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INITIATIVES AND REFERENDUMS

Give Nevada Voters Power of Direct Democracy

BY DANIEL STEWART, ESQ.



My first ideas about lawmaking included a singing cartoon bill stuck in some committee on Capitol Hill, while dreaming of becoming law. Schoolhouse Rock certainly captured an ethos in our constitutional republic – making law is hard!

For the first half of this country's history, we were mostly content with our structural barriers to lawmaking. Checks and balances limited both lawmakers and lawmaking alike. But by the early 1900s, our patience ran out. Frustrated with the lack of progress from within the halls of state power, many Americans, including Nevadans, broke the lawmakers' monopoly on making law. At the state level, we gave ourselves the power of direct democracy to enact or repeal laws without the consent of our elected representatives.

"Since 1912, Nevada's Constitution has secured to the citizens of this state 'the power to propose, by initiative petition, statutes and amendments to statutes ... and to enact or reject them at the polls.'" *Education Init. v. Comm. To Protect Nev. Jobs*, 129 Nev. 35, 39, 293 P.3d 874, 877 (2013) (quoting Nev. Const. at 19 § 2(1)). Through the power of initiative and referendum, Nevadans joined elected representatives as co-authors of the statute books. Over the course of 100 years, direct democracy has not lost its appeal. In 2016 and 2018 alone, Nevadans passed laws legalizing recreational marijuana, mandating background checks on all gun transfers and automatically registering voters at the DMV.¹

Although one of the goals of direct democracy was to ease lawmaking, Nevadans understood the potential mischief that would come with making it too easy to pass new laws. We did not completely abandon our Madisonian fear of the tyrannical majority. The *Vox Populi* needed balance too. The first check was built into the Nevada Constitution itself: only those initiative petitions with adequate public support — signatures from at least 10 percent of registered voters of the state who voted in the last general election — could go to the



ballot. The state constitution also tasked lawmakers with “ ‘provid[ing] by law ... procedures to facilitate’ the people’s power to legislate by initiative.” *Id.*, 129 Nev. at 40, 193 P.3d at 877 (quoting Nev. Const. art. 19, § 5.).

We now have all sorts of rules covering initiatives from birth to death. But all of these rules seek two basic ends:

- 1) making sure that initiative supporters properly and actually obtain the required number of signatures; and
- 2) making sure that signers and voters understand what they are being asked to support. Election officials and the courts police the process.

Substantive Rules

All initiatives, regardless of topic, must meet certain substantive requirements set by statute. *See* NRS 295.009. Initiatives may embrace only one subject and must be properly and thoroughly described.

Single Subject

First, a ballot initiative must embrace “only one subject and matters necessarily connected therewith and pertaining thereto.” NRS 295.009(1)(a). The petition satisfies this rule if “the parts of the proposed initiative or referendum are

functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by, the proposed initiative” NRS 295.009(2).

“[T]he single-subject requirement helps both in promoting informed decisions and in preventing the enactment of unpopular provisions by attaching them to more attractive initiatives (i.e., logrolling).” *Las Vegas Taxpayer Accountability Committee v. City Council*, 125 Nev. 165, 176-77, 208 P.3d 429, 436-37 (2009) (striking down municipal initiative for violating single-subject rule). “[I]n order to determine whether a ballot initiative’s parts are ‘functionally related’ and ‘germane’ to each other and the initiative’s purpose, [courts] must first determine the initiative’s primary purpose.” *Educ. Init.*, 129 Nev. at 50, 293 P.3d at 884.

You cannot hide multiple subjects with reticence either. “Excessive generality can lead to a violation of the single-subject requirement in NRS 295.009(1)(a), when it masks the multifarious and distinct subjects an initiative impermissible covers.” *Prevent Sanctuary Cities v. Haley*, 2018 WL 2272955 421 P.3d 281 (2018).

Description of Effect

NRS 295.009(1)(b) requires each initiative to have a title and a (200-word or less) description of in the initiative’s

effect if adopted. The description must be “straightforward, succinct, and nonargumentative[.]” *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 183, 208 P.3d 429, 441 (2009) (quoting *Herbst Gaming, Inc. v. Sec’t of State*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006)). The description may not be “deceptive or

misleading” either. *Ed. Init.*, 129 Nev. at 42, 293 P.3d at 879.

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A proposed initiative must address the non-hypothetical outcomes of implementation. The Nevada Supreme Court, in *Coalition for Nevada's Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 WL 2842925 (Nev. May 11, 2016), stated an initiative must accurately identify the practical ramifications of a proposed amendment to Nevada law. *Id.* at *4. Moreover, both the title and the description of effect must be sufficient to allow the voter to understand the initiative being proposed and its effect if adopted. *Haley*, 2018 WL 2272955.

Other Substantive Requirements

Initiatives must be legislative, not administrative. See *Herbst*, 122 Nev. at 883, 141 P.3d at 1228. The Nevada Constitution prohibits any initiative that “makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue.” Nev. Const., at 19 § 6.

Of course, initiatives may only pass laws that do not violate the state and federal constitutions, but such constitutional challenges are generally not ripe unless and until the voters enact it at the election. See *Herbst*, 122 Nev. at 884, 141 P.3d at 1228.

Procedural and Technical Requirements

Substantive compliance, however, is not enough. Successful initiatives must navigate a whole host of procedural and technical rules as well. Before you can gather signatures for a petition, you have to make certain timely filings with the Nevada Secretary of State, including:

1. A copy of the petition, including the description required by 295.009.
 - a. The petition must also meet certain technical formatting requirements including font, specific language, signature boxes, information demands, structural mandates, affidavits and more. See NRS 295.055; NAC 295.020.
2. Complete a prescribed Notice of Intent to Circulate Statewide Initiative or Referendum.
3. File a committee for political action registration form. Initiative proponents must form a committee for political action (PAC). The PAC will need flesh-and-blood officers who do not need to be Nevadans. Once formed, the PAC must report all contributions and expenditures.

Gathering Signatures

Signature-gatherers need not be registered voters or even Nevadans, but they must be at least 18 years old. They may receive (reported) compensation for their work.

Both signers and gatherers violate the law if they engage in certain specified conduct such as forgery, fraud or intimidation. And signers may remove their signatures at any time before the petition is filed. NRS 295.055(4).

The signatures must be turned in by a certain deadline. For 2020, the last day for petitioners to submit signatures to the counties for verification is June 16, 2020.

Qualification

To qualify for the ballot, petitioners must obtain signatures from at least 10 percent of registered voters who voted at the last preceding general election. The signatures must come from each of Nevada's four congressional districts.

If the petition is circulated in more than one county, all documents must be submitted to each county's election official at the same time for verification. NRS 293.1277.

If the petition is deemed sufficient (i.e. it has enough signatures) the secretary of state will prepare it for the ballot. NRS 293.250(5) requires the secretary of state to explain the initiative “in easily understood language and of reasonable length.” The secretary of state will also appoint two committees – one in favor of the initiative (usually picked by the PAC) and one opposed. They will draft their respective arguments, and then rebut each other's arguments. NRS 293.252(1), (5)(d), and NRS 293.252(5)(e). Once the secretary of state approves each side's arguments and rebuttals, she will place them with her own explanation on the sample ballot distributed to the voters before the general election. NRS 293.097; NRS 293.252(8).

1. For the purposes of this article, I am going to focus on statutory initiatives only. The rules for referendums and constitutional amendments are similar, though, so much of what I discuss will be generally applicable to all direct democracy.

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