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

BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

Last Friday, Secretary of State Robert B. Evnen held a press conference following his certification of the 2024 general election ballot. At the press conference, Secretary Evnen lauded the tireless work of local and statewide election officials who counted, verified, and confirmed more than 600,000 petition signatures from voters throughout the state. "The citizens of the State of Nebraska owe a debt of gratitude to our elections officials throughout the state; our county clerks, our county election commissioners, their staffs—they did a tremendous job in tight circumstances," Secretary Evnen said.

This lawsuit attacks the integrity, credibility, and accuracy of Nebraska's election officials. Throughout the Amended Complaint, Plaintiff makes various conclusory allegations that local and state election officials improperly counted petition signatures that Plaintiff claims are invalid. In making these allegations, Plaintiff accuses the State's highest executive officers, including the Secretary of State, of bad faith, claiming he "illegally" accepted tens of thousands of signatures that should have been rejected. Plaintiff requests the

equivalent of a recount, implying that he is best equipped to make important election decisions currently left to the sound discretion of our election experts, who are equipped with significant resources and tools to make their individualized determinations.

Plaintiff not only implies that he is better equipped to make important election decisions—he is also charging the Court with the performance of specific election-related tasks, which the Legislature specifically delegated to entities in the executive branch. Plaintiff is certainly not better equipped than our election officials to make these determinations, and, setting aside separation of powers concerns, courts should not be asked to do so either. Plaintiff invites the Court to step into the role of state and local election officials to carry out a functional signature recount. The Court should decline this invitation.

Plaintiff's unfounded allegations jeopardize the State's core election processes by questioning the integrity and accuracy of local and statewide officials. They also threaten the initiative process more generally—a process the Nebraska Supreme Court reiterated *just last week* is "precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *State ex rel. Brooks v. Evnen*, 317 Neb. 581, 594, --- N.W.3d --- (2024).

Ultimately, Plaintiff's allegations fail to state a claim upon which relief may be granted. As discussed more fully below, none of Plaintiff's various allegations of wrongdoing—even accepting them as true—give rise to a viable claim for relief. Accordingly, the Court should dismiss Plaintiff's Amended Complaint, with prejudice, and reject Plaintiff's challenge to the Secretary of State's decision to place both disputed initiatives on the 2024 general election ballot.

FACTUAL BACKGROUND

This summer, five ballot initiatives and one ballot referendum submitted petition signatures to Secretary Evnen to qualify for placement on the 2024 general election ballot (Am. Compl. Ex. E). At

issue in this case are two of those initiatives—the Patient Protection Act for Medical Cannabis Legalization (the "Patient Protection Initiative"), and the Nebraska Medical Cannabis Regulatory Act (the "Regulatory Initiative") (Am. Compl. Ex. A–B). This brief refers to the two ballot measures collectively as the "Initiatives."

The purpose of the Patient Protection Initiative is to enact a statute "that makes penalties inapplicable under state and local law for the use, possession, and acquisition of limited quantities of cannabis for medical purposes by a qualified patient with a written recommendation from a health care practitioner, and for a caregiver to assist a qualified patient in these activities." (Am. Compl. Ex. A, at 002). Stated another way, the initiative—if passed—will de-penalize the use and possession of medical marijuana in limited circumstances.

The purpose of the Regulatory Initiative is to enact a statute "that makes penalties inapplicable under state law for the possession, manufacture, distribution, delivery, and dispensing of cannabis for medical purposes by registered private entities, and establishing a Medical Cannabis Commission to regulate such entities." (Am. Compl. Ex. B, at 002).

Nebraska law requires the Secretary of State to determine the legal sufficiency of ballot measures in the first instance before certification for the general election ballot. Neb. Rev. Stat. § 32-1409(3). Consistent with this requirement, Secretary Evnen certified both Initiatives for the general election ballot on September 13, 2024. (Am. Compl. Ex. N, at 002). In doing so, Secretary Evnen necessarily determined that the Initiatives satisfy the requirement of submitting valid signatures from 7% of registered voters statewide and from 5% of registered voters in at least 38 Nebraska counties. *See* Neb. Const. art. III, § 2. He also determined the Initiatives meet all "constitutional and statutory requirements," including valid sworn sponsor statements and compliance with the single subject rule. Neb. Rev. Stat. § 32-1409(3).

Plaintiff John Kuehn filed his Amended Complaint on September 17, 2024. Plaintiff alleges four causes of action pertaining to Secretary Evnen's purported counting and verification of "illegal" signatures; the sponsors' alleged failure to comply with required sworn sponsor statements; and purported violations of Nebraska's single subject rule. Plaintiff seeks to enjoin Secretary Evnen from "certifying or printing the proposed Initiatives on the November 5, 2024 general election ballot," or in the alternative, an injunction requiring the Secretary to "de-certify the Initiatives for placement on the ballot." Although not separately pled, Plaintiff also seeks a "declaratory judgment" finding the Initiatives "legally insufficient."

NEB. REV. STAT. § 32-1412

Neb. Rev. Stat. § 32-1412(2) provides a cause of action to any Nebraska resident challenging the Secretary of State's legal sufficiency determination. When a resident seeks to remove an issue from the ballot, as Plaintiff does here, the statute provides for injunctive relief. *Id*. (explaining the Court may "enjoin" the Secretary). Typically, legal sufficiency challenges under § 32-1412(2) are decided on the pleadings, without discovery. *See Beckner v. Evnen*, No. CI 20-3118 (Dist. Ct. Lancaster Cnty. 2020) (dismissing lawsuit on motion to dismiss); *Chaney v. Evnen*, No. CI 20-3141 (Dist. Ct. Lancaster Cnty. 2020) (same); *Christensen v. Gale*, No. CI 18-305 (Dist. Ct. Lancaster Cnty. 2018) (same). This includes lawsuits making similar allegations regarding the validity of petition signatures. *Chaney v. Evnen*, No. CI 20-3141 (Dist. Ct. Lancaster Cnty. 2020).

Section 32-1412 contemplates an expedited proceeding and disposition. As the Nebraska Supreme Court has recognized, however, courts have the authority to make legal sufficiency determinations both before and after an election has occurred. *Chaney v. Evnen*, 307 Neb. 512, 517, 949 N.W.2d 761, 767 (2020). Accordingly, ballot sufficiency challenges should be expedited in a manner that ensures legal compliance *and* affords ballot sponsors a meaningful opportunity

to mount an effective defense. *See Christensen v. Gale*, 301 Neb. 19, 27, 917 N.W.2d 145, 153 (2018) ("Statutory provisions authorizing initiative petitions should be construed in such a manner that the legislative power reserved in the people is effectual.").

ARGUMENT

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted. Counts I and II of the Amended Complaint fail because Plaintiff misstates what does—and does not—count as a valid signature under Nebraska law. To this end, Plaintiff seeks to invalidate thousands of signatures on grounds which the Nebraska Supreme Court has held are not valid grounds to support such a challenge. Plaintiff's arguments also violate the Supreme Court's liberal construction of election statutes to facilitate—not undermine—the reserved power of initiative.

Counts III and IV of the Amended Complaint also fail as a matter of law. As discussed below, the sworn sponsors complied with all aspects of Neb. Rev. Stat. § 32-1405(1) by listing their names, street addresses, and phone numbers in required paperwork filed with the Secretary of State. This is apparent from documents attached to Plaintiff's own pleading, which establish statutory compliance as a matter of law. Further, the Regulatory Initiative easily satisfies the deferential single subject test governing statutory initiatives. For these additional reasons, Plaintiff's Complaint should be dismissed.

I. Plaintiff has not stated a viable claim based on alleged signature irregularities (Counts I and II).

Plaintiff's first two causes of action follow a familiar playbook. When an initiative satisfies a signature threshold by a few thousand signatures, opponents of the initiative attack local and statewide election officials as acting improperly—or "illegally"—by verifying signatures that the opponent claims should be tossed out as improper. The objective is to invalidate *just enough* signatures to bring the measure below the legally required signature threshold—here, 7% of

registered voters statewide. This strategy, as applied here, requires Plaintiff to invalidate **3,464** signatures on the Patient Protection Initiative (Am. Compl. ¶ 51), and **3,342** signatures on the Regulatory Initiative (Am. Compl. Ex. D, at 001).

The fundamental problem with Plaintiff's strategy is that it relies on a misapplication of established Nebraska Supreme Court precedent. In particular, Plaintiff encourages a narrow and strict interpretation of Nebraska's petition statutes that the Supreme Court has specifically disavowed. Further, Plaintiff's Amended Complaint lists alleged deficiencies with petition signatures that—by law—do not result in invalidation. Thus, even accepting Plaintiff's allegations as true, he has not stated a claim upon which relief may be granted.

The remainder of this section proceeds in three parts. The first part overviews the Nebraska Supreme Court's liberal construction of Nebraska's initiative statutes in the context of signature verification. The second part delineates the discretion afforded to local election officials in counting and verifying signatures, and explains how this discretion forecloses Plaintiff's claims as a matter of law. The final section lists each of the alleged signature deficiencies identified in the Amended Complaint and describes why, as a matter of law, they do not result in invalidation.

A. Statutes facilitating the initiative process are liberally construed.

Article III, Section 2 of the Nebraska Constitution establishes certain signature thresholds for initiative petitions like those at issue here. For statutory initiatives, sponsors must obtain signatures from "seven percent of the registered voters of the state" to include "five percent of the registered voters of each of two-fifths of the counties of the state." Neb. Const. art. III, § 2.

The Constitution does not, however, establish guidelines for signature collection or verifications. Instead, these rules and regulations exist in statute. For example, Neb. Rev. Stat. § 32-628

establishes spacing and line requirements for petitions. Similarly, Neb. Rev. Stat. § 32-1409 delineates signature verification responsibilities among state and local officials and requires that each signer be a "registered voter on or before the date on which the petition was required to be filed with the Secretary of State." Thus, specific process requirements are legislatively created and flow from the "precious" right of initiative enshrined in the Constitution. *Brooks v. Evnen*, 317 Neb. at 594.

Because form and process requirements are statutory, as opposed to constitutional, the Nebraska Supreme Court construes them liberally to effectuate the initiative process. Indeed, "statutory provisions authorizing initiative petitions should be construed in such a manner that the legislative power reserved in the people is effectual **and should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes** pertaining to its exercise." *Christensen*, 301 Neb. at 27 (emphasis added). Stated another way: "Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved." *State ex rel. Morris v. Marsh*, 183 Neb. 521, 524, 162 N.W.2d 262, 265 (1968).

The Nebraska Supreme Court has repeatedly applied these principles in rejecting the types of arguments raised here. In *State ex rel. Stenberg v. Moore*, for example, the Supreme Court invalidated a provision of Nebraska statute that required a petition signer's information—*i.e.*, their address, date of birth, and street address—to exactly match the state's voter registration records. 258 Neb. 199, 214, 602 N.W.2d 465, 476 (1999). "A requirement that the voters be responsible for independently proving the validity of signatures that were invalidated because they did not exactly match the registration records is contrary to the high value we place on the right of the people to engage in the initiative and referendum process," the Court held. *Id.* at 213. "Any presumption *must be in favor of the legality* of the signer's

act," and signature verification statutes must be interpreted to account for "technical errors." *Id.* (emphasis added).

In a similar vein, the Nebraska Supreme Court has rejected efforts to invalidate petition signatures based on missing or incorrect dates, or incomplete names provided by petition circulators. *Morris* , 183 Neb. at 531, 162 N.W.2d at 269 . These are "technical" errors, the Court held, and do not rise to the level of signature invalidation. Any other result would frustrate the liberal construction of the initiative process to "promote the democratic process." *Id.* ("[T]he right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.").

Plaintiff's first two causes of action depend on the type of narrow and strict interpretation specifically disavowed in the cases cited above. Indeed, Plaintiff asks the Court to invalidate thousands of signatures for purported technical deficiencies—many of which are of no fault of the registered voter who signed the petition. Such an interpretation, if adopted, would frustrate the precious right of initiative inherent in the Nebraska Constitution.

B. A petition signature is valid if the signer is a registered Nebraska voter as determined by election officials.

Plaintiff's Amended Complaint also ignores black letter law as to what does, and does not, count as a valid signature in Nebraska. To this end, Plaintiff asks the Court to toss tens of thousands of signatures based on purported irregularities that—even if proved at trial—would not result in invalidation. For this additional reason, Plaintiff's Amended Complaint should be dismissed.

Plaintiff's Amended Complaint relies on a mechanical approach to validating signatures. Plaintiff alleges, for example, that if a particular petition entry is missing an address or birthday, or if the

petition gatherer does not disclose whether they are paid or volunteer, the corresponding signature is necessarily invalid as a matter of law.

This mechanical approach is inconsistent with Nebraska law in two primary respects. First, there is no strict requirement in Nebraska that petition signers include their birthday, address, or other information in order for their signature to be valid. Rather, for a signature to be validly counted in Nebraska, the signer must be a "**registered voter on or before the date on which the petition was required to be filed with the Secretary of State**." Neb. Rev. Stat. § 32-1409(1) (emphasis added). The signature, printed name, birthday, and address on the petition can be *evidence* that the signer is a registered voter—but they are not independent requirements for validity. Thus, even if Plaintiff proved these alleged defects at trial, it would not result in the type of wholesale signature invalidation Plaintiff requests.

Second, Neb. Rev. Stat. § 32-1409 authorizes local elected officials to exercise discretion in validating signatures, which is inherently inconsistent with Plaintiff's mechanical approach. Indeed, the validation statute allows county election officials to use "any credible evidence" they find sufficient to rebut their initial validity determination. For instance, a county election official who noted a missing address on a petition may call the voter directly, ask them if they signed the petition, and—if satisfied that the voter did sign—determine the signature is valid.

The discretion afforded to Nebraska's election officials underscores the legal impossibility of Plaintiff's Amended Complaint. Nowhere in the pleading is there any allegation that local or statewide officials abused this discretion or otherwise considered improper evidence in validating the signatures. Instead, the allegations require the Court to presume that local election officials either did not do their jobs, or that they did them incorrectly—a presumption that is not supported, and should not be applied, on the specific facts alleged. *See*

State v. Parnell, 301 Neb. 774, 777, 919 N.W.2d 900, 902 (2018) (stating courts "presume[] that a public officer will faithfully perform his or her official duties"). For these additional reasons, Plaintiff's Amended Complaint should be dismissed.

C. Signature invalidation is not a proper remedy on the facts and circumstances alleged.

The Court can and should dismiss Plaintiff's first two causes of action for the reasons stated above—namely, because the claims are inconsistent with Nebraska's precious right of initiative and fail to account for the statutory discretion afforded to local election officials. But even if the Court considers the specific deficiencies alleged, dismissal is still required as a matter of law.

The Amended Complaint identifies 10 purported signature deficiencies which, Plaintiff alleges, result in automatic signature invalidation by the Court. These purported deficiencies range from missing addresses and birth dates to a failure "to disclose whether [the circulator was] paid or volunteer." (Am. Compl. ¶ 51). The most significant request, by far, pertains to the circulator's disclosure statement regarding their status as paid or volunteer.

i. Circulator Disclosure – 13,243 signatures.

Plaintiff seeks to invalidate 13,243 signatures from the Patient Protection Initiative for allegedly deficient circulator disclosures. This purported deficiency corresponds to Neb. Rev. Stat. § 32-628(4), which generally requires that petitions contain a printed statement identifying whether the circulator is a volunteer or paid. As alleged in the Amended Complaint, failure to comply with this requirement results in automatic signature invalidation as a matter of law.

Even assuming the petitions were deficient in the manner alleged by Plaintiff, the purported deficiency would not—under any circumstance—result in signature invalidation. This is true for three separate and independent reasons.

First, the circulator disclosure requirement exists in the same statute that provides other technical requirements for petitions. Neb. Rev. Stat. § 32-628. For instance, the statute requires signature spaces to be at least 2.5 inches long and requires that petitions not have more than 20 signatures per page. Neb. Rev. Stat. § 32-628(1). Every petition must also contain a circulator's affidavit where the petition circulator attests to, among other things, witnessing each signature and reading the petition's object statement to each signer. § 32-638(3). And, relevant here, the provision requires that petitions contain "a statement in letters not smaller than sixteen-point type in red print" that identifies the circulator as either "paid" or "volunteer."

The purpose of these technical requirements is the prevention of fraud, deception, and misrepresentation. Neb. Rev. Stat. § 32-628(2). So, it may be true that petitions that do not perfectly comply with the technical requirement of Section 32-628 are invalid *upon allegations and proof of fraudulent activity*. But no such allegations exist in the Amended Complaint. Instead, Plaintiff alleges that all signatures are *necessarily* invalid simply because of the purported existence of a technical defect. Without any allegations or evidence of fraud, this argument fails as a matter of law. *See Stenberg,* 258 Neb. at 213, 602 N.W.2d at 476 (explaining "signatures cannot be discounted due to technical errors" and "[a]ny presumption must be in favor of the legality of the signer's act").

Caselaw from this District is instructive. *State ex. rel. Hall v. John Gale* involved a challenge to the legal sufficiency of an affirmative action petition passed in 2008. Case No. CI 08-4055 (Dist. Ct. Lancaster Cnty., Jan. 22, 2009). The challengers alleged widespread fraud in the collection of signatures by circulators in the months leading up to the initiative's passage. One component of these allegations was that petition circulators, in collecting signatures, did not read the object statement word-for-word as it appeared on the top of the form. The Court ultimately rejected this argument, holding that

section 32-1405(3), while prohibiting the recitation of a misleading summary, does not impose the type of rigid, word-for-word requirement urged by the appellant. *Id*.

In reaching this conclusion, the Court relied on statutory principles that apply equally here. The Court cited decades of precedent recognizing that the power of initiative must be liberally construed to promote the democratic process, including that the power of initiative "should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise." *Christensen*, 301 Neb. at 27, 917 N.W.2d at 153 (emphasis added). Stated another way, Nebraska courts interpret statutes in a manner that makes it easier—not harder—to exercise the right of initiative. *Id.*

Relatedly, the Court interpreted its authority over signature verification in the initiative process as limited, applying only to the prevention of "pervasive pattern[s] of fraud, misrepresentation or deception." *Id*. The Court determined that the object statement allegations did not fit within these limited categories because there was no allegation of misrepresentation.

The same principles apply here. The only allegation provided in the Amended Complaint is that unidentified circulators did not carry petitions with the correct circulator disclosure. Even accepting this allegation as true, there are no factual allegations that would allow this Court to infer fraud or misrepresentation on the part of the circulators, which is the only arguable basis for invalidating the corresponding signatures. Because the circulator disclosure is a technical requirement that does not—on these facts—result in signature invalidation, this component of Plaintiff's claim fails.

Second, strictly construing the circulator disclosure requirement to *per se* invalidate signatures would disenfranchise electors in the exercise of their reserved right of initiative.

As discussed, Plaintiff alleges that every single signature on a petition containing the wrong word is necessarily invalid, even if the circulator complied with all other constitutional and statutory requirements. If adopted, this would mean that thousands of voters who intended to sign the petition, and complied with all legal requirements for doing so, would have their signatures invalidated based on the mistake of a circulator.

Consider, for example, a volunteer circulator who accidentally grabs a "paid circulator" petition, but otherwise complies with all relevant laws and regulations pertaining to circulation. Under Plaintiff's interpretation, every single signature obtained by the circulator would be invalid *per se* simply because the petition says "paid circulator" instead of "volunteer." This result is inconsistent with the framework set forth above, which expressly discourages the "narrow and strict interpretation" encouraged by Plaintiff.

Third, Nebraska's petition statutes require *substantial* compliance, not perfect compliance, with petition technical requirements. During the signature verification process, "[c]lerical and technical errors in a petition shall be disregarded if the forms prescribed in" Sections 32-1401 to 32-1403—which reference and incorporate Section 32-628—are "**substantially followed.**" Neb. Rev. Stat. § 32-1409(3) (emphasis added). This includes not only clerical and technical issues in the petition form, but also in the manner of execution. *Marsh*, 183 Neb. at 531, 162 N.W.2d at 269.

In sum, Plaintiff's request that the Court invalidate over 13,000 signatures based only on the circulator disclosure statement fails as a matter of law. No amount of discovery can change this result. Because an improper circulator disclosure form does not *per se* invalidate signatures, Plaintiff's claim should be dismissed.

ii. Circulator Affidavit – 568 signatures

Plaintiff also seeks to invalidate 568 petition signatures on the conclusory allegation that the petition pages were notarized "when the circulator was not in the presence of the notary." (Am. Compl. ¶ 51.9). Plaintiff's contention that *all* signatures on a petition are *per se* invalid because the petition form was improperly notarized fails to state a claim. Paragraph 51.9 should be dismissed.

The circulator affidavit is another requirement in Neb. Rev. Stat. § 32-628—meaning if the petition requirements (form and execution) are "substantially followed," technical errors should be disregarded. The Nebraska Supreme Court has stated as much: An issue with the circulator's oath removes the *presumption* of signature validity but does not mean the signatures are *per se* invalid. *Barkley v. Pool*, 103 Neb. 629, 629. 173 N.W. 600, 602 (stating a circulator oath invalidated for fraud removes the presumption of signature validity "unless the genuine signatures are affirmatively shown"); *see also* Op. Att'y Gen. No. 92104, at 7 (stating signatures can be counted "even though the petition certification is bad" if there is additional evidence of the signature's authenticity).

As stated previously, county election officials and Secretary Evnen have authority to consider "any credible evidence" to determine a signature's validity. If a county official has reason to believe a circulator's affidavit is invalid, the official can contact individual voters to confirm that they signed the petition, thus validating that signature. Accordingly, Paragraph 51.9 fails to state a signature validity claim.

To be sure, there may be circumstances where a plaintiff could state a claim for signature invalidity based on a circulator's failure to follow the petition form rules in Sections 32-1401 or 32-628—for instance, where there are well-pleaded allegations of pervasive, widespread fraud, which must be pled with particularity. Neb. Ct. R. Pldg. § 6-1109(b). But Plaintiff has not pled any fraud allegations here, and there are other remedies when fraud is at issue to penalize the

person who committed the fraud—not voters exercising their initiative right. *See*, *e.g.*, Neb. Rev. Stat. § 32-1546 (providing penalties for falsely swearing to a circulator's affidavit, among other things); Neb. Rev. Stat. § 64-113 (stating repercussions for "charges of malfeasance in office" by a notary public); *Stenberg*, 258 Neb. at 214, 602 N.W.2d at 476 ("A provision enacted to prevent fraud that also has the effect of causing the signatures of some registered voters not to be counted cannot be deemed to facilitate the initiative process.").

iii. Address, Birthday, and Date – 641 signatures

According to Plaintiff, Secretary Evnen "illegally" counted an additional 641 petition signatures that have missing or incorrect birthdays, addresses, and dates. He alleges issues with 411 birthdays (Am. Compl. ¶ 51.2), 134 addresses (¶ 51.3), and 96 dates (¶¶ 51.5, 51.7, 51.8).

As has already been stated, per Nebraska Supreme Court caselaw, these are *not* invalidating issues. Addresses and birthdays are two factors among many that county election officials consider in determining whether a signature is valid. Neb. Rev. Stat. § 32-1409 (authorizing election officials to use "any credible evidence" to validate signatures, including *but not limited to* addresses and birthdays); *see also Stenberg*, 258 Neb. at 213, 602 N.W.2d at 476 (determining that an "exact match" requirement was unconstitutional).

Similarly, a missing or incorrect date is not, by itself, reason to invalidate a signature. *Morris*, 183 Neb. at 532, 162 N.W.2d at 269 ("On an otherwise validly executed initiative petition form . . . the omission or faulty rendition of the date should be treated as a clerical or technical error . . . ."); *see also* Op. Att'y Gen. No. 92104, at 4 (1992) ("The date as stated in a [petition's] certificate of acknowledgment is not regarded as a material fact, and a certificate otherwise sufficient will not be rendered void by a mistake in the date."); *id.* at 5 (incorrect dates from petition signers are "clerical or technical" errors and not invalidating).

Plaintiff's allegations highlight the absurdity that results when date requirements are strictly construed. Plaintiff alleges that 60 signatures "pre-date the Petition campaign." (Am. Compl. ¶ 51.5). But petitions clearly could not have been signed *before* the petition period, because there were no petitions to sign. Likewise, a petition could not have been signed *after* the petition submission deadline (¶ 51.7), nor notarized after that date (¶ 51.8), because the Secretary of State does not accept any petitions after the deadline. It is common sense that signatures pre-dating or post-dating the petition signing period are scrivener's errors and have no bearing on whether a signer is a registered voter.

Accordingly, none of these alleged deficiencies, if proven at trial, would result in signature invalidation. All of Plaintiff's allegations related to deficient addresses, birthdays, and dates should be dismissed.

iv. Nonregistered Voters and Duplicates

Plaintiff's remaining signature validity allegations fall into two categories: signatures from allegedly nonregistered voters (Am. Compl. ¶¶ 51.1, 51.6) and duplicate signatures (Am. Compl. ¶¶ 51.4, 57–60). These allegations are "threadbare recitals of the elements . . . supported by mere conclusory statements," and the Court is not required to accept them as true. *Chaney*, 307 Neb. at 520, 949 N.W.2d at 769. The allegations fail to identify any of the challenged signatures or which counties those signatures are from.

But even if accepted as true, these two categories total **only 2,548** allegedly invalid signatures. If the 2,548 signatures are excluded from the Patient Protection Initiative's valid signature total, the remaining signatures still satisfy the valid signature threshold as a matter of law (Am. Compl. Ex. D).

Finally, the only allegation about invalid signatures on the Regulatory Petition is that Plaintiff "anticipates that similar issues

will be present in the signatures." This is clearly conclusory and should not be accepted as true. Accordingly, Plaintiff plainly fails to state a claim for insufficient petition signatures. Counts I and II should both be dismissed.

* * *

Plaintiff asks the Court to invalidate thousands of otherwise-valid signatures based primarily on alleged technical or scrivener's errors. This approach has been expressly rejected by the Supreme Court, and for good reason: Rejecting signatures from registered voters based on purported technicalities undermines the electorate's precious right of initiative and invites the Courts to second guess the work of trained election officials. Sworn Sponsor Defendants respectfully request that the Court reject Plaintiff's narrow interpretation of the petition statutes and dismiss the signature validity claims in Counts I and II.

II. Plaintiff's remaining legal objections fail as a matter of law.

Plaintiff's remaining claims pertain to purported legal deficiencies in the sworn sponsor statements and alleged violations of the single subject rule. By certifying the Initiatives for the ballot, Secretary Evnen has necessarily considered—and rejected—these arguments. Because neither claim has merit, the Court should dismiss them as a matter of law.

A. The sworn sponsor statements are legally sufficient.

Count III fails because the Initiatives' sworn sponsor statements are legally sufficient as a matter of law. Before collecting signatures for an initiative petition, proponents of an initiative must file a "sworn statement containing the names and street addresses" of every person or entity sponsoring the petition. Neb. Rev. Stat. § 32-1405(1).

Plaintiff alleges that the Initiatives' sworn statements are deficient because Defendant Wishart did not include her city, state, or

zip code. But city, state, and zip code are *not* statutory requirements—only street address is. The Petition Sworn Sponsor Statement provided by the Secretary of State asks only for "street address," as required by statute. (Am. Compl. Ex. A, at 001, Ex.B, at 001). By contrast, when city, state, or zip code are required on an election-related form, the form explicitly asks for those fields. *See*, *e.g.*, Nebraska Secretary of State's Official Voter Registration Application, https://rb.gy/3ofxwe (last accessed Sept. 17, 2024). Other statutes and official forms also indicate that the term "street address" does not necessarily include city, state, and zip code. *See, e.g.*, Neb. Rev. Stat. § 87-212 ("The street address, city, and state of the assignee must be included in the assignment."); Neb. Rev. Stat. § 21-504 ("[I]nstruments shall include the street address, city, and state of the assignee."); Neb. Ct. R. App. Prac. Ch. 2, Art. 1, App. 3 (Motion to Dismiss Form); Neb. Ct. R. Ch. 3, Art. 1, App. B (Motion for Pro Hac Vice Admission).

Defendant Wishart included her full street address, including street number and street name, on both sworn statements. (Am. Compl. Ex. A, at 001, Ex. B, at 001). Narrowly construing "street address" to require city, state, and zip code—and thereby invalidating tens of thousands of signatures—would circumscribe the right to initiative in violation of Article III, Section 2 of the Nebraska Constitution. *Loontjer v. Robinson*, 266 Neb. 902, 909, 670 N.W.2d 301, 307 (2003) ("[T]he right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.") (internal citation omitted) (cleaned up). Accordingly, Count III fails as a matter of law and should be dismissed.

B. The Regulatory Initiative satisfies the single subject rule.

Nebraskans amended the Nebraska Constitution to reserve for themselves "the power to propose laws and amendments to the Constitution" independent of the Legislature. Neb. Const. art. III, § 1; *see also id.* § 2. This power—the *initiative* power—"is precious to the

people" and a right "courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *Christiansen*, 301 Neb. at 27. Under Article III, the People of Nebraska and the Nebraska Legislature are co-equal lawmaking bodies and can enact the same two types of laws: (1) constitutional amendments and (2) statutes.

Article III also provides certain lawmaking procedures. As relevant here, voter initiatives and Legislative enactments are both subject to single subject rules. A purpose of the single subject rule is to avoid combining dissimilar propositions and "forcing voters to vote for or against the whole package even though they would have voted differently had the propositions been submitted separately." *State ex rel. McNally v. Evnen*, 307 Neb. 103, 119, 948 N.W.2d 463, 477 (2020). As discussed below, the single subject test for constitutional amendments "tends to be stricter" than the test for statutes. *Planned Parenthood of the Heartland, Inc. v. Hilgers,* 317 Neb. 217, 229, 9 N.W.3d 604, 613 (2024).

The Legislature, through statute, has entrusted the Secretary of State to determine the legal sufficiency of initiatives in the first instance—including compliance with the single subject rule. Neb. Rev. Stat. § 32-1409(3) (directing the Secretary of State to "determine if constitutional and statutory requirements have been met"). Thus, Secretary Evnen's certification of the Initiatives necessarily means he determined both satisfy the single subject rule.

Plaintiff challenges Secretary Evnen's determination, alleging the Regulatory Initiative contains four distinct subjects in violation of the single subject rule. (Am. Compl. ¶ 68). His claim fails as a matter of law for two reasons: (1) the same broad statutory single subject test governs all statutes, irrespective of which legislative body (the Legislature or the People) enacts them, and (2) the Regulatory Initiative easily satisfies the single subject rule under both a broader statutory test (which applies here) and narrower "natural and

necessary connection" test (which applies only to constitutional amendments).

i. The statutory test is the governing standard for statutory initiatives.

The Nebraska Supreme Court has never directly addressed which single subject test applies to *statutory* initiatives like the Regulatory Initiative—that is, initiatives that seek to enact a statute, as opposed to a constitutional amendment. But Article III, Section 2 and related case law suggest that statutory initiatives should be reviewed with the same deferential standard as statutes enacted by the Legislature.

Under Article III, the People of Nebraska and the Nebraska Legislature are co-equal lawmaking bodies. *See Klosterman v. Marsh*, 180 Neb. 506, 511, 143 N.W.2d 744, 748 (1966) (stating the Legislature and electorate "are coordinate legislative bodies" with "no superiority of power between" them). Accordingly, the "legislative power of the people is as great as that of the legislature," and "[v]oter initiatives . . . receive the same judicial deference as proposals before the state legislature" under the separation of powers doctrine. *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 486, 723 N.W.2d 65, 77 (2006) (cleaned up) (quoting *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997)). In other words, initiatives are reviewed with the same deference as Legislative proposals.

The People of Nebraska, through initiative, can enact the same two kinds of laws as the Legislature: statutes and constitutional amendments. For the Legislature, statutes and constitutional amendments are governed by two distinct single subject rules. A liberal rule applies to Legislative statutes. Neb. Const. Art. III, § 14; *Anderson v. Tiemann*, 182 Neb. 393, 408–09, 155 N.W.2d 322, 332 (1967) ("If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto . . . it does not violate Article III, section 14"). By contrast, the single subject rule

for constitutional amendments is construed with a "stricter standard," known as the "natural and necessary connection test." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 996, 853 N.W.2d 494, 510 (2014); Neb. Const. art XVI, § 1.

Likewise, Article III, Section 2 contains two adjacent provisions that govern the single subject rule for initiatives:

> (1) The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. (2) Initiative measures shall contain only one subject.

Neb. Const. art. III, § 2 (numbers added for ease of discussion). The two provisions correspond with the two distinct single subject rules for Legislative enactments.

The first provision incorporates the single subject test for Legislative statutes and applies it to statutory initiatives. *See Loontjer v. Robinson*, 266 Neb. 902, 918, 670 N.W.2d 301, 313 (2003) (Hendry, C.J., concurring in the result) (explaining the provision "applies to *statutes* enacted by initiative and 'incorporates' the 'one subject' requirement for legislative bills and resolutions found in Neb. Const. art. III, § 14"). The second provision was amended to the Nebraska Constitution in 1998 to specifically address *constitutional* ballot initiatives. *See* Floor Debate, L.R. 32, 95th Leg., 1st Sess. 870 (Feb. 10, 1997) ("[C]itizens, if they are, in fact, serving as the second house in initiating *constitutional amendments*, should follow the same basic standards we do." (emphasis added)).

Accordingly, the more deferential statutory single subject test should apply to statutory initiatives, and the narrower constitutional test should apply to constitutional initiatives. Although the Nebraska Supreme Court has never directly addressed the question, this approach finds support in case law. Five years after the 1998 single subject amendment, parties raised a single subject challenge in the

Nebraska Supreme Court. *Robinson*, 266 Neb. at 912, 670 N.W.2d at 309. The Court struck down the initiative on other grounds. But two concurring justices, writing separately, each concluded that statutory initiatives are governed by the same requirement applicable to the Legislature, and constitutional initiatives are governed by the separate test added in 1998. *Id.* at 919, 922 (Hendry, C.J., and Wright, J., concurring).

The Nebraska Supreme Court suggested the same this past summer. In *Planned Parenthood of the Heartland, Inc. v. Hilgers*, the Court determined that a Legislative bill passed in 2023, L.B. 574, satisfied the statutory single subject rule in Article III, Section 14. 317 Neb. 217, 9 N.W.3d 604. L.B. 574 both "restricted gender-altering care for minors" and "limit[ed] abortion after 12 weeks of pregnancy." *Id.* at 219–20, 9 N.W.3d at 607. The Court, "guided by [its] respect for the Legislature as [its] coequal branch of government," gave the single subject rule "broad construction." *Id.* at 226–27, 9 N.W.3d at 611–12. The Court referenced the longstanding doctrine that "courts will not declare an act of the Legislature unconstitutional unless it is manifestly so." *Id.* at 228, 9 N.W.3d at 612.

The Court's holding focused on the single subject rule for Legislative enactments (art. III, § 14). But the majority also discussed the single subject rule governing initiatives (art. III, § 2). The Court specifically noted that a stricter test applies to *constitutional* initiatives, leaving the door open for a broader test for *statutory* initiatives. *See id.* at 229, 9 N.W.3d at 612–13 ("When considering the single subject rule for voter ballot initiatives concerning *constitutional* amendments, we follow the natural and necessary connection test . . . [I]n the instance of a *constitutional* amendment brought by voters . . . the provision must be naturally and necessarily connected to a measure's primary purpose" (emphasis added)).

Ultimately, the separation of powers doctrine mandates a "broad construction" of the statutory single subject rule. Because the

Legislature and electorate are co-equal legislative bodies under the Nebraska Constitution, the same judicial deference and broad construction should apply to statutory voter initiatives. Here, the Regulatory Initiative is a statutory initiative, so the broader single subject test is the proper rule. Applying the stricter constitutional test would place the People of Nebraska on lesser footing than the Legislature and undermine the "precious" right of initiative. *Christiansen*, 301 Neb. at 27, 917 N.W.2d at 153.

ii. The Regulatory Initiative satisfies the single subject test irrespective of the level of scrutiny applied.

In 2020, the Nebraska Supreme Court considered a single subject challenge to a *constitutional* initiative related to medical cannabis. *See State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948 N.W.2d 244 (2020). That initiative sought to, among other things, (1) establish a right for individuals with serious health conditions "to use, possess, access, purchase, and safely and discreetly produce" medical cannabis, and (2) permit entities to "grow, cultivate, process, possess, transport, sell, test, or transfer possession" of medical cannabis. *Id.* at 146, 948 N.W.2d at 250. The Court determined that "personal, individual rights" conferred to individuals who use medical cannabis are "fundamentally distinct" from the property rights held by entities. *Id.* The Court struck down the initiative on single subject grounds. *Id.*

In this case, the Sworn Sponsor Defendants abided by *Wagner*'s directive and brought two separate initiatives. When, as here, initiatives are presented separately on the same ballot, "single subject review should focus on the specific initiative being reviewed without reference to the content of another initiative that is submitted separately." *McNally*, 307 Neb. at 119–20, 948 N.W.2d at 477. Plaintiff challenges only the Regulatory Initiative's single subject compliance, so the Regulatory Initiative must be assessed independently.

The Regulatory Initiative satisfies the single subject rule under both the broad statutory single subject test and the stricter "natural

and necessary connection test." Under either test, the Regulatory Initiative is legally sufficient and Count IV should be dismissed

a. The Regulatory Initiative satisfies the broader statutory single subject test.

A proposed law satisfies the broad statutory single subject rule if it "has but one general object, no matter how broad that object may be, and contains no matter not germane thereto." *Planned Parenthood*, 317 Neb. at 237, 9 N.W.3d at 617 (internal quotation omitted). The Court in *Planned Parenthood* did not resolve the issue of "whether, in a single subject challenge to a statute, a court should . . . begin with the subject chosen by the Legislature or whether a court should . . . attempt to independently identify a 'single main purpose'" by referencing the text of the proposed statute. *Id.* at 233–34, 9 N.W.3d at 615. It does not make a difference here.

Referencing both the object statement and text of the initiative, the chosen subject or "single main purpose" of the Regulatory Initiative is the "**de-penalization under state and local law of the possession, manufacture, distribution, delivery, and dispensing of cannabis for medical purposes by registered private entities, and establishing a Nebraska Medical Cannabis Commission to regulate such entities**." Under the broad standard, everything in the proposed law is clearly germane to and "encompassed within" that subject—terms that define the scope of the law, the creation of the Nebraska Medical Cannabis Commission, and the establishment of the Commission's duties. *See id.* at 239, 9 N.W.3d at 618 ("[E]ven though abortion and gender-altering care are distinct types of medical care, and even though L.B. 574 effectuates its purpose or object differently for each type, when broadly construing L.B. 574, all its provisions certainly are encompassed within the regulation of permissible medical care.").

Because the Regulatory Initiative has one general subject and everything in the proposed law is germane to that subject, it satisfies

the broad statutory single subject test as a matter of law. Count IV should be dismissed for that reason alone.

b. The Regulatory Initiative's components are naturally and necessarily related to its general subject.

The Regulatory Initiative also satisfies the stricter constitutional single subject test. Under that test, an initiative contains a single subject when "the limits of a proposed law, having natural and necessary connection with each other, and together, are a part of one general subject." *Christensen,* 301 Neb. at 32, 917 N.W at 156. The controlling consideration is the initiative's "singleness of purpose and relationship of the details to the general subject, not the strict necessity of any given detail to carry out the general subject." *Brooks*, 317 Neb. at 595.

The analysis is a two-step inquiry. First, the Court determines the initiative's general subject. *Wagner*, 307 Neb. at 153, 948 N.W.2d at 254 ("Our analysis here under the single subject rule begins by characterizing the . . . general subject."). Courts define a general subject based on the initiative's "primary purpose," *McNally*, 307 Neb. at 109, 948 N.W.2d at 471, informed by the object statement and text of the initiative, *see Wagner*, 307 Neb. at 154, 948 N.W.2d at 255 (object statement provided evidence of initiative's general subject). Next, the Court identifies any "secondary purposes" and evaluates whether those purposes are naturally and necessarily connected to the general subject. *Wagner,* 307 Neb. at 152, 948 N.W.2d at 254.

The general subject of the Regulatory Initiative is the "de-penalization under state and local law of the possession, manufacture, distribution, delivery, and dispensing of cannabis for medical purposes by registered private entities, and establishing a Nebraska Medical Cannabis Commission to regulate such entities." This subject strikes a balance between preserving the People's power of initiative and ensuring meaningful review. *McNally*, 307 Neb at 153, 948 N.W.2d at

480 (stating the general subject must be "characterized at a level of specificity that allows for meaningful review" without becoming "license for the judiciary to exercise a pedantic tyranny over efforts to change the law" (citing *PA Against Gambling Expansion Fund v. Com.*, 583 Pa. 275, 296, 877 A.2d 383, 395–96 (2005)).

Plaintiff alleges that the Regulatory Initiative contains four components, which he erroneously characterizes as separate subjects: (1) "cannabis regulation;" (2) "whether to legalize the possession, manufacture, distribution, delivery, and dispensing of cannabis by certain individuals," (3) "whether to create a new executive department of this State, the Nebraska Medical Cannabis Commission;" and (4) "whether to divest the Legislature of its constitutional authority to legislate by giving that new executive department the exclusive authority to 'regulate'—a term that is not defined." Plaintiff fails to state a claim with any of these alleged "subjects."

The first component—"cannabis regulation"—is an overly-broad description of the Regulatory Initiative. The Regulatory Initiative does not regulate *all* cannabis, only cannabis for medical purposes. Similarly, it specifically regulates "registered private entities" that possess, manufacture, distribute, deliver, or dispense medical cannabis. To the extent it does "regulate cannabis," that is clearly naturally and necessarily connected to the general subject.

The second alleged "subject"—"whether to legalize the possession, manufacture, distribution, delivery, and dispensing of cannabis by *certain individuals*" (emphasis added)—misstates the proposed law. As stated above, the Regulatory Initiative would de-penalize the manufacture and distribution of medical cannabis by "registered private entities," *not* individuals. This distinction is important given the discussion of individual use rights versus private property rights in *Wagner*. *See* 307 Neb. at 146, 948 N.W.2d at 250. And, as with the first component, the Regulatory Initiative does not apply to *all* cannabis, only medical cannabis. There is no support for

Plaintiff's alleged second "subject" in the text of the initiative, and the argument fails.

The third component—"whether to create a new executive department of this State, the Nebraska Medical Cannabis Commission"—naturally and necessarily relates to the Regulatory Initiative's general subject. In support of his assertion that this is a distinct subject, Plaintiff alleges that the "caption" of the Regulatory Initiative—apparently referencing the object statement—includes an "and" before discussion of the Commission. There is no support for this narrow application of the single subject rule in Nebraska case law.

In *McNally*, the Nebraska Supreme Court upheld a statutory initiative that established the Nebraska Gaming Commission to regulate games of chance. 307 Neb. at 130, 948 N.W.2d at 483. That initiative was structured similarly to the Regulatory Initiative. It's object statement stated:

> The object of this petition is to enact a statute allowing all games of chance to be conducted by authorized gaming operators within licenses racetrack enclosures in Nebraska **and** establishes a Nebraska Gaming Commission to regulate such gaming in Nebraska.

Robert B. Evnen, Informational Pamphlet,Initiative Measure Nos. 428, 429, 430, 431, Appearing on the 2020 General Election Ballot 13 (2020), https://perma.cc/44JZ-74SN (emphasis added); *see also id.* at 3 (payday lending initiative's object statement contained three clauses separated by "and"); *id.* at 23 (tax initiative separates clauses with "and"); *McNally*, 307 Neb. at 107–08, 948 N.W.2d at 470.

Moreover, the Nebraska Supreme Court has held that components of an initiative that "define the limits," "set parameters," and "define terms" are naturally and necessarily connected to the initiative's general subject. *Brooks,* 317 Neb. at 597–98, --- N.W.3d ---. The text of the Regulatory Initiative clearly states that the purpose of

the Commission is to "provid[e] the necessary registration and regulation of persons that possess, manufacture, distribute, deliver, and dispense cannabis for medical purposes" under the Regulatory Initiative. (Am. Compl. Ex. B, at 003). In other words, the establishment of the Commission and the Commission's duties sets parameters around the possession, manufacture, distribution, delivery, and dispensing of medical cannabis. Thus, the establishment of the Nebraska Medical Cannabis Commission is "directed to the general subject" of the initiative. *Brooks*, 317 Neb. at 597–98, --- N.W.3d ---.

Finally, Plaintiff's fourth alleged "subject" suffers from a fatal defect: Courts do not consider contingent future events or substantive challenges to an initiative in pre-election single subject challenges. Because the outcome of an election is a contingent future event, "a challenge that a proposed ballot measure will violate the *substantive* provisions of the U.S. or Nebraska Constitution does not present a justiciable controversy" and is not ripe for pre-election judicial determination. *State ex rel. Collar v. Evnen*, 317 Neb. 608, 615, --- N.W.3d --- (2024). Only procedural challenges that attack the form of the initiative "or the procedural requirements for its placement on the ballot" are ripe for pre-election review. *Id.* at 615–16. Plaintiff's allegation about "whether to divest the Legislature of its constitutional authority to legislate" is properly characterized as a challenge that the Regulatory Initiative will violate the separation of powers doctrine of the Nebraska Constitution. That challenge is not ripe for pre-election single subject review. It also fundamentally misrepresents the impact of the initiative. See Neb. Const. Art. III, § 2 (providing that laws enacted by initiative may be amended, modified, or repealed by a vote of at least two-third of the Legislature).

For these reasons, Plaintiff's single subject challenge fails to state a claim. The Regulatory Initiative contains a single subject, and Count IV should be dismissed.

CONCLUSION

For the foregoing reasons, Sworn Sponsor Defendants Anna Wishart, Crista Eggers, and Adam Morfeld request this Court enter an Order granting the Motion to Dismiss and dismissing the Complaint together with such further relief as the Court deems appropriate.

DATED this 20th day of September, 2024.

ANNA WISHART, CRISTA EGGERS, and ADAM MORFELD,

By: /s/ *Daniel J. Gutman*

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Certificate of Service

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