he or she affixed his or her signature to the petition.

Garrett Connely
Circulator's Signature

11713 Bauman Ave
Address

Omaha, NE 68164
City, State, Zip

Subscribed and sworn to before me, a notary public, this 27 day of May, 2024 at Omaha, Nebraska.
(City or village of notarial act.)

(Seal)

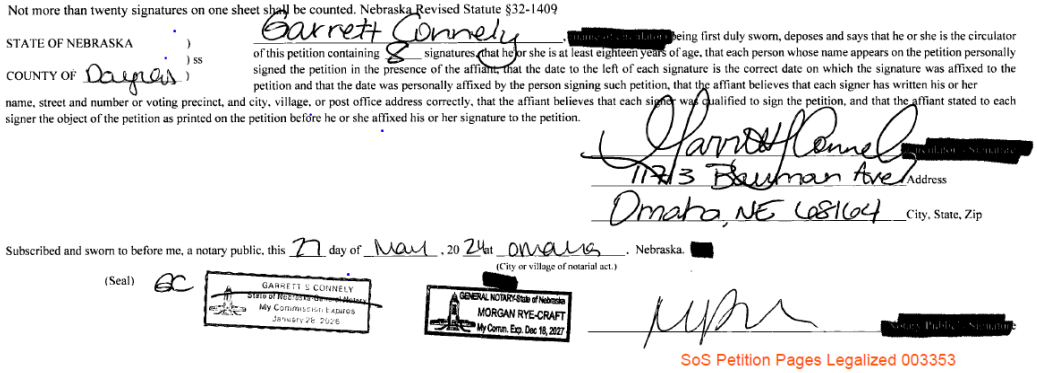
GARRETT S CONNELY
State of Nebraska - General Notary
My Commission Expires
January 28, 2026

GENERAL NOTARY - State of Nebraska
TIMOTHY P. BELL
My Comm. Expires Sept 26 2027

Notary Public's Signature

SoS Petition Pages Regulated 016818

Ex. 180, p. 3114.



Not more than twenty signatures on one sheet shall be counted. Nebraska Revised Statute §32-1409

STATE OF NEBRASKA)
) ss
COUNTY OF Douglas)

Garrett Connely [redacted], being first duly sworn, deposes and says that he or she is the circulator of this petition containing 8 signatures that he or she is at least eighteen years of age, that each person whose name appears on the petition personally signed the petition in the presence of the affiant, that the date to the left of each signature is the correct date on which the signature was affixed to the petition and that the date was personally affixed by the person signing such petition, that the affiant believes that each signer has written his or her name, street and number or voting precinct, and city, village, or post office address correctly, that the affiant believes that each signer was qualified to sign the petition, and that the affiant stated to each signer the object of the petition as printed on the petition before he or she affixed his or her signature to the petition.

[redacted] Circulator's Signature
11213 Bauman Ave Address
Omaha, NE 68164 City, State, Zip

Subscribed and sworn to before me, a notary public, this 27 day of May, 20 24 at Omaha (City or village of notarial act.), Nebraska. [redacted]

(Seal) GARRETT S CONNELY State of Nebraska My Commission Expires January 28, 2026

GENERAL NOTARY-State of Nebraska MORGAN RYE-CRAFT My Comm. Exp. Dec 18, 2027

[redacted] Notary Public's Signature

SoS Petition Pages Legalized 003353

Ex. 181, p. 3353. Notably, these incomplete and improper (and, under the circumstances, dubious) "attempted corrections" were submitted even though Eggers had sought and received guidance from the Secretary of State's Office about the proper way to correct an improperly notarized petition page. *See* Ex. 250.

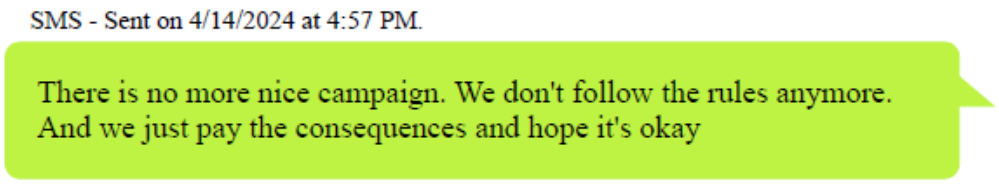
Finally, as discussed above, the necessary implication of handwriting expert Mark Songer's testimony is that on at least three occasions, the notaries who notarized petitions ostensibly circulated by Michael Glenn, Tommy Davis, and Edward Matthews, performed notarial acts outside the presence of a circulator. *See* pp. 12, *supra*. If the circulator signature was forged, then it is necessarily true that the notary in those instances did not properly verify the identity of the signer.

Thus, Petersen engaged in malfeasance when she notarized petitions associated with Glenn, *see* Ex. 143, pp. 29-30; Ex. 181, p. 7954 & 11504, Coryell engaged in malfeasance when she notarized petitions associated with Matthews, *see* Ex. 143, pp. 29-30; Ex. 181, p. 5048 & 8656, and Bowling-Martin engaged in malfeasance when she notarized petitions associated with Davis, *see* Ex. 143, pp 29-30, Ex. 181, p. 8678 & 8679.

C. Campaign Leadership Was Aware Of And Encouraged Intentional Wrongdoing

The evidence discussed above plainly illustrates both Eggers and Connely's knowledge of and substantial involvement in NMM's fraud and malfeasance. It is beyond question that Eggers directed, knew about, and personally participated in a range of intentional wrongful conduct. Connely too was both well-aware of and an active participant in that deceitful behavior. While it may be difficult to discern the full extent of NMM's intentional wrongdoing, their acts and the contemporaneous communications that corroborate them establish beyond a shadow of a doubt that the campaign was engaged in a bevy of deceptive and wrongful behavior. It is likely, given the pervasiveness of this conduct, that it was not limited to the examples that have been definitively shown at trial.

Moreover, Eggers repeatedly directed NMM supporters and staff to ignore state laws protecting the integrity of the ballot initiative process and do whatever it took to produce the minimum number of signatures needed for the initiatives to gain access to the ballot. In an April 14, 2024, text message to Connely—sent three months before the campaign turned in its signatures—Eggers declared that the campaign would not "follow the rules anymore" and would instead "just pay the consequences":

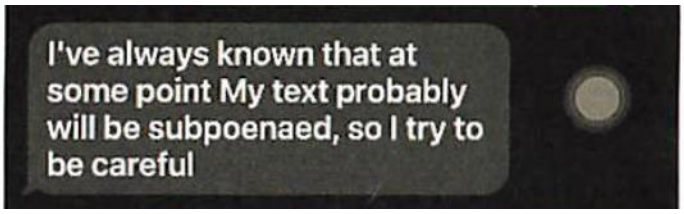


Ex. 172, p. 690; Ex. 190, at 00:03:30; Ex. 279.

The next month, Eggers told Henning to do whatever she could to obtain signatures, up to and even past the point of arrest. Eggers again declared that "there are no rules" and that Henning should "push the limits":

Ex. 97; Ex. 183, at 00:04:05–00:04:07.

Later text messages between Eggers and Henning also reflect Eggers' awareness of the breadth of her and the campaign's wrongdoing. Eggers told Henning she knew her text messages "probably will be subpoenaed," and that she needed to "to be careful" when engaging in written communication for that reason:

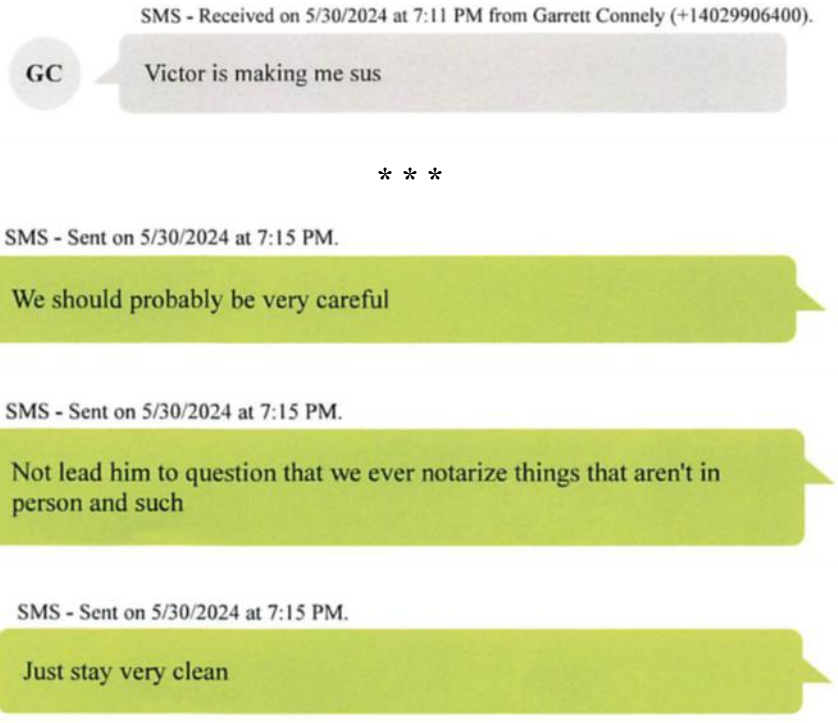


Ex. 183, at 00:05:31; Ex. 281.

Eggers' intentional misconduct also includes specifically directing circulators to engage in fraud. As discussed above, Henning

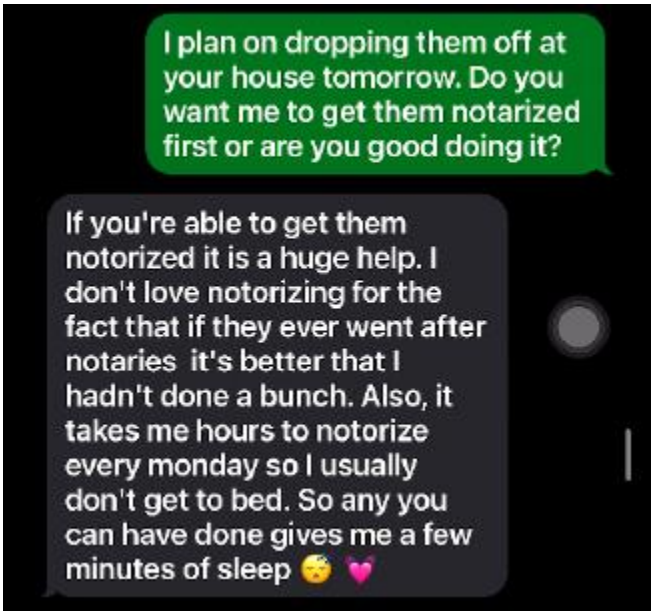
testified that she collected, signed, and turned in petition pages left out on the counter of a vape shop in Seward at Eggers' direction. Trial Tr. Vol. I at 422:6–423:16; 441:24-25; 475:24-478:5. Contemporaneous text messages between Eggers and Henning corroborate and reinforce Henning's testimony to this effect. Ex. 94; Ex. 95; Ex. 96; Ex. 183, at 00:03:29-00:03:54.

Other evidence reinforces the notion that Eggers not only tolerated, but also encouraged fraud and malfeasance by members of the NMM campaign. In May 2024, Eggers exchanged messages with Connely about a circulator who they believed had come to suspect that the campaign routinely engaged in malfeasant or fraudulent notarizations. Ex. 107, pp. 1-4; Ex. 172, pp. 400-403; Ex. 190, at 00:19:50-00:19:56; Ex. 278, pp. 1-3. Eggers told Connely that the campaign "should be very careful" to not lead the circulator "to question that we ever notarize things that aren't in person and such." Ex. 107, pp. 1-2; Ex. 172, pp. 400-401; Ex. 190, at 00:19:55-00:19:56; Ex. 278, p. 3. The key messages from that exchange are as follows:



Ex. 107, pp. 1, 2, 4. *See also* Ex. 190 at 00:19:50-00:19:56; Ex. 278.

Around the same time, Eggers attempted to push notarization obligations on to other NMM staff members, most likely because she was aware of the campaign's rampant notarial malfeasance. When Henning asked Eggers whether she would notarize petition pages that Henning had collected, Eggers hesitated, and stated, "if they ever went after notaries it's better that I hadn't done a bunch." Ex. 95; Ex. 183, at 00:03:50-00:03:51. The same message admits that Eggers would spend "hours" notarizing petition pages "every Monday so I usually don't get to bed" which, given the surrounding circumstances, strongly suggests those notarizations were being conducted in a malfeasant manner (i.e., in her home, late at night, and thus likely outside the presence of the circulator):



Ex. 95; Ex. 183, at 00:03:50-00:03:51.

Eggers' willful disobedience and disregard for the law was consistent with the approach she indicated NMM would adopt after its previous failure to get on the ballot. In August 2022, after failing to submit a sufficient number of signatures, Eggers told a reporter that she was willing to "do whatever it takes" to get the initiatives certified

and that "[t]here is nothing off the table." *See* Paul Hammel, *Advocates might push for recreational cannabis after medical marijuana drive fails*, Nebraska Examiner (Aug. 22, 2020), https://perma.cc/VY67-8XW2; *see also* Eggers Trial Testimony Tr. (not yet transcribed).

D. Evidence At Trial Suggests Efforts To Impede Discovery

The fact that the campaign engaged in pervasive wrongdoing also finds support in Eggers's efforts to impede civil discovery. Three pieces of evidence collectively raise the inference that discovery was at least withheld, if not destroyed, by the Sponsors.

First, Henning testified that she attended a meeting with Eggers, Connely and Reed at a Cheddars restaurant in Omaha in September 2024, after this lawsuit was filed. Trial Tr. Vol. I at 431:7-20. At that meeting, Henning testified that Eggers told those in attendance that they should delete potentially discoverable communications related to the campaign, such as their text messages. *Id.*

The Sponsors failure to refute this testimony is particularly important. *Morris v. Equitable Life Assur. Soc. of U.S.,* 109 Neb. 348, 191 N.W. 190, 190–91 (1922) ("It is a rule well established that uncontradicted evidence should ordinarily be taken as true, and that where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it."). As the United States Supreme Court has stated, "[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question." *United States v. Hale*, 422 U.S. 171, 176 (1975). Eggers repeatedly invoked her constitutional right against self-incrimination at trial, so she did not attempt to rebut this accusation. The Secretary is not relying on an adverse inference from Eggers' invocation of the Fifth Amendment, *but see* pp. 60-63, *infra* (discussing why the Court *can* draw such an inference), to establish that this evidence is unrebutted. Rather, it is fact that the Sponsors could have

called *other witnesses*—but chose not to—which makes the evidence unrebutted. *See United States v. Williams,* 479 F.2d 1138, 1140 (4th Cir. 1973) ("It is true that the overwhelming weight of authority, even after *Griffin* [*v. California*], is to the effect that [a party] may point out that the defense did not offer evidence to contradict the government's case, at least where it is apparent that witnesses other than the defendant might have been offered by the defense") (internal citations omitted); *see also United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996). That said, it is also worth noting that other evidence before the Court shows that Eggers met with members of the NMM campaign, including Connely and Henning, after this litigation began. *See* Ex. 183 at 00:05:49.

The Sponsors could have elicited testimony challenging Hennings' assertion that Eggers directed her to delete messages. Most obvious are the other two Sponsors, Adam Morfeld and Anna Wishart. Neither were called to the stand to challenge the notion that their fellow Sponsor (Eggers) had issued such a directive, nor did they offer any indication that they, in their role as Sponsors, had instructed NMM agents to preserve campaign-related communications. At most, the Sponsors played a self-serving recording from Eggers that contained empty platitudes about integrity and does not address the substance of Hennings' claim regarding the meeting at Cheddars and the directive Eggers issued there. Trial Tr. Vol. I at 474:4-10, 474:20-25, 475:10; *see also* Ex. 272. Moreover, the absence of communications between the individual Sponsors, in particular between Eggers and Morfeld, as described further below, lends credibility to Henning's testimony suggesting that Eggers encouraged the deletion (or the withholding) of campaign-related messages and other communications that should have been produced in discovery. *See* Ex. 34.

Second, Eggers also (after this lawsuit was filed) instructed Connely to shut down NMM's Slack channel; Connely later suggested the campaign migrate group communications to the messaging application Signal, which has an automatic message deletion feature. Ex. 191, at 00:14:00, 00:14:14; Ex. 280, pp. 1-3; *see also* p. 57, *infra*. In addition,

Connelly testified that, after the lawsuit began, he communicated with Eggers via Snapchat, another ephemeral messaging platform. Ex. 273 at 17:22-21:5, 114:6-116:16. Considered in context, these choices about which communications platforms to utilize are revealing.

Third, as discussed further below, the gaps in production of communications received from Eggers compared to copies of her communications received from other sources, at least suggest that Eggers withheld (and possibly deleted) evidence in an effort to stymie any investigation and cover her (and NMM's) fraudulent and malfeasant tracks.

As discussed below, Eggers' behavior may warrant an adverse spoliation inference. At a minimum, her behavior plainly evinces a pattern and practice of impeding discovery and a generalized attempt to frustrate and inhibit the pursuit of the truth in this litigation. Such behavior has in other cases (and likewise should be here) taken into consideration when determining the remedy warranted under these circumstances. *See* pp. 32, 39, *infra*.

BURDEN OF PROOF

The appropriate standard of proof is a preponderance, not (as the Sponsors have suggested) clear and convincing. The Secretary's affirmative claim, set forth in the Amended Cross-Claim, is a request for declaratory judgment. *See generally* Am. Cross-Claim. "Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence" and that burden is "to be borne by the" party seeking the declaration, here the Secretary. *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 224 (1999).

The Sponsors' contention that the heightened clear and convincing standard applies is predicated on the notion that this case is an equitable action, rather than an action at law. While that may have been true with respect to the Plaintiff—who sought an injunction against the (at the time of filing) not-yet-certified ballot measures, *see* Pl. Am Compl. ¶¶ 7, 34, 48 & prayer—it has never been true with respect to the Secretary's Cross-Claim. The Secretary's request for declaratory

relief has always sounded in *law*, not *equity*. *See State ex rel. Cherry v. Burns, 258 Neb. 216, 223 (1999)* ("The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought").

"Actions at law are founded upon a party's absolute right rather than upon an appeal to the discretion of the court." *Johnson v. QFD, Inc.*, 807 N.W.2d 719, 728 n.4 (Mich. App. 2011); *accord* 1A C.J.S. Actions § 158. The command of the Nebraska Constitution regarding the numerosity of signatures required to place an initiative petition on the ballot is absolute, not discretionary. Neb. Const. Art. III, § 2. To obtain a place on the general election ballot, a petition "*shall* be signed by seven percent of the registered voters of the state." *Id.* "Without a sufficient number of valid signatures, the initiative petition fails." *Monastero*, 228 Neb. at 826.

Precedent supports the notion that matters pertaining to elections and the electoral process are generally legal, not equitable. As New York's highest court has explained: "It is the settled law . . . that equity has no jurisdiction over contests for office even if the election is claimed to be void. Parties aggrieved are required to assert their rights in proceedings provided by statute or in actions at law." *Schieffelin v. Komfort*, 106 N.E. 675, 679 (N.Y. 1914).

A similar view has been espoused by other courts that have addressed the availability of equity in the election law context. *See*, *e.g.*, *Harries v. McCrea,* 219 P. 533, 537 (Utah 1923) (explaining that "a court of equity is powerless to interfere with the declared results of elections" and collecting authority); *Markert v. Sumter Cnty.*, 53 So. 613, 613 (Fla. 1910) ("The jurisdiction of courts having general equity powers does not include mere election contests of any kind, unless so provided expressly or impliedly by organic or statute laws."); *Harrison v. Stroud*, 110 S.W. 828, 831 (Ky. App. 1908) ("Courts of equity have not the inherent jurisdiction to try contests over elections to office").

But, to the extent the Secretary's Cross-Claim is determined to sound in equity rather than law, causing the heightened "clear and

convincing" evidentiary standard to apply, *see Malousek v. Meyer,* 309 Neb. 803, 825 (2021), the evidence presented throughout the course of the trial (and recapped throughout this brief) is sufficient to satisfy that heightened standard. The Secretary has elicited and introduced enough evidence to establish a "firm belief or conviction," *In re Int. of Joshua M.*, 251 Neb. 614, 636 (1997), that the campaign to place the Legalization and Regulation petitions on the ballot were irreparably tainted by widespread and substantial fraud, malfeasance, and other intentional wrongful conduct.

ARGUMENT

The pervasive nature of the fraud and misconduct established by the Secretary at trial warrants a declaratory judgment that the petitions are invalid. Based on the weight of the evidence—which overwhelmingly establishes pervasive fraud at all levels of the NMM campaign— and the authorities cited below, a second phase of trial is not necessary.

I. Both Initiatives Are Irredeemably Infected by Pervasive and Intentional Wrongdoing.

A.

Instances of systemic campaign malfeasance in state elections are thankfully uncommon. But where fraud has been traced to the apex of a campaign, state courts of last resort have approved invalidating a campaign in its entirety rather than putting a fact finder in the difficult position of segregating a campaign's bad acts from its permissible conduct.

The Oklahoma Supreme Court's invalidation of a 2006 ballot initiative provides a useful example. *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006) ("*Oklahoma Petition Fraud Case*"). Oklahoma law requires petition circulators to be Oklahoma residents. *Id.* at 40. Against this requirement, the sponsor of an Oklahoma ballot initiative hired a professional petition circulation

company that utilized some non-resident circulators to collect signatures. *Id.* at 37–39. Those non-resident circulators falsely swore to be Oklahoma residents. *Id.* at 42–43. And during the subsequent investigation into the campaign's conduct, the campaign and associated circulators "resisted discovery." *Id.* at 45.

Only "limited evidence . . . [was] able to [be] extract[ed] from" the petition sponsors, but on that record, the Oklahoma Supreme Court found "a pervasive pattern of wrongdoing and fraud." *Id.* at 34, 46; *see also id.* at 46 ("systemic wrongdoing"). The "wrongdoing extended all the way to the top of the hierarchy of the organization." *Id.* at 46. And the campaign's "resistance to discovery and the secrecy surrounding the petition process warrant[ed] the garnering of negative inferences concerning the entire operation." *Id.* at 34. The court held that "the only effective way to protect the integrity of the initiative process" was to "strike the . . . petition in its entirety" regardless of what a signature-by-signature analysis of the fraud might show. *Id.* That sort of inquiry could never expose all instances of fraud: The nature of the campaign's dishonest conduct left the court with "no way to determine with any sort of accuracy exactly how many signatures were collected [unlawfully]." *Id.* at 49.

In Oklahoma, like Nebraska, the Supreme Court "zealously preserves the precious right of the initiative to the fullest measure." *Id.* at 39. But, as the Oklahoma high court explained, invalidating a fraud-infected petition "does not disenfranchise voters. Rather, it upholds the integrity of the initiative process that has been undermined by criminal wrongdoing and fraud." *Id.* at 49–50. In the closely related election context, the Nebraska Supreme Court itself has recognized that "an election can be rightfully quashed" when the process is infused with "fraud or corruption" or "such gross irregularity" that it is "impossible" to determine how many lawful votes were cast. *Griffith v. Bonawitz*, 73 Neb. 622, 626 (1905). "Nothing less than the strong sanction of voiding the entire petition will serve to deter similar activity in the future and to protect the precious right of the initiative." *Oklahoma Petition*

Fraud Case, 155 P.3d at 50. *Cf. Brousseau*, 675 *P.2d* at 715–16 (noting that "[c]ases in several jurisdictions support the proposition that fraud by the circulator voids the petitions associated with the fraud" and collecting authority).

Like Oklahoma, the court of last resort for the District of Columbia has held that when "wrongdoing permeate[s] a signature-gathering operation, . . . the remedy of excluding all petitions associated with that operation" is proper. *Citizens Comm. for D.C. Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics*, 860 A.2d 813, 818 (D.C. 2004) ("*Video Lottery*"). In *Video Lottery*, a ballot initiative campaign hired two "operations" to collect signatures. *See id.* at 814 & n.2. Circulators from one of the operations obtained signatures outside the presence of petition signers but denied they had done so on their circulator affidavits, both in violation of D.C. law. *Id.* at 814. Of the operation's 79 circulators, eight admitted to falsely signing affidavits. *Id.* at 815. Those circulators also testified about other kinds of circulator fraud that the campaign committed, including "wrongdoing shown by the evidence [to] extend[] well into the ranks and hierarchy" of the signature-collection operation. *Id.* at 817. The D.C. Board of Elections found that the eight insiders' "testimony demonstrated a *pattern and practice* of wrongdoing" by the operation. *Id.* at 817.

On appeal, the D.C. Court of Appeals affirmed the Board's factual findings. The court found it unnecessary to determine with "complete accuracy" how many signatures the operation obtained via fraud. *Id.* at 819 n.8. Regardless of the number of improperly obtained signatures, "a pervasive pattern of fraud, forgeries and other improprieties [so] permeated the petition circulation process" that excluding all the signatures collected by the operation "was a proper remedy." *Id.* at 818. Like the Oklahoma court, the D.C. Court of Appeals determined "that a broad remedy of exclusion—commensurate with the magnitude of the wrongdoing it had found—was necessary to preserve the integrity of the circulation process." *Id.* at 819.

Similarly, New York has a long history of invalidating a candidate's placement on the ballot when the petition to place the candidate on the ballot is infused with wrongdoing. *E.g.*, *Eccles v. Gargiulo*, 497 F. Supp. 419, 422 (E.D.N.Y. 1980); *Lerner v. Power*, 239 N.E.2d 389 (N.Y. 1968); *Weisberger v. Cohen*, 22 N.Y.S.2d 1011, *aff'd*, 22 N.Y.S.2d 835 (App. Div. 1940). New York courts have invalidated candidacies where "fraud and irregularity so 'permeated' the petition as a whole as to call for its invalidation." *Proskin v. May*, 355 N.E.2d 793 (N.Y. 1976). This rule applies even if the non-fraudulent "signatures might be numerically sufficient" to meet the threshold for inclusion on the ballot. *Buchanan v. Espada*, 646 N.Y.S.2d 680, 681, *aff'd*, 671 N.E.2d 538 (N.Y. 1996). And when the candidate himself commits fraud in collecting signatures, the candidate cannot appear on the ballot, no matter how many signatures were invalidated. *Layden v. Gargiulo*, 431 N.Y.S.2d 118 (App. Div. 1980).

In a similar context, Florida considers three factors to determine whether the results of an election should be set aside because of widespread fraud. *See Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975). Those factors are: "(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing; (b) whether there has been substantial compliance with the essential requirements of the [relevant election] law; and (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election." *Id.* Applying that test, the Florida Supreme Court held that when one-third of absentee votes were tainted by a vote-buying scheme, *no* absentee votes could be counted—even though the number of tainted votes would not have changed the results of the election. *Bolden v. Potter*, 452 So. 2d 564, 565, 567 (Fla. 1984). This categorical-invalidation rule promotes the integrity of the electoral process because "requir[ing] evidence which would establish with mathematical certainty the specific number of invalid votes sufficient to change the result of an election would make the task of setting aside an election because of intentional fraud or corruption virtually impossible." *Id.* at 567.

B.

Given the record of top-to-bottom falsification presented at trial, these precedents point to the wholesale invalidation of the Legalization and Regulation petitions without undertaking a signature-by-signature inquiry. Widespread, coordinated fraud does not happen by accident. It is possible only with deliberate direction from "the top of the hierarchy." *Oklahoma Petition Fraud Case*, 155 P.3d at 34. Here one of the Sponsors and NMM's campaign manager, Crista Eggers, made her direction to the campaign clear: "There is no more nice campaign. We don't follow the rules anymore. And we just pay the consequences and hope it's okay." Ex. 109; Ex. 172, p. 690; Ex. 190, at 00:03:30; Ex. 279, p. 1. The rules that Eggers ordered the campaign to violate—state statutes that facilitate the initiative power—were enacted "to prevent fraud" in the petition process. *Loontjer v. Robinson*, 266 Neb. 902, 909 (2003) (quoting *State ex rel. Stenberg v. Moore,* 258 Neb. 199, 211 (1999)); *see also Monastero,* 228 Neb. at 826 (the availability of criminal sanctions helps "deter . . . fraud" related to the initiative petition process).

It should come as no surprise, given Eggers' attitude and directives, that fraud and other malfeasance infected every facet of the campaign. Circulators forged signatures in violation of state law. *See* pp. 11-13, *supra*.; *see* Neb. Rev. Stat. § 32-630(2), (3). Circulators left petition sheets at smoke shops where signatures were collected outside their presence, in violation of state law. *See* pp. 12-13, *supra*; *see* Neb. Rev. Stat. § 32-630(2). Circulators claimed to have circulated petition sheets when they were circulated by someone else, in violation of state law. *See* pp. 12, *supra*; *see* Neb. Rev. Stat. §§ 32-628, 32-1546(2). Petition sheets were notarized outside circulators' presence, in violation of state law. *See* pp. 14-17, 19 *supra*; *see* Neb. Rev. Stat. § 32-628. Petition sheets were notarized without a circulator's signature, in violation of state law. *See* pp. 19, 21-22 *supra*; *see* Neb. Rev. Stat. § 32-628. And petition sheets were improperly re-notarized outside the presence of

the circulator, in violation of state law. *See* pp. 21-22, *supra*; *see* Neb. Rev. Stat. § 64-105.

All these examples capture only the wrongdoing that has been discovered in this brief litigation. After its illicit tactics were brought to light, the campaign generally and Sponsor Eggers in particular, undertook efforts to obscure their fraudulent and malfeasant behavior, some of which are described in Section III, *infra*. Those tactics were compounded by the repeated and unjustified invocation of the Fifth Amendment privilege by numerous witnesses, which extended to questions that had absolutely no tendency to incriminate. *See*, *e.g.* Trial Tr. Vol. I at 661:18–662:7 (witness advised to invoke the Fifth in response to questions such as "Are you aware of the phrase notary public" and "Are you aware of the Constitution of the State of Nebraska"). Unfortunately, given both the expedited pace and abbreviated duration of discovery, as well as the Sponsors' strategic refusal to provide certain tranches of relevant information throughout the litigation and the obstructionist tact taken by numerous witnesses, the true extent of the NMM campaign's fraud and malfeasance may never be known.

The campaign's stonewalling is just one more piece of evidence showing that the petition process was infused with malfeasance. "[R]esistance to discovery and the secrecy surrounding its operation warrants an inference that the organization and the entire circulation process lacked all integrity." *Oklahoma Petition Fraud Case*, 155 P.3d at 45.

C.

The remedy of wholesale removal from the ballot is warranted because the campaign's blatant disregard of Nebraska's petition-integrity laws are "much more than mere technical violations." *Oklahoma Petition Fraud Case*, 155 P.3d at 50. "The Legislature and the electorate are concurrently equal in rank as sources of legislation." *Loontjer v. Robinson*, 266 Neb. 902, 909 (2003). Just as the Constitution grants the Legislature power to enact procedural rules to govern its

lawmaking, so too does the Constitution permit the Legislature to enact "reasonable legislation" to facilitate the right of initiative. *State ex rel. Winter v. Swanson*, 138 Neb. 597, 599 (1940); Neb. Const. art. III, §§ 4, 10. Under this power, the Legislature has enacted rules for the petition process intended to "prevent fraud." *Loontjer*, 266 Neb. 902, 909 (2003) (quoting *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211 (1999)); *see also Monastero,* 228 Neb. at 826. True, signatures cannot be discounted where signers and circulators substantially complied with the petition statutes in good faith. *See Moore*, 258 Neb. at 213–14; *Duggan*, 245 Neb. at 916. But intentionally infringing those statutes goes well beyond mere "technical errors." *Id.* at 214. *Cf. Montanans for Just. v. State ex rel. McGrath,* 146 P.3d 759, 777 (Mont. 2006).

The Sponsors and many members of the NMM campaign purposefully violated the petition-process rules in attempting to run around "the statutory safeguards against the perpetration of frauds and deceptions." *Winter*, 138 Neb. at 599. For example, rules that prohibit forgery, signing a petition for others, and signing a petition outside the presence of a circulator, *see* Neb. Rev. Stat. § 32-630(2), (3), all work to ensure that only "registered voters" sign petitions, Neb. Const. art. III, § 2, and that each signature is validly obtained, *see Monastero*, 228 Neb. at 826. If these rules were not observed, then "the initiative process might be invoked and placed in motion without any semblance of compliance with the constitutional provisions governing the initiative." *Id.* The rule requiring circulators to swear an oath before a notary promote the same integrity in the process. Requiring a sworn statement properly notarized "exposes [the circulators and notaries] to potential criminal charges if information is falsified." *Loontjer*, 266 Neb. at 911; *see* Neb. Rev. Stat. §§ 32-628(3), 32-1546(2) (class IV felony for circulators), 28-924 (class II misdemeanor for notaries). These "requirement[s] prevent[] fraud in the [initiative] process." *Loontjer*, 266 Neb. at 911. The important role these requirements play has been reinforced here, where at least three individuals—Egbert, Todd, and Connely—have been subject to criminal charges. *See* Am. Cross-Claim ¶¶ 31, 37; *see also* Ex. 273 at 117:17-24.

Beyond preventing fraud, the rules bolster the integrity of the petition process. The "the right of initiative is precious to the people." *State ex rel. Brooks v. Evnen*, 317 Neb. 581, 594 (2024). And it "must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual." *Id.* An effectual initiative process is a fair one. In light of their importance, the Oklahoma Supreme Court put a fine point on how violations of the initiative statutes should be treated:

> The primary purpose of the statutory scheme is to protect the public from corrupting influences . . . . This protection can be fully accorded only if petitions which are tainted by illegal circulation may be barred from the public ballot. If the State's sole remedy is merely a criminal prosecution, then the public will be forced to bear the burden of dealing with the very sort of petition which the statutes seek to prevent. Were we to decree the validity of such a petition, we would be affirmatively sanctioning the type of corruption which the statutes outlaw and we would be depriving the public of the protection which the Legislature has conferred. This we will not do. Therefore, we determine that the initiative petition must be struck in its entirety.

Oklahoma Petition Fraud Case, 155 P.3d at 47; *see also Sturdy v. Hall*, 143 S.W.2d 547, 551 (Ark. 1940) ("If an officer of the election is detected in a wilful and deliberate fraud upon the ballot–box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result.") (quoting McCray, American Law of Elections, 4th Ed., § 574).

Indeed, "fraud in invoking the initiative process is fraud perpetrated . . . ultimately on the people of Nebraska." *Monastero*, 228 Neb. at 826. Allowing the results of a vote on a measure that obtained its place on the ballot by way of significant fraud would undermine the

People's faith in the precious power of initiative. It would also send the message that cheating is allowed so long as an initiative campaign can conceal or cover-up enough cheating to plausibly argue that the initiative obtained enough potentially valid signatures to qualify for the ballot. This case proves the point. The record "is replete with credible, unchallenged instances of actual fraud in the circulation of petitions." *Oklahoma Petition Fraud Case*, 155 P.3d at 46.

Still, in no small part due to the campaign's cover-up efforts, "[t]here is no way to determine with any sort of accuracy exactly how many signatures were" tainted by fraud. *Id.* at 49. The fraud was certainly more widespread than the evidence discovered on an extremely compressed timeline and with resistance from the campaign can show. In this scenario, only wholesale rejection of the petitions can restore the people's faith in the power of initiative. Rather than undermining that power, striking both petitions entirely would "uphold[] the integrity of the initiative process that has been undermined by criminal wrongdoing and fraud." *Oklahoma Petition Fraud Case*, 155 P.3d at 47.

The remedy for the campaign's brazen illegality and intentional wrongful conduct is a declaration that both the Legalization and Regulation petitions are legally insufficient no matter how many signatures the Secretary can specifically establish are the product of fraud. When "a pervasive pattern of wrongdoing and fraud" infects "the signature gathering process," "the only effective way to protect the integrity of the initiative process and to uphold the constitutional and statutory rights and restrictions associated therewith is to strike the . . . petition in its entirety." *Oklahoma Petition Fraud Case*, 155 P.3d at 34. Given the pervasive fraud here, neither the Legalization nor Regulation petition should have qualified for the general election ballot. "The only way to protect the [signature collection] process from fraud and falsehood is to make such conduct unprofitable." *Brousseau*, 675 P.2d at 716. Now that the election has occurred (and both initiatives passed), the appropriate remedy is declaring the result of the elections void. *Duggan v. Beermann*, 245 Neb. 907, 915–16 (1994).

II. The Initiatives Do Not Meet the Minimum Signature Requirement.

Pervasive malfeasance has not only spoiled the integrity of the campaign overseen by the Sponsors, it has also—despite the difficulties presented by time constraints and obfuscation—infected enough signatures to bring both the Legalization and Regulation initiatives under the minimum signature requirement for ballot initiatives.

The parties agree that both the Legalization and Regulation initiatives needed to be signed by 86,499 Nebraska registered voters to make the ballot. The Legislature has created a process through which sponsors can presumptively prove that the requisite number of Nebraska voters have signed their initiative petitions. This process relies on, and presumes, the honesty of circulators who collect the signatures and notaries public who verify the circulator's oath on each petition sheet. *See generally Neth*, 276 Neb. at 890 ("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."). But the Nebraska Supreme Court has held that the presumption of an actor's honesty is stripped when he acts falsely in the petition process. *Barkley v. Pool*, 103 Neb. 629, 635–36 (1919). On a showing of wrongdoing, that actor's witness and certification are no longer presumptively valid. Thus, the actor's signatures and notarizations carry no weight, and every document he signs or notarizes is as if it had not been signed or notarized at all. The burden then shifts to those in support of the petition to provide additional evidence showing that the signatures certified by the bad actor are genuine and properly obtained.

In this trial, Plaintiff and the Secretary have shown that at least 12 individuals, eight of whom served as both circulators and notaries during this campaign, acted dishonestly in exercising their duties. *See* p. 2, *supra*. Because the oaths and notarizations of these bad actors carry no evidentiary value under Nebraska law, the signatures associated with these individuals are without necessary proof of their

genuineness. Unless the Sponsors offer additional evidence rebutting the invalidity of these signatures, the seven-percent threshold is not satisfied.

A.

In *Barkley v. Pool*, three circulators were caught fraudulently adding names to petitions for a referendum. 103 Neb. at 632–33. The district court recognized its dilemma, acknowledging that despite the fraud, "[t]he petitions may contain the signatures of good-faith signers." *Id.* The district court did not throw out every signature gathered for the referendum, but it threw out every petition sheet sworn to by one of the fraudsters, unless additional evidence proved the genuineness of the signatures. *Id.* at 633–34.

The Supreme Court affirmed the district court. The Court relied on the "elementary" principle in evidence that "when the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated." *Id.* at 635. Applying this principle, the Court reasoned that because a circulator's "oath is the only evidence of the genuineness of the signature, it follows as a matter of course that, where he 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 635–36 (quoting *State ex rel. McNary v. Olcott*, 125 Pac. 303, 307 (Or. 1912)).

In other words, the sworn certificate of a circulator is necessary to prove that the petition signatures are properly obtained signatures of Nebraska registered voters. Several other states have affirmed that similar verification procedures are necessary to verify the authenticity of petition signatures and the integrity of the process by which they were obtained. *See Knutson v. Dep't of Sec'y of State*, 954 A.2d 1054, 1062 (Me. 2008); *Montanans for Justice v. State ex. rel McGrath,*146 P.3d 759, 777 (Mont. 2006); *Citizens Comm. for the D.C. Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics,* 860 A.2d 813, 816–17 (D.C. App. 2004); *State ex rel. Commt. for the Referendum of*

Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections, 774 N.E.2d 239, 249 (Ohio 2002); *Brousseau v. Fitzgerald,* 675 P.2d 713, 715–16 (Ariz. 1984); *In re Glazier*, 378 A.2d 314, 316 (Pa. 1977); *Sturdy v. Hall*, 143 S.W.2d 547, 551 (Ark. 1940).

Indeed, "the filing of a false affidavit by a signature gatherer is 'more than a technicality' in that it destroys the primary procedural safeguard for ensuring the integrity of the signature gathering process." *Montanans for Just.*, 146 P.3d at 777. But when circulators act dishonestly with respect to an initiative, "the probative value of the certificates of the [dishonest] circulators is destroyed." *Pool*, 103 Neb. at 635. A circulator's dishonesty "destroy[s] the integrity of his official acts." *Sturdy*, 143 S.W.2d at 551. "[T]he evidence of wrongdoing with respect to the [fraudulent] affidavits casts doubt on the veracity of other petition sheets circulated by [the fraudulent] individuals." *Video Lottery*, 860 A.2d at 829.

The burden then shifts to supporters of the petition to provide additional "proof of the genuineness of any of the purported signatures appearing on such petition." *Pool*, 103 Neb. at 635. If no such proof is proffered, every signature on any page verified by the wrongdoers is invalid.

B.

Applying *Pool* to this case, intentional wrongful conduct within the campaign strips the presumptive validity of 48,137 signatures for the Legalization initiative. Subtracted from the 89,962 signatures initially verified by the Secretary for the Legalization initiative, Defendants are left with 41,825 presumptively valid signatures. That falls short of the 86,499-signature minimum by 44,674. As for the Regulation initiative, the Secretary initially verified 89,856 signatures. Because 29,560 signatures are tainted, Defendants are left with 60,296 presumptively valid signatures. That too falls short of the signature minimum, by 26,203 signatures.

Starting with circulators, Egbert testified that he copied names out of a phone book on a petition and forged signatures. *See* p. 11, *supra*. Henning admitted that she falsely signed her name as the circulator for petition pages collected from a vape shop in Seward. *See* p. 11, *supra*. Reed added envelope information to petition pages. *See* p. 12, *supra*. Songer testified that at least some of the circulator's oath signatures of Glenn, Matthews, and Davis were likely forgeries. *See* p. 12, *supra*. And Slack messages on the "families" group channel show that Eggers, Lawlor, Connely and Bowling-Martin knew and approved of a campaign practice to leave petition sheets out in public locations to obtain signatures not overseen by a circulator, facilitated the collection of those sheets by couriers, which culminated in those sheets being notarized elsewhere, outside the presence of any circulator. *See* pp. 11-12, 19-20, *supra*. Additionally, text messages between Reed and Eggers similarly show that Reed notarized petition pages outside the presence of circulators. *See* p. 20, *supra*.

Thus, under *Pool*, every signature sheet circulated by Egbert, Connely, Henning, Lawlor, Bowling-Martin, and Reed, as well as the sheets notarized by notaries who notarized pages outside the presence of Glenn, Matthews, and Davis (which adds Patricia Petersen and Shannon Coryell to the list above) lose the presumption of validity and must be subtracted from the count of verified signatures.

Evidence also established widespread wrongdoing by notaries. For instance, evidence showed that Eggers, Connely, Bowling-Martin, Todd, and Peterson notarized sheets with no circulator signature at all. *See* p. 21, *supra*. In addition, Connely, Lawlor, and Coryell notarized documents they themselves circulated. *See* pp. 18, 21. Peterson, Coryell, Bell, and Rye-Craft made wrongful re-notarizations of petition sheets outside the presence of the circulator. *See* p. 21, *supra*. And the Secretary offered uncontroverted evidence that Eggers and Bowling-Martin notarized stacks of petition sheets delivered to them from around the State outside of the presence of the circulators, and that notaries such as Reed notarized those petition pages without the

circulator being present. *See* p. 20, *supra*. Connely admitted to notarizing Henning's circulator affidavits outside of her presence. *See* p. 17, *supra*. Egbert testified that he signed sheets on which he had forged signatures that were notarized by Eggers and Todd outside of his presence, testimony that is corroborated by one of the Sponsors' answers to an interrogatory. *See* p. 14, *supra*. Because Eggers, Connely, Bowling-Martin, Todd, Coryell, Peterson, Lawlor, Rye-Craft, Bell, and Reed are impeached by their own dishonesty and intentional wrongdoing, under the *Pool* principle, their notarizations no longer carry evidentiary value, and the affidavits they purport to validate no longer carry evidentiary value. *See* Nebraska Attorney General Opinion No. 92104, 1992 WL 473480 (Aug. 24, 1992) (citing *Pool*). Thus, like the circulators, every signature on every petition sheet notarized by these notaries currently lacks necessary evidence to support that it was properly obtained.

The tables that follow on the next page summarize the number of signatures that lose the presumption of validity because of the malfeasance or other wrongdoing of these dishonest actors:

Legalization Petition	Signatures	Regulation Petition	Signatures
Eggers	1,630	Eggers	1,639
Connely	11,603	Connely	8,393
Coryell	7,648	Coryell	3,675
Lawlor	8,312	Lawlor	4,427
Bowling-Martin	3,343	Bowling-Martin	752
Petersen	10,510	Petersen	7,673
Reed	3,535	Reed	1,897
Todd	1,556	Todd	1,104
Total	**48,137**	**Total**	**29,560**

Ex. 30; Ex. 31; Ex. 45; Ex. 168.

C.

1.

The Sponsors have, in prior filings, invited this Court to discard the *Pool* framework and suggest an out-of-state case, *Hendrix v. Jaeger*, 979 N.W.2d 918 (N.D. 2022), should apply instead. In *Hendrix*, the North Dakota Secretary of State invalidated over 15,000 signatures "merely because they appeared on petitions gathered by circulators whose affidavits were notarized by" a single notary suspected of fraud.

Id. at 921. The only evidence of notarial fraud in Hendrix was based on two signatures from a single circulator that appeared to "vary wildly." *Id.* at 920. And the notary denied any wrongdoing. *Id.* Significantly, the North Dakota Supreme Court never found whether intentional wrongdoing occurred. *Id.* at 922. Instead, the court held that the Secretary could not invalidate all the signatures with circulator affidavits sworn before the suspected notary. *Id.*

To start, *Hendrix* is of limited utility given the Nebraska Supreme Court's ruling on similar issues in *Pool*. But even without that controlling precedent, *Hendrix* is distinguishable on its facts. Whereas *Hendrix* arose on a *single* notary's *suspected* falsification, the facts presented in this trial established multiple instances of *admitted* intentional falsity by multiple notaries. *Id.* at 924. The Secretary established that at least eight notaries engaged in various forms of systematic wrongdoing. *See* p. 45, *supra*. And the fraud did not stop with them. At least two circulators (Egbert and Henning) admitted to signing false affidavits. *See* p. 11, *supra*. And a sponsor (Eggers) of both initiatives engaged in notarial malfeasance and compounded that wrongdoing by trying to cover it up. *See* pp. 14–16, 23-27, *supra*. Further, while the North Dakota case on which the Sponsors rely, *Hendrix*, involved signature variation, this case includes testimony from a handwriting expert who *confirmed* that suspicious signatures on circulator affidavits were likely forgeries. *See generally* Trial Tr. Vol. I at 563:1–600. In sum, the North Dakota Supreme Court was not asked, in *Hendrix*, to analyze facts closely analogous to those the Secretary has established here.

Furthermore, *Hendrix* is not even the most relevant North Dakota case on point. In *Zaiser v. Jaeger*, 822 N.W.2d 472 (N.D. 2012), six petition circulators *admitted* to forging signatures and submitting false circulator affidavits. *Id.* at 475. The remedy there was to "not count elector signatures on petitions with circulator's affidavits" that violated North Dakota law. *Id.* at 482. North Dakota, in other words, follows the rule that the Nebraska Supreme Court laid out in *Pool*. Where

fraud in the circulation process has been proven, North Dakota, like Nebraska, does not count the signatures turned in by circulators who broke the law in signing the circulators' affidavit. Defendants' resort to North Dakota precedent is unhelpful to them.

2.

The Sponsors also argue that *Pool* is inapposite. Specifically, the Sponsors argue (1) that *Pool* can be applied only to circulator fraud, not notary fraud, and (2) that *Pool* is antiquated. Neither argument unseats *Pool*.

a.

The Sponsors argue that the *Pool* framework is not triggered by notary fraud because the fraudsters in *Pool* were circulators and not notaries. But there is no reason to believe this distinction makes a difference. *Pool*'s central reasoning was that the credibility of a witness is impeached by their false testimony in the same case. Thus, when a circulator lies about the validity of one petition sheet, there is no reason to give any weight to that same circulator's oath regarding another sheet. And if no weight is given to the circulator's oath, it is as if no circulator oath was provided. And the Court determined that the circulator's oath is necessary evidence for presuming the validity of a signature.

The same reasoning applies to notaries. If a notary dishonestly notarizes one petition sheet, there is no reason to trust that notary's notarizations of other sheets. Thus, any sheet notarized by the fraudulent notary is as if it were not notarized at all. And, the Legislature having determined that notarization of the circulator oath is necessary to validate the circulator's oath, all signatures not supported by a properly notarized oath lose the necessary evidence to support their presumptive validity.

A 1992 Attorney General's Opinion affirms the significance of false or wrongful notarization. The opinion, relying on *Pool*, opined

that notarization errors beyond mere technical errors "destroy the prima facia presumption of validity which attaches to the petition signatures on a properly certified petition." Op. Att'y Gen. 92-104, 1992 WL 473480, *5 (Aug. 24, 1992). And "[i]n the absence of any additional proof as to the genuineness of the signatures on [a] petition [tainted by an invalidating error], th[ose] [signatures] should not be counted." *Id.* Courts in other states have also held that proper notarization is necessary to verify petition signatures. *See Taxpayers Action Network*, 795 A.2d at 80*; Roberts v. Priest*, 975 S.W.2d 850, 854 (Ark. 1998); *Williams v. Butler,* 341 N.E.2d 394, 396–98 (Ill. App. 1976).

Pool's reasoning naturally and necessarily extends to intentional wrongful conduct by a notary.

b.

The Sponsors assert that the *Pool* framework is no longer necessary because county officials can verify the authenticity of signatures by comparing the petition signatures to the voter registration records. They also rely on the Secretary of State's initial determination that the petitions had enough verified signatures to be certified for the ballot. This line of argument misses the mark for several reason. *First*, while county officials provide a basic comparison of signatures, they are not handwriting experts capable of identifying sophisticated forgeries. *Second*, there are other methods by which a circulator could falsely add signatures to a petition that do not involve forgery and could not be detected by county officials. *Third*, the Sponsors' argument ignores that the purpose of the notarization requirement is to help prevent fraud that county officials cannot detect. And *fourth*, the Secretary of State's certification of the initiatives for the ballot is not *necessarily* conclusive as to the factual question of whether seven percent of Nebraska registered voters signed the initiatives.

i.

The Sponsors wrongly assume that county officials' analysis of signatures is sufficient to prevent forgery. At the threshold, it must be

noted that county officials apply the "two-out-of-three" rule, which allows submitted signatures to be verified even if some identifying information is incorrect. This forgiving standard provides a measure of cover for the dedicated or sophisticated fraudster. Armed with as little as the mere knowledge of his friends or family members' names and addresses, a fraudster could supply enough to survive the initial screening conducted by county officials. And there are countless ways a fraudster could reach beyond their personal knowledge to expand the universe of names one could fraudulently include. Michael Egbert, for example, used a phone book. It is not hard to imagine scraping "envelope information" or other "metadata" from social media platforms; many users publicly display details such as their name and birthdate on such platforms. And there are countless "people search" applications, both free and paid, that collate and provide envelope data from sources such as credit reports and public records.

Furthermore, as explained by Deputy Secretary Bena and confirmed by Saunders County Clerk Nice, neither county election officials nor their staff are handwriting experts. *See* Trial Tr. Vol. I at 92:2-17; 487:1-22. They often spot obvious forgeries (e.g., misspelled names and wildly divergent signatures), but more sophisticated forgeries require a more trained eye that can spot the difference between ordinary signature variation and forgery. *See generally* Ex. 143. And some forgeries may not be detectable by even trained handwriting experts. When dealing with presumptively valid signatures—those where a petition circulator has collected a signature in person and the circulator's oath was sworn before a notary public—the signature matching conducted by non-expert county officials more than suffices to mitigate against the potential of fraud. But when that presumptive veracity is lacking, it asks too much of non-expert county officials to detect fraud that is discernable (if at all) only by comparing submitted signatures with those in the voter files.

The physical presence of a circulator helps thwart attempted falsifications. A circulator observing the signature could easily spot a

forger using a sample signature to copy a signature not the signer's own. The physical presence of a circulator also would prevent attempts by signers to sign for multiple people. A husband may be familiar enough with his wife's signature to fool a county official, but a husband could not so easily sign for both himself and his wife in the presence of an honest circulator. Indeed, the Secretary presented evidence at trial of this kind of fraud in Saunders County, where a woman who signature appeared on a petition page and was verified by county officials later notified those officials that she had not signed either initiative. Trial Tr. Vol. I at 93:7-19, 492:6-23, 494:23-25; 495:11-15.

So, while a county official's signature comparison and identifying information check serves as an additional layer of security to root out obvious forgeries, it is the physical presence and observation of a circulator that remains the only presumptive evidence against sophisticated forgeries. Ultimately, while "the Secretary's records may be utilized to verify whether a certain individual is a registered voter, the Secretary and this Court have no ability to ascertain whether a particular voter actually signed a petition." *Oklahoma Petition Fraud Case*, 155 P.3d at 42. That is why "the integrity of the initiative process in many ways hinges on the trustworthiness and veracity of the circulator," *id.*, along with measures that help ensure circulators act in an honest and trustworthy manner, such as Nebraska's requirement that circulator's sign their circulator's oath in the presence of a notary.

ii.

Beyond forgeries, there are other improper modes a circulator may use to curate signatures. For example, a circulator could misrepresent the object statement of the petition to a registered voter such that the voter signs a petition he may not actually support. *See* Neb. Rev. Stat. § 32-628(3). A circulator could also illegally pay or offer other things of value to obtain a signer's signature. *See id.* § 32-630(3)(f). These frauds would not be apparent by comparing the signature of the signer to a signature in the voter registration system. Instead, these frauds illustrate that the reasoning in *Pool* is still relevant

today—once a circulator or notary demonstrates they are willing to commit fraud to obtain the requisite number of signatures, there is no reason to trust their testimony elsewhere that they honestly obtained signatures or verified the circulator's oath. Thus, their oath—or in the case of notaries, their notarization—loses its probative value and it is as if the pages were submitted without a signature or a notarization.

iii.

The Sponsor's argument also ignores that the notarization and circulator oath requirements are themselves tools to prevent fraud, deception, and misrepresentation. *See* pp. 6-9, 37-39, *supra*. It is no answer to the Sponsors' violation of one election integrity safeguard that that protection is not the only safeguard against wrongdoing. Based on the Legislature's determination that a notarized affidavit is still necessary for the integrity and security of the initiative process, *Pool*'s reasoning (echoed and embraced by the Attorney General's 1992 Opinion, Opinion No. 92104, 1992 WL 473480) that such affidavit loses its probative value when executed by a dishonest actor (such as a fraudulent circulator or malfeasant notary) still applies today.

iv.

The Sponsors make much out of the Secretary's initial determination that there were enough valid signatures to certify both initiatives for the ballot. But this determination, which was made before the Secretary was aware of the pervasiveness of the fraud in the initiative campaigns, does not control this Court.

While the Secretary is tasked under Neb. Rev. Stat. § 32-1409(1) with determining the validity and sufficiency of signatures in a filed petition, there is nothing in Nebraska law suggesting that this initial determination is final. In *Duggan v. Beerman*, the Nebraska Supreme Court held that the Secretary of State erred in determining there were sufficient numbers of signatures to certify a ballot initiative and—years after the election in question had taken place—declared the results of that election void because an insufficient number of signatures

had been submitted. 245 Neb. at 915–16. This Court can (and should) do the same.

The Sponsors have also suggested that even if this Court *may* find the Secretary erred in his initial determination and certification, the certification is presumptive evidence that the initiatives have enough signatures. Not so. In fact, the Secretary's initial certification illustrates that the Secretary did what the law required based on the evidence before him at the time the certification took place; at that time, the Secretary genuinely believed, despite the initial (non-trivial, but comparatively limited) evidence of fraud, that there were enough signatures to certify the initiatives. But in light of the mountain of evidence of fraud, malfeasance, and intentional wrongful conduct that was subsequently uncovered and has been presented during the course of this trial, the Secretary is before the Court today convinced that neither initiative was genuinely signed by 86,499 registered voters in Nebraska. In such a circumstance, it was appropriate to seek judicial intervention. Indeed, that is the path embraced by our Supreme Court in *Pool*. As the Court explained in its initial, 1918 decision, when credible allegations of fraud are raised against an initiative petition, that gives rise to a "judicial question[,]" one that is "not proper to be decided by a state official, acting only in a ministerial capacity." *Pool*, 102 Neb. 799, 169 N.W. at 731. Thus, the Secretary's pledge to not act unilaterally and instead seek judicial resolution is fully congruent with Nebraska law. That does not mean, however, that his prior certification can be wielded as a sword against his request for judicial relief. This Court is not constrained by the Secretary's original certification; it can (and should) issue an appropriate declaration based on the evidence that has been presented at trial.

III. The Court Should Draw an Adverse Inference From Possible Spoliation

The above discussion of unrefuted facts establishes that necessity and justification of invalidation of the petition. *See Morris* 109 Neb. 348, 191 N.W. at 190–91. *Accord Quock Ting v. United States*, 140

U.S. 417, 420 (1891) ("Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court . . . ."). *See also Conclusiveness of uncontradicted testimony of witness,* 8 Cyc. Of Federal Proc. § 26:133 (3d ed.).

Nevertheless, given both the salience to the pattern and practice of misconduct during the campaign and the need to provide a fulsome record for the Court's consideration, it is necessary to also outline the evidence of potential misconduct when it comes to the search for truth in this case. Specifically, the evidence before this Court, including the direct testimony of Henning and related circumstantial evidence, at the very least gives rise to an inference that Eggers deleted, withheld, or otherwise suppressed highly probative evidence (namely various written communications) in an effort to conceal the NMM campaign's wrongdoing.

When a party destroys evidence, "the factfinder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction." *State v. Davlin*, 263 Neb. 283, 301 (2002). A party seeking an adverse inference drawn from spoliation must show "substantial evidence" to support four findings: (1) "evidence had been in existence," (2) "in the possession or under the control of the party against whom the inference may be drawn," (3) "that the evidence would have been admissible at trial," and (4) "that the party responsible for the destruction of the evidence did so intentionally and in bad faith." *Davlin*, 263 Neb. at 302. Similarly, a party that intentionally withholds or otherwise refuses to produce discoverable materials in bad faith is subject to sanction. *See*, *e.g.*, *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 505 (N.D. Ohio 2013) (sanctioning a plaintiff who "intentionally and willfully withheld documents in an effort to thwart defendants' ability to discover material evidence bearing on plaintiff's claims" by ordering that the plaintiff's claims be dismissed with prejudice); *see also id.* at 509–515 (examining possible sanctions, including drawing a negative inference or taking certain facts as conclusively

established, and outlining factors to consider when evaluating which sanction is appropriate).

The evidentiary record in this case strongly suggests that Eggers deleted or at least refused to produce communications she engaged in with campaign members regarding NMM's conduct during the signature-gathering and notarization process. *First*, as outlined above, Henning testified that Eggers directed NMM agents to delete messages and communications. *See* Trial Tr. Vol. I at 431:7-20; *see also* pp. 27-29, *supra*. That testimony remained unrebutted; Sponsors called no testifiers, and provided no documentary evidence or communications, to rebut Henning's testimony about the meeting at Cheddars where Eggers gave that directive.

Second, Ms. Henning's testimony is buttressed by a comparison of the materials obtained in the response to the Secretary's discovery requests (most notably the copies of Eggers' communications that were produced by the Sponsors) to materials (also copies of Eggers' communications) that the Secretary received from other sources. In short, those productions do not fully align; communications produced by other sources are missing from the productions provide by the Sponsors in discovery. This strongly suggests that Eggers failed to produce highly probative and clearly discoverable communications, and give rise to an inference as to why that was so—because she either deleted those messages or refused to produce them, in an effort to avoid their discovery.

For example, as explained at trial, the evidence shows that Eggers engaged in text message communications with Jennifer Henning in early May 2024. This is an incontrovertible fact; Henning provided the Secretary with copies of those communications, many of which were introduced into evidence. *See* Ex. 94; Ex.95; Ex.96; Ex. 97; Ex. 183; Ex. 281. However, the discovery materials produced by the Sponsors did not include any text messages between Eggers and Henning until after Eggers' deposition had concluded. On the evening of October 26, approximately 20 minutes before the deadline for the close of discovery, the Sponsors produced *some* messages between Eggers and

Henning. *See* Ex. 44. But even then, the conversations between Henning and Eggers from May 2 to May 20 do not appear. *Compare* Ex. 44, p. 16. *with* Ex. 94; Ex.95; Ex.96; Ex. 97; Ex. 183 at 00:03:29-00:03:54, and Ex. 281. Notably, these messages are—as the trial illustrated—highly probative, insofar as they corroborate Henning's story about travelling to the vape shop in Seward and also corroborate other messages from Eggers where she expressed a comfort and willingness to notarize petition pages which Henning had signed outside Eggers' presence. Trial Tr. Vol. I at 412:25–419:19; 422:6-423:16; 441:24-25; 475:24-478:5; *see also* Ex. 94; Ex.95; Ex.96; Ex. 97; Ex. 183 at 00:03:29-00:03:54, and Ex. 281. The absence of these messages, which are highly damaging to the Sponsors' case, is telling.

Other gaps in the Sponsors' discovery production are also notable. For one, during his deposition (which was admitted into evidence after he repeatedly invoked the Fifth Amendment at trial and thus was deemed unavailable) Connely testified that he communicated regularly with Eggers in the late summer and fall of 2024 related to the campaign, which was corroborated by the text messages he produced. *See* Ex. 273; *see also* Ex. 190; Ex. 191. Despite this, the Sponsors produced none of Eggers' messages with Connely during that time frame. *See* Ex. 172. Nor did the Sponsors produce any text messages from Eggers with any other campaign member that occurred after the signature submission deadline of July 3, 2024.

That last refusal (related to messages after July 3, 2024) was accompanied by a discovery objection, *see* Ex. 34, pp. 1–2, but that objection provides extremely thin protection. The Secretary propounded several relevant request for production, including a request seeking "[a]ll communications, documents, and files related to petition circulators' signature and notaries' notarization of petition pages for each Initiative," another seeking "[a]ll communications, documents, and files" that supported the Sponsor's contention that "petition pages were not notarized outside the presence of a petition circulator for either Initiative, and that petition circulators and/or notaries did not self-notarize

petition pages," as well as a catch-all request that requested all "communications" referenced and relied upon when responding to the Secretary's propounded interrogatories. Ex. 34, pp. 1, 3, 6. The notion that Eggers' communications during the run-up to and then pendency of this lawsuit did not fall within the scope of these requests (or were somehow irrelevant) is difficult to take seriously. And the production the Sponsors did provide illustrates that responding to these requests was not unduly burdensome. Thus, the Sponsors objections to producing post-July 3 messages appears to utterly lack a good-faith basis.

Moreover, as indicated during argument at trial, the extraordinarily time compressed nature of discovery made a motion to compel functionally impossible. Ms. Eggers' deposition concluded on the Saturday before the start of trial (October 26, 2024). *See* Ex. 34; Ex. 44; Ex. 132. Given that the trial began on Tuesday October 29, it was practically impossible to identify gaps in production until after trial had commenced, at which point a motion to compel was functionally moot.

In any event, the (threadbare) discovery objection does not explain the Sponsors' failure to produce any text messages from Eggers sent prior to March 14, 2024. See, *e.g.*, Ex. 172, p. 829. Given that signature collection had, at that point in time, been ongoing for nearly a year, *see* Ex. 5; Ex. 6; Ex. 155; Ex. 156, and Eggers was NMM's campaign manager, it strains credulity to suggest that she had *zero* relevant text messages *with anyone associated with the NMM campaign* predating March 14, 2024. One plausible—or given all the surrounding context, *probable*—explanation for the absence of any such messages, of course, is that Eggers deleted them or, at least, strategically refused to produce them.

Second, Eggers failed to produce certain *types* of communications known to exist. Despite admissions that the NMM campaign and the Sponsors frequently used alternative communications channels, such as Slack, Snapchat, and Signal, during the course of the campaign, very few examples of communications from these alternative channels were produced. To be sure, automatic deletion is a design

feature of some of the aforementioned applications. *See*, *e.g.*, Signal Support, *Set and manage disappearing messages*, https://perma.cc/S8UE-395G. But when litigation is anticipated, potential litigants have a duty to preserve communications and disable auto-deletion features. *See*, *e.g.*, *Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226, 233 (D. Minn. 2019). Potential litigants have an obligation to "suspend [any] routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018). Here, however, the Sponsors did precisely the opposite. When it became apparent that litigation was likely, the NMM campaign suspended its use of the communication platform Slack and moved its communications to Signal. *See* Ex. 280.

The Sponsors also produced no communications between Eggers and her co-sponsor Morfeld, even though other communications make reference to text messages being exchanged between Eggers and Morfeld regarding the conduct of the campaign. *See* Ex. 172 at p. 190. The Sponsors have, thus far, offered no explanation for this gap in production. And it is hard to accept at face value that two of the named ballot sponsors *never* corresponded in writing about the campaign for the entirety of its more than year-long existence, especially in light of the other messages produced by the Sponsors that indicate such communications did, in fact, exist.

Given their nature, any missing communications were obviously within Eggers's control and possession. Those communications would have been sent from Eggers' own devices and accounts. Their absence gives rise, at the very least, to the compelling inference that Eggers deleted or otherwise refused to produce these communications. That inference is bolstered by Henning's testimony at trial that Eggers instructed members of the campaign to delete any campaign-related messages in their possession on at least one occasion. Trial Tr. Vol. I. at 431:7-20.

Withheld communications falling into the categories described above would also have been admissible at trial. At the threshold, Eggers is a party opponent, so her communications are exempt from the rule against hearsay. *See* Neb. Rev. Stat. § 27-801(4)(b). As the Court repeatedly concluded during trial, Eggers' messages about the conduct of the campaign were highly relevant. For example, various text conversations between Henning, Reed, and Connely, respectively, with Eggers were admitted because they tended to show that the campaign was fraught with intentional wrongful conduct, and that Eggers—a Sponsor and the campaign manager—had both encouraged and participated in such wrongful conduct. *See* Exs. 94–97; Exs. 107–109; Ex. 183; Exs. 190–192; Exs. 278–281. Any destroyed or otherwise withheld communications would have been admissible for the same reason—circumstances strongly suggest those communications would have included communications from Eggers to campaign members regarding the internal practices of the campaigns that actively encouraged intentional wrongful conduct by others and/or revealed additional wrongful conduct by Eggers herself. *See Beaven v. U.S. Dep't of Just.,* 622 F.3d 540, 555 (6th Cir. 2010) ("[A] party seeking an adverse [spoilation] inference may rely on circumstantial evidence to suggest the contents of destroyed evidence.") (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 110 (2d Cir. 2001)). Furthermore, as this Court's evidentiary rulings during trial already illustrate, the admission of prior written communications does not infringe the rights of a party who invokes their Fifth Amendment right during civil litigation. *See Duncan v. Barton's Discounts, LLC*, 178 N.E.3d 810, 818 (Ind. Ct. App. 2021).

Other evidence suggests that Eggers intentionally deleted or strategically withheld the communications discussed above for purposes of suppressing the truth and obstructing the progress of any litigation. On September 10, 2024, two days before this lawsuit was filed, Eggers told Henning in a text message that she knew her cell phone would "probably will be subpoenaed" and therefore felt the need "to be careful" about her communications. Ex. 183, at 00:05:31; Ex. 281. As discussed above, Henning also offered uncontradicted testimony that

during an in-person meeting in Omaha, Eggers instructed a group of campaign members to delete their communications because of the ongoing litigation. Trial Tr. Vol. I at 431:7-20.. Eggers later ordered campaign personnel to shut down the campaign's Slack communications channel. *See* Ex. 191, at 00:14:00, 00:14:14; Ex. 280, pp. 1-3. These facts show that Eggers' efforts to impede discover, be it via the deletion of communications or their strategic withholding, was more than just mere routine. *See Davlin*, 263 Neb. at 302. (And even if it had been routine, once litigation was anticipated and certainly after it had commenced, Eggers had an obligation to suspend any routine destruction, *see Paisley Park*, *supra*). Considered holistically, Eggers' behavior is best understood as part of an orchestrated plan to suppress relevant (and damaging) campaign communications from coming to light, including during the discovery process.

The Sponsors will likely accuse the Secretary of relying on circumstantial evidence to establish Eggers' bad-faith intent. Of course, Henning's testimony that Eggers told campaign members—after this litigation had commenced—to delete messages is compelling direct evidence (even if it requires a circumstantial inference to reach the conclusion that Eggers was also following her own directive). But, in any event, the use of circumstantial evidence to prove intent is hardly out of the ordinary. "Intent is rarely proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors." *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 902 (8th Cir. 2004)). The evidence before this Court reasonably leads to the conclusion that Eggers intentionally deleted or otherwise refused to produce communications she had with campaign members about the conduct of NMM's petition campaign. This Court should conclude that these deleted or withheld communications were unfavorable to Eggers, a Sponsor, and thus draw an adverse inference against the Sponsors that the communications

would have been harmful to their case. *Davlin*, 263 Neb. at 302; *Laukus*, 292 F.R.D. at 512–513.

Drawing such an inference would add yet another stone on top of the Secretary's mountain of evidence that there was intentional wrongful conduct pervading the NMM campaign from top to bottom.

IV. This Court Can (And Should) Draw an Adverse Inference Against The Sponsors From the Invocation of the Fifth Amendment by Numerous Witnesses.

At the close of the Secretary's evidence, the Secretary renewed his motion in limine asking the Court to draw an adverse inference. *See* Mot; Br in Supp; Tr. Transcript. During the pretrial conference, the Court orally ruled that Neb. Rev. Stat. § 27-513 precludes, as a matter of law, the drawing of such an inference. To ensure the record is properly preserved for appeal (and recognizing that this Court reserved the right to reconsider its ruling on the limine motion), the Secretary expressly incorporates by reference and re-raises the arguments set forth in the motion in limine, the brief in support, and the oral argument presented at both the pretrial conference and again at trial. The Secretary will not repeat those arguments in full here, but two additional points are worth briefly highlighting.

During oral argument at the pretrial conference, counsel for the Secretary noted that Section 27-513 was enacted in 1975 and that at least three cases decided by our Supreme Court *after* 1975 have declared that it is permissible, in a civil proceeding, to draw an adverse inference from an invocation of the Fifth Amendment, *See In re Est. of Jeffrey B.*, 268 Neb. 761, 773 (2004); *Wilson v. Misko*, 244 Neb. 526, 548 (1993); *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 74–75 (1981) *disapproved on other grounds* 214 Neb. 85 (1983). In none of those three cases was Section 27-513 discussed. As counsel for the Plaintiff aptly noted at trial, *In re Est. of Jeffrey B.* was written by an eminent Nebraska jurist, then-Justice, now-federal Judge John M. Gerrard. It is unlikely that Judge Gerrard—or three separate panels writing

during three different decades—were unaware of the existence of Section 27-513 and its import. While it is theoretically possible that Section 27-513 thrice escaped the notice of the Supreme Court and all impacted parties, it is far more plausible that Section 27-513 was not argued by the parties or addressed by the Supreme Court because that rule is not implicated by invocations of the Fifth Amendment during civil proceedings in Nebraska.

The latter conclusion finds support in the preeminent Nebraska treatise discussing the rules of evidence. In Professor Mangrum's discussion of Section 27-513, he declares that "[w]hile it is constitutionally impermissible in a criminal case to comment on the invocation of the privilege against self-incrimination, that prohibition does not constitutionally extend to civil cases, and has been held inapplicable in Nebraska." *Mangrum on Evidence*, Art. 5, Section 27-513, 3 Neb. Prac., Mangrum Neb. Evid. Section 27-513 (2024 ed.). Professor Mangrum relies on *Jeffrey B.* and *Misko* to undergird his conclusion. *Id.*

CONCLUSION

The Court should declare that, due to overwhelming evidence of fraud and malfeasance, an insufficient number of genuine signatures have been submitted in support of the Legalization and Regulation petitions. The Court should therefore also order that both petitions are legally insufficient, should never have been placed on the general election ballot, and thus, the result of the elections as to both petitions is void.

In the alternative, the Court should find that the Secretary has met his burden of production under *Barkley v. Pool* and order this case to proceed to phase two of the trial.

Respectfully submitted this 12th day of November 2024.

ROBERT B. EVNEN, in his official capacity as the Secretary of State

of Nebraska, Defendant & Cross-Claimant.

By: MICHAEL T. HILGERS, #24483
Nebraska Attorney General

By: */s/ Zachary A. Viglianco*
Zachary A. Viglianco, #27825
Deputy Solicitor General
Jennifer A. Huxoll, #20406
Justin J. Hall, #26161
Phoebe L. Lurz, #26333
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Lincoln, Nebraska 68509
Phone: (402) 471-1814
Fax: (402) 471-4725
zachary.viglianco@nebraska.gov
Attorneys for Robert B. Evnen.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the required typeface and formatting rules set forth in Neb. Ct. R. Pldg. § 6-1503 and Neb. Ct. R. App. P. § 2-103 and contains 17,597 words and was prepared using the Microsoft Word program from Microsoft Office 365.

By: */s/ Zachary A. Viglianco*
Zachary A. Viglianco, #27825
Deputy Solicitor General

Certificate of Service

I hereby certify that on Wednesday, November 13, 2024 I provided a true and correct copy of the Brief to the following:

Evnen,Robert,B represented by Justin J. Hall (Bar Number: 26161) service method: Electronic Service to justin.hall@nebraska.gov

Eggers,Crista, represented by Daniel J. Gutman (Bar Number: 26039) service method: Electronic Service to daniel@gutmanllc.com

Evnen,Robert,B represented by Jennifer A. Huxoll (Bar Number: 20406) service method: Electronic Service to jennifer.huxoll@nebraska.gov

Henning,Jennifer, service method: Constructive Service

Morfeld,Adam, represented by Kaitlin Madsen (Bar Number: 27359) service method: Electronic Service to kait@gutmanllc.com

Evnen,Robert,B represented by SCHULTZ, DARRIN F (Bar Number: 27663) service method: Electronic Service to darrin.schultz@nebraska.gov

Morfeld,Adam, represented by ARKFELD, ALEXANDER S (Bar Number: 27277) service method: Electronic Service to alex@gutmanllc.com

Eggers,Crista, represented by ARKFELD, ALEXANDER S (Bar Number: 27277) service method: Electronic Service to alex@gutmanllc.com

Wishart,Anna, represented by Daniel J. Gutman (Bar Number: 26039) service method: Electronic Service to daniel@gutmanllc.com

Glenn,Michael, service method: Constructive Service

Coryell,Shannon, service method: Constructive Service

Todd,Jacy, service method: Constructive Service

Kuehn,John, represented by LaGrone, Andrew Thomas (Bar Number: 25948) service

method: Electronic Service to andrew@lagronelawnebraska.com

Eggers,Crista, represented by HAYES, SYDNEY L. (Bar Number: 27051) service method: Electronic Service to sydney@gutmanllc.com

Evnen,Robert,B represented by Kinnison, Benedict (Bar Number: 28156) service method: Electronic Service to benedict.kinnison@nebraska.gov

Wishart,Anna, represented by HAYES, SYDNEY L. (Bar Number: 27051) service method: Electronic Service to sydney@gutmanllc.com

Lawlor,Shari, service method: Constructive Service

Wishart,Anna, represented by ARKFELD, ALEXANDER S (Bar Number: 27277) service method: Electronic Service to alex@gutmanllc.com

Wishart,Anna, represented by Kaitlin Madsen (Bar Number: 27359) service method: Electronic Service to kait@gutmanllc.com

Evnen,Robert,B represented by Phoebe Louise Lurz (Bar Number: 26333) service method: Electronic Service to phoebe.lurz@nebraska.gov

Kuehn,John, represented by Guenzel,Steven,E (Bar Number: 15677) service method: Electronic Service to sguenzel@johnsonflodman.com

Bowling-Martin,Kimberly, service method: Constructive Service

Petersen,Patricia, service method: Constructive Service

Morfeld,Adam, represented by HAYES, SYDNEY L. (Bar Number: 27051) service method: Electronic Service to sydney@gutmanllc.com

Morfeld,Adam, represented by Daniel J. Gutman (Bar Number: 26039) service method: Electronic Service to daniel@gutmanllc.com

Connely,Garrett, service method: Constructive Service

Evnen,Robert,B represented by STROBL, GRANT D (Bar Number: 27985) service method:

Electronic Service to grant.strobl@nebraska.gov

Reed,Marcie, service method: Constructive Service

Eggers,Crista, represented by Kaitlin Madsen (Bar Number: 27359) service method: Electronic Service to kait@gutmanllc.com

Signature: /s/ VIGLIANCO, ZACHARY A (Bar Number: 27825)