IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN SILBERKRAUS; CHELYN SAWYER; DAVID SATORY; CLAIRE ROTH; NEIL ROTH; AND KATHRYN MCKENZIE, SIGNATORIES OF THE NOTICE OF INTENT TO RECALL, Appellants, vs. JOYCE WOODHOUSE, IN HER CAPACITY AS NEVADA STATE SENATOR FOR SENATE DISTRICT 5; NICOLE J. CANNIZZARO, IN HER CAPACITY AS SENATOR FOR SENATE DISTRICT 6; BARBARA CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE; AND JOSEPH P. GLORIA, IN HIS OFFICIAL CAPACITY AS REGISTRAR OF VOTERS FOR CLARK COUNTY, NEVADA, Respondents.	**Supreme Court No. 76040** District Court Case No. A764587

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APPELLANTS

REAL PARTIES IN INTEREST STEPHEN SILBERKRAUS'S, CHELYN SAWYER'S, DAVID SATORY'S, CLAIRE ROTH'S, NEIL ROTH'S, and KATHERINE MCKENZIE's

OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Stephen Silberkraus is an individual.

Chelyn Sawyer is an individual.

David Satory is an individual.

Claire Roth is an individual.

Neil Roth is an individual.

Katherine McKenzie is an individual.

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 31st day of August, 2018.

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,895 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31st day of August, 2018.

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JURISDICTIONAL STATEMENT

Real Parties in Interest Stephen Silberkraus, Chelyn Sawyer, David Satory (the "Woodhouse RPII"), and Claire Roth, Neil Roth, and Katie McKenzie (the "Cannizzaro RPII") (referred to collectively as "RPII") appeal from a May 9, 2018 Order from the District Court, Judge Wiese (the "District Court"), directing the Clark County Registrar of Voters (the "Registrar") and the Nevada Secretary of State to take no further action on recall petitions ("Recall Petitions" or "Petitions") filed against State Senators Joyce Woodhouse ("Woodhouse") and Nicole Cannizzaro ("Cannizzaro"). (Vol. XVII, at A.A. 003796-003816.)

On November 13, 2017, pursuant to NRS 306.040(5), Woodhouse filed a Complaint and a Motion for Injunctive and Declaratory Relief challenging the legal sufficiency of the recall petition against her that the Secretary of State and Registrar had verified, qualified, and filed pursuant to NRS 306.015(4), NRS 306.035(2), and NRS 306.040(1). (Vols. I-IX, at, A.A. 000001-001261.) Department XXX received the case (Case No. A-17-764587-C). (*Id.*)

On December 27, 2017, Cannizzaro filed a similar Complaint and Motion challenging the recall petition against her that the Secretary of State and Registrar had also verified, qualified, and filed pursuant to Nevada law. (Vols. X-XIV, at 002035-003195.) Department VI received that case (Case No. A-17-766857-C) (*Id.*)

On January 9, 2018 Department XXX consolidated both matters into Case No. A-17-764587-C. (Vol. XIV, at A.A. 003196-00003202.)

Following multiples filings and two hearings, the District Court issued its May 9, 2018 Order finding the Recall Petitions insufficient, and prohibiting further action on them. (Vol. XVII, at A.A. 003796-003816.)

RPII timely filed their notice of appeal on May 30, 2018. (Vol. XVIII, at A.A. 003922.) *See* NRAP 4(a)(1). They appeal both a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered (NRAP 3A(b)(1)), and an order granting an injunction (NRAP 3A(b)(3)).

ROUTING STATEMENT

Although NRAP 17(b)(13) presumptively assigns this case to the Nevada Court of Appeals (cases challenging the grant or denial of injunctive relief), the case raises substantial constitutional questions of first impression with statewide importance. Therefore, RPII suggest that it would be appropriate for this Court to retain and decide this case under NRAP 17(a)(2), (10)&(11).

STATEMENT OF THE ISSUES

1. The Nevada Constitution requires resignation or special election once the Registrar and Secretary of State qualify and file a recall petition against a public officer. NRS 306.040(2) adds a statutory off-ramp; opponents can stop the

elections by convincing enough petition signers to recant from qualified petitions via "Strike Requests."[1] Here, the District Court found NRS 306.040(2) constitutional, and then used Strike Requests to disqualify the Recall Petitions. Did the District Court err?

2. NAC 306.010-NAC 306.014 establishes a detailed process for counting recall petition Strike Requests. Those the Secretary of State does not count in five business days from the date the petition qualifies cannot affect the legal sufficiency of the petition. The Secretary of State was unable to reconcile any of the Strike Requests here within five business days. Did the District Court err by allowing these Strike Requests to affect the legal sufficiency of the Petitions?

3. Nevada law required the Registrar to verify the Recall Petitions through random statistical sampling. He did. Then, without any foundation showing the sample verifications unreliable or erroneous, the District Court rejected them, and ordered full verifications of both Petitions. Did the District Court err by ordering full verifications?

4. The results of the full verifications were clearly erroneous, differing

[1] Signers have two statutory methods for removing their names from recall petitions: (1) before the petition is turned in per NRS 306.015(5); and (2) after it qualifies per NRS 306.040(2). Unfortunately, the record includes differing terms for these procedures. For simplicity, RPII refers to all 306.015(5) removals as "Withdrawals," and all NRS 306.040(2) removals as "Strike Requests."

substantially (and inexplicitly) from the undisputed facts, the sample verifications, and Woodhouse's, Cannizzaro's, and RPII's own independent reviews. Did the District Court err in accepting the results?

5. RPII demonstrated numerous mistakes with the full verification of the Woodhouse Petition. The Registrar reviewed only some of those mistakes, but still added back 175 signatures. The District Court refused to consider the Registrar's additions or any of the other alleged mistakes even when doing so may have given the Woodhouse Petition enough valid signatures, before counting Strike Requests. Did the District Court err?

INTRODUCTION

The recall process itself may by complex, but this appeal is not. All the issues this Court needs to resolve hinge on first answering a single, straightforward question: Can Woodhouse and Cannizzaro invalidate qualified and filed Recall Petition by gathering signatures on Strike Requests after RPII turned the Petitions in? The District Court said yes, ordering the Registrar and Secretary of State to count Strike Requests through full verifications of the already-verified Petitions.

The District Court erred in allowing Strike Request to count, and erred again in the way he ordered them counted. Both errors are inextricably entangled

with each other. And they require this Court's review.

RPII now respectfully ask this Court to overturn both the decision approving Strike Requests and the mistaken procedure that followed.

STATEMENT OF THE FACTS

A. Background

At the 2016 General Election, voters elected Woodhouse and Cannizzaro to four-year terms representing Nevada State Senate Districts 5 and 6. (Vol. I, at A.A. 000004:6-7, and Vol. X, at A.A. 002039:7-8.)[2]

The Woodhouse Recall Petition

On August 2, 2017, Woodhouse RPII filed a Notice of Intent with the Registrar to circulate a petition to recall Woodhouse (the "Woodhouse Petition") (Vol. I, at A.A. 000025.) To qualify the Woodhouse Petition, they had to collect at least 14,412 valid signatures by October 31, 2017. (Vol. I, at A.A. 000030.)

Not long after Woodhouse RPII began gathering signatures, Woodhouse countered their efforts by targeting the same pool of potential signers, trying to convince them not to sign the Woodhouse Petition. (Vol. XVII, at A.A.

[2] RPII's Appendix is large, even though they need less than one third of the documents. In an effort to create a Joint Appendix, RPII included thousands of additional pages per Respondent's request. Although the parties did not reach a final agreement, RPII hope that they have included most, if not all, of the documents Respondents will ultimately need.

003679:3-18.) Woodhouse also created, distributed, and collected signed forms from individuals asking the Registrar to remove their names from the Woodhouse Petition pursuant to NRS 306.015(5) (the "Woodhouse Withdrawals). (Vol. III, at A.A. 000526-000577.)

RPII submitted the Woodhouse Petition on October 30, 2017. (Vol. I, at A.A. 000007 ¶ 7.) The Registrar counted 17,502 signatures. (*Id.*) The Secretary of State then instructed the Registrar to verify the signatures. *See* NRS 293.1276. Because the Woodhouse Petition had over 500 signatures, he did so with statistical sampling. (Vol. I, at A.A. 000007 and 000033.)

On November 3, 2017, the Registrar finished his review and certified the results. (Vol. I, at A.A. 000032.) The Secretary of State issued a "Notice of Sufficiency" that the Woodhouse Petition had 15,444 valid signatures, and was "deemed to qualify."[3] (Vol. I, at A.A. 000035.) The Registrar then filed the Woodhouse Petition per NRS 306.15(4) and NRS 306.035(2), and Woodhouse received a full copy of it with all the signatures. (Vol. I, at A.A. 000043.)

Beginning at least October 2, 2017 (more than a month before the Woodhouse Petition qualified), Woodhouse circulated to petition signers a Strike

[3] On November 9, 2017, the Secretary of State amended the "Notice of Sufficiency," revising down the number of valid signatures to 15,244. The new total did not affect the Woodhouse Petition's sufficiency. (Vol. I, at A.A. 000042.)

Request form she created. (Vol. V, at A.A. 001181-001234.) In part, the form read "[p]ursuant to Nevada law, I request that my name be removed from the Senate District 5 recall petition that I signed. I oppose the recall of my State Senator, Joyce Woodhouse," listing the following possible "REASONS" for removal that individuals could select:

> After additional thought and consideration, I do not want my state senator to be recalled.
>
> After additional thought and consideration, I do not believe that this recall election is a good use of taxpayer money and I do not want it to occur.
>
> I did not fully understand what I was being asked to sign, when I signed the petition.
>
> The person who asked me to sign the petition misled me about what I was signing.
>
> I do not remember signing the petition and I believe my signature was forged.
>
> I did not understand when I signed the petition that this could result in more than a simple recall – I would not have signed if I knew that this could result in a partisan election between the state senator and other candidates.
>
> Other _____

(Vol. V, at A.A. 001181-001234.)

Woodhouse then gathered signed forms and hand delivered them to the Secretary of State. (Vol. VI, at A.A. 001235-1238.) After filing her Complaint on November 13, 2017, she could no longer turn in any more Strike Requests. *See* NRS 306.040(2).

The Cannizzaro Recall Petition

On August 16, 2017, Cannizzaro RPII filed a Notice of Intent with the Registrar to circulate a petition for the recall of Cannizzaro (the "Cannizzaro Petition"). (Vol. X, at A.A. 002060.) To qualify the Cannizzaro Petition, they had to collect a minimum of 14,975 valid signatures by November 14, 2017. (Vol. X, at A.A. 002065.)

Shortly after RPII began gathering signatures, Cannizzaro adopted the same tactics as Woodhouse: convincing potential signers not to sign the petition, or, if they had already signed, persuading them to submit a Withdrawal pursuant to NRS 306.015(5) (the "Cannizzaro Withdrawals"). (Vol. XIV, at A.A. 003060-003103.)

RPII turned in the Cannizzaro Petition on November 14, 2017. (Vol. X, at A.A. 002042 ¶ 24.) The Registrar counted 16,910 signatures. (*Id.*) As with the Woodhouse Petition, he verified the Cannizzaro Petition with statistical sampling. (Vol. X, at A.A. 002068.)

On November 22, 2017, Cannizzaro received a copy of the Cannizzaro Petition with all of the signatures. (Vol. X, at A.A. 002105 ¶ 4.) On November 28, 2017, the Nevada Secretary of State ordered the Registrar to fully verify all of the Cannizzaro Withdrawals pursuant to NRS 293.1278(3). (Vol. X, at A.A. 002070-002071.)

On December 19, 2017, following the full verification of the Cannizzaro Withdrawals, the Secretary of State issued a "Notice of Sufficiency" that the Cannizzaro Petition had received 15,018 valid signatures, and was "deemed to qualify." (Vol. X, at A.A. 002103.) The Registrar then filed the Petition per NRS 306.15(4) and NRS 306.035(2).

Beginning at least November 4, 2017, Cannizzaro circulated her own Strike Request form that was nearly identical to the Woodhouse form. (Vol. XIV, at A.A. 003104, and Vol. XIV, at A.A. 003110-003165.) Cannizzaro then hand delivered the Strike Requests to the Secretary of State. (Vol. XIV, at A.A. 003166.) She filed her Complaint on December 27, 2017, prohibiting further Strike Requests. *See* NRS 306.040(2).

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The following timeline may help in summarizing the above facts:

Woodhouse

August 2, 2017: Woodhouse RPII file Notice of Intent.

August 2, 2017 through October 31, 2017: RPII gather signatures; Woodhouse campaigns to persuade people not to sign the Woodhouse Petition, and to convince signers to turn in Withdrawals.

October 2, 2017: Woodhouse obtains her first Strike Request.

October 31, 2017: Woodhouse Petition submitted. No more Withdrawals allowed.

October 31, 2017 through November 13, 2017: Woodhouse continues collecting Strike Requests.

November 3, 2017: The Secretary of State issues a "Notice of Sufficiency," qualifying the Woodhouse Petition, and Woodhouse receives a copy of it with all the signatures.

November 13, 2017: Woodhouse files her Complaint; no more Strike Requests permitted.

Cannizzaro

August 16, 2017: Cannizzaro RPII file Notice of Intent.

August 16, 2017 through November 14, 2017: RPII gather signatures; Cannizzaro campaigns to persuade individuals not to sign the Cannizzaro Petition, and to convince signers to turn in Withdrawals.

November 2, 2017: Cannizzaro obtains her first Strike Request.

November 14, 2017: Cannizzaro Petition submitted. No more Withdrawals allowed.

November 14, 2017 through December 27, 2017: Cannizzaro continues collecting Strike Requests.

November 22, 2017: Cannizzaro receives a copy of the Cannizzaro Petition with all its signatures.

November 28, 2017: The Secretary of State orders a full verification of all Cannizzaro Withdrawals.

December 19, 2017: The Secretary of State issues a "Notice of Sufficiency," qualifying the Cannizzaro Petition.

December 27, 2017: Cannizzaro files her Complaint; no more Strike Requests permitted.

B. Pleadings and Procedural Facts

Woodhouse Proceedings

On November 13, 2017, Woodhouse filed both her Complaint challenging the legal sufficiency of the Woodhouse Petition, and her Motion for Declaratory and Injunctive Relief. (Vols. I-VI, at A.A. 000001-001253.)

In that Complaint, Woodhouse alleged the following:

a. 3,564 of 17,597 petition signatures were invalid.

b. Petition signers removed an additional 2,012 otherwise

valid signatures through 406[4] Withdrawals or 1,666 Strike Requests.

(Vol. VI, at A.A. 001240:23-001241:5.) Woodhouse supported her allegations with (non-expert) Declarations and documentary evidence. (Vol. I, at A.A. 000043-000210; Vols. II - III, at A.A. 000211-000525.)

On November 30, 2017, Woodhouse RPII filed their Opposition to Woodhouse's Motion. (Vol. VI, at A.A. 001262-001338.) Using expert testimony and documentary evidence, RPII demonstrated that there were 15,110 valid signatures on the Woodhouse Petition, before counting any of the Strike Requests. (Vol. VI, at A.A. 001339-001634; A.A. 001343 ¶ 11; and A.A. 001349 ¶ 66.)

In response to RPII's evidence, Woodhouse substantially amended her original claims, revising down the number of alleged invalid signatures from 3,564 to 2,373. (Vol. VI, at A.A. 001669:6-001676:11.)

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[4] Of the 1,029 Woodhouse Withdrawals turned in, Woodhouse claimed only 406

As such, before counting any Strike Requests, the only evidence presented at the February 7, 2017 hearing (the "Hearing") in the Woodhouse matter was:

Categories	Registrar Findings	Woodhouse Findings	RPII Findings
Total Signatures Turned In	17,502	17,597	17,502
Total Invalid Petition Signatures	2,258	2,373	1,842
Totals	15,244	15,224	15,460
Total Withdrawals	440	406	350
Total Signatures After Subtracting Withdrawals	14,877	14,818	15,110
Constitutional Threshold 14,412	**Qualifies**	**Qualifies**	**Qualifies**

(For the Registrar's Findings: Vol. I, at A.A. 000039; for Woodhouse's Findings: Vol. I, at A.A. 000002:22-23, A.A 000012:7-8, A.A. 000051:25-27, and Vol. VI, at A.A. 001669:6-001676:11; and for RPII's findings: Vol. VI, at A.A. 001343 ¶ 8 and ¶ 11, and A.A. 001349 ¶ 66.)

Thus, before counting Strike Requests, the District Court had three numbers to choose from: (1) the Registrar's number: 14,877; (2) Woodhouse's number: 14,818; and RPII's number: 15,110. It was indisputable that the Woodhouse Petition had *at least* 14,818 valid signatures before counting Strike Requests, and

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were valid. (Vol. I, at A.A. 000009, Table One, Row C, and 000051:25-27.)

all three possible numbers exceeded the 14,412 signatures needed to qualify the Woodhouse Petition. (*Id.*) Only the Strike Requests could stop the elections.

Cannizzaro Proceedings

Cannizzaro filed her Complaint and Motion for Declaratory and Injunctive relief on December 27, 2017, alleging the following:

a. 2,331 of 17,041 petition signatures were invalid.

b. Petition signers removed an additional 2,225 otherwise valid signatures through 549[5] Withdrawals or 1,725 Strike Requests

(Vol. XIV, at A.A. 003168:23-003170:5.) Cannizzaro supported her allegations with (non-expert) Declarations and documentary evidence. (Vols. X-XIV, at A.A. 002104-003058.)

On January 9, 2018, the District Court consolidated the Cannizzaro and Woodhouse matters. (Vol. XIV, at A.A. 003196-003202.)

On January 19, 2018, Cannizzaro RPII filed their Opposition to Cannizzaro's Motion. (Vol. XV, at A.A. 003276-003376.) Using expert testimony and documentary evidence, they demonstrated that there were 15,488 valid signatures on the Cannizzaro Petition, before counting any Strike Requests.

(Vol. XV, at A.A. 003280 ¶ 11, and 003287 ¶ 74.) In response, Cannizzaro substantially amended her original claims, revising down the number of alleged invalid signatures from 2,331 to 1,973. (Vol. XV, at A.A. 003414:9-003421:2.)

Unlike in Woodhouse, though, the Registrar conducted a full verification of all Cannizzaro Withdrawals. He found only 453 valid. (Vol. X, at A.A. 002101.) The Secretary of State rejected Cannizzaro's argument for counting additional Cannizzaro Withdrawals that individuals had signed prior to signing the Cannizzaro Petition. (Vol. X, at A.A. 002073, 002075, and 002097-002098.)

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[5] Of the 1,273 Cannizzaro Withdrawals turned in, Cannizzaro claims only 549

As such, before including any Strike Requests, the evidence presented at the Hearing in the Cannizzaro matter was:

Categories	Registrar Findings	Cannizzaro Findings	RPII Findings
Total Petition Signatures	16,910	17,041	16,910
Total Invalid Signatures	1,439	1,973	998
Totals	15,471	15,068	15,912
Withdrawals	453	549	424
Totals After Subtracting Withdrawals	15,018	14,519	15,488
Constitutional Threshold 14,975	**Qualifies**	**Fails**	**Qualifies**

(For the Registrar's Findings: Vol. X, at A.A. 002101; for Cannizzaro's Findings: Vol. X, at A.A. 002036:26-27, Vol. XIV, at A.A. 3179:13-14, and Vol. XV, at A.A. 003414:9-003421:2; and for RPII's findings: Vol. XV, at A.A. 003280 ¶ 8 and ¶ 11, and A.A. 003287 ¶ 74.)

The Parties did dispute the Petition's sufficiency even without Strike Requests. That said, the difference between the Registrar's sampling and Cannizzaro's claims was minimal. But Cannizzaro relied on non-expert testimony to get there, and the claims were never tested in court. Thus, before

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were valid. (Vol. XIV, at A.A. 003175, Table Two, Row C.)

counting Strike Requests, the District Court had three numbers to choose from: (1) the Registrar's number: 15,018; (2) Cannizzaro's number: 14,519; and RPII's number: 15,488. It was indisputable that the Cannizzaro Petition had *at least* 14,519 valid signatures before counting Strike Requests, and two of the three possible numbers exceeded the 14,975 signatures needed to qualify the Cannizzaro Petition.

Strike Requests

By the time of the Hearing, the Secretary of State had been unable to reconcile any of the Strike Requests in either matter pursuant to NAC 306.010-NAC 306.014. (Vol. XV, at A.A. 003383:13-003385:7.)

The February 7, 2018 Hearing

The parties presented no new evidence at the Hearing, having agreed to rely on the papers and pleadings. (Vol. XVII, at A.A. 003636:18-003637:7.) Instead, they argued exclusively about the constitutionality, legality, and equity of the Strike Requests. (Vol. XVII, at A.A. 003632-003778.)

On March 14, 2018, the District Court upheld NRS 306.040(2) as "aid[ing] the operation" of Art. 2, Sec. 9 of the Nevada Constitution. (12:7-9.) In particular, the District Court adopted this Court's reasoning in *Citizens for Honest & Responsible Government v. Sec'y of State*, 116 Nev. 939, 949-50, 11 P.3d 121,

127-28 (Nev. 2000) with respect to Withdrawals, concluding that "the same analysis would apply to [Strike Requests] pursuant to NRS 306.040(2)." (Vol. XVII, at A.A. 003811:24-26.)

The District Court rejected RPII's "equity" argument too, noting that the "legislature has given the subjects of the Recall Petition, only 5 days after submission, to obtain strike requests, which is a very limited amount of time." (*Id*., at A.A. 003812: 4-6.)

The District Court also disagreed with RPII's argument under NAC 306.014 that the Strike Requests could not affect the legal sufficiency of the Recall Petitions because the Secretary of State did not reconcile them in five business days. (*Id*., at A.A. 003812:8-21.) The District Court determined that such an interpretation would lead to an absurd result, allowing the Secretary of State unilateral control over the outcome of a recall petition. (*Id*.)

Finally, the District Court ordered a full verification and counting of all Strike Requests *and* all signatures on the Recall Petitions based on "numerical inconsistencies and potential incompleteness." (*Id*., at A.A. 003814:1-11.)

The full verifications and the April 19, 2018 Hearing

On April 2, 2017, the Registrar completed the full verifications and certified the results. (Vol. XVII, at A.A. 003822 and 003825.) In the Woodhouse matter,

he found 14,216 valid signatures. (*Id.*, at A.A. 003822.) In the Cannizzaro matter, he found 14,469 valid signatures. (*Id.*, at A.A. 003825.) On April 6, 2018, the Nevada Secretary of State notified the Court that she had found a total of 1,388 valid Strike Requests in the Woodhouse matter, and 1,373 valid Strike Requests in the Cannizzaro matter. (*Id.*, at A.A. 003821 and 003824.) The final tally: the Woodhouse Petition had 12,828 valid signatures, and the Cannizzaro Petition had 13,096. (*Id.*)

Upon receipt of these results, RPII conducted their own review of the backup data for the full verifications. (Vol. XVII, at A.A. 003827-003879.) On April 11, 2018,[6] RPII notified the Registrar that he had improperly rejected at least 389 signatures in the Woodhouse matter alone. (*Id.*, at A.A. 003832 ¶ 23.) RPII also gave the Registrar supporting materials for 335 of those 389 alleged mistakes. (*Id.*, at A.A. 3832 ¶ 34.) On April 16, 2018, RPII provided evidence for the remaining 54 alleged mistakes, and informed the Registrar that he wrongly counted 32 Woodhouse Withdrawals, and failed to count 10 rejected signatures that signers had verified with Declarations. (*Id.*, at A.A. 003831 ¶ 14, 003832 ¶ 19, and 003833 ¶ 25.) The Registrar did not have time to review the additional 54

[6] The hearing transcript contains a confusing error. Mr. Stewart is identified as the speaker in Vol. XVII, at A.A. 003883:3-20. But Mr. Elias was the person speaking. The reporter could not correct the mistake before filing the transcript.

alleged mistakes, and did not consider the remaining alleged 42 names or signatures. (Vol. XVIII, at A.A. 003897:6.)

On April 16, 2018, the Registrar issued an Amended Certificate of Results in the Woodhouse matter, adding back 175 signatures based on 335 of the mistakes RPII had found. (Vol. XVII, at A.A. 003878-003879.) With the additional 175 names, the Woodhouse Petition had 14,391 signatures, only 21 away from qualifying, before counting the Strike Requests. Nevertheless, at the April 17, 2018 hearing, the District Court refused to accept the Amended Certificate of Results or consider the outstanding 96 names and signatures that, if only 21 were accepted, would have given the Woodhouse Petition 14,412 signatures, before counting any Strike Requests. (Vol. XVIII, at A.A. 003905:14-003906:18.)

On May 9, 2018, The District Court declared the Recall Petitions insufficient and ordered that no further action be taken. (Vol. XVIII, at A.A. 003920:8-15.)

RPII filed their appeal on May 30, 2018. (Vol. XVIII, at A.A. 003922.)

SUMMARY OF ARGUMENT

RPII successfully qualified two recall petitions, and there should have been special recall elections. But the District Court disqualified the petitions by

allowing thousands of Strike Requests turned in after the Recall Petitions had qualified. The District Court then ordered a full verification of all petition signatures to reconcile the Strike Requests without legal or factual foundation. This Court should reverse the District Court's Order for the following reasons:

First, the statute permitting Strike Requests—NRS 306.040(2)—is unconstitutional. Recall petitions that have qualified and been filed pursuant to the Nevada Constitution cannot then be disqualified through a statutory process that diverges from the plain language, history, and intent of the Nevada Constitution itself. After qualifying the Recall Petitions, the Registrar and Secretary of State had a duty to move forward with the elections, unless Woodhouse or Cannizzaro resigned, or unless Respondents could prove that the Registrar and Secretary of State erred when verifying the Petitions' signatures.

Second, even if Strike Requests are constitutional, the Secretary of State did not reconcile them within five business days pursuant NAC 306.010-NAC 306.014. As such, the District Court erred in allowing the Strike Requests to affect the legal sufficiency of the Recall Petitions.

Third, after deciding that the Strike Requests were constitutional and that they should be counted, the District Court magnified its error by ordering full verifications of the already verified Petitions rather than merely ordering a

reconciliation of the Strike Requests. The court mistook both undisputed facts and inescapable law, forcing the Registrar to conduct additional, unneeded verifications.

Fourth, the results of the full verification were so obviously (and proven) erroneous that the District Court should have rejected them, and relied instead on any of the following results: (1) the sample verifications; (2) the numbers provided by Woodhouse's and Cannizzaro's own reviews (providing an incontrovertible factual floor); or (3) the numbers provided by RPII who advanced actual expert testimony in support of their claims.

If this Court determines that Nevada law permits Strike Requests, the Recall Petitions fail. RPII cannot dispute that reality. But if this Court rejects them, then there are multiple possible options:

One, decide that the Recall Petitions were sufficient, and that Respondents did not meet their burden of proving the contrary.

Two, decide that the undisputed facts show that the Woodhouse Petition qualified, and that the Cannizzaro Petition needs further evidentiary review in the lower court.

Three, decide that both the Woodhouse and Cannizzaro Petitions need further evidentiary review in the lower court.

Four, decide that the Cannizzaro Petition fails based on the results of the full verification, but that the Woodhouse Petition requires further evidentiary review of the remaining 96 disputed signatures to determine whether, at a minimum, an additional 21 signatures should be added back. If so, the Woodhouse Petition will then be sufficient.

If under any of the above scenarios one or both of the Recall Petitions are sufficient, special recall elections should ensue.

DISCUSSION

I. Standard of Appellate Review.

"This court reviews questions of constitutional interpretation de novo." *Ramsey v. City of North Las Vegas*, 133 Nev. Adv. Op. 16, 392 P.3d 614, 616 (Nev. 2017) (citing *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). "This court applies a de novo standard of review to questions of law, which includes the administrative construction of statutes." *Felton v. Douglas County*, 134 Nev. Adv. Op. 6, 410 P.3d 991, 994 (Nev. 2018) (citing *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780. 784-85, 312 P.3d 479, 482 (Nev. 2013)).

A "district court's factual findings … are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (Nev. 2009) (*citing International*

*Fid. Ins. v. State of Nevad*a, 122 Nev. 39, 42, 126 P.3d 1133, 1134–35 (2006)).

For recalls specifically "the recall right 'should be *liberally construed* with a view to promote the purpose for which it was intended.'" *Citizens*, 116 Nev. at 947, 11 P.3d at 126 (quoting *State v. Scott*, 52 Nev. 216, 231, 286 P. 511, 514 (Nev. 1930)) (emphasis added).

II. Nevada's Recall Process

In Nevada, "[a]ll political power is inherent in the people," including the power to recall "[e]very public officer," save judges. Nev. Const. Art. 1, Sec. 2 and Art. 2, Sec. 9*; see Ramsey*, 392 P.3d 615.

Article 2, Section 9 of the Nevada Constitution (the "Recall Amendments") states:

> For this purpose, not less than twenty-five percent (25%) of the number who actually voted in the state or in the county, district, or municipality which he represents, at the election in which he was elected**,** shall file their petition, in the manner herein provided, demanding his recall by the people . . .
>
> . . . If he shall not resign within five (5) days after the petition is filed, a special election shall be ordered to be held within thirty (30) days after the issuance of the call therefor, in the state, or county, district, or municipality electing said officer, to determine whether the people will recall said officer . . .
>
> . . . The recall petition shall be filed with the officer with whom the petition for nomination to such office shall be

> filed, and the same officer shall order the special election when it is required . . .
>
> . . . Such additional legislation as may aid the operation of this section shall be provided by law.

Nev. Const. Art. 2, Sec. 9.

Although Nevadans have nearly absolute power to recall public officers, they rarely use it. Qualifying a recall petition is extremely difficult – rightfully so. Recall petitions require signatures from 25% of the still-registered voters who actually voted in the general election at which the public officer was elected, and who still live in the respective district. *Id.*; *see also Strickland v. Waymire*, 126 Nev. 230, 240, 235 P.3d 605, 612 (Nev. 2010).

There are numerous technical requirements too. Each signature must be signed on a legally conforming petition, with a printed name, an address, and a date. The signature must match the voting records. A petition circulator must witnesses each petition signature, and then sign his or her own proscribed, witnessed, and notarized Affidavit of Circulator. *See* NRS 306.020, NRS 306.030, and NAC 293.182.

And recall supporters must obtain all of these valid signatures in no more than 90 days. *See* NRS 306.015(3).

Furthermore, petition signers may change their minds and use Withdrawals

to remove their names any time before the petition is turned in. *See* NRS 306.014(5); *see also Citizens*, 116 Nev. at 949-50, 11 P.3d at 127-28. And these Withdrawals do not have to meet any of the technical requirements that petition signatures must meet. (Vol. XVII, at A.A. 003812:22-003813:2.)

Once the recall petition is turned in, the Registrar and the Secretary of State verify it through the same statutory process used for all petitions, including initiatives, referendums, and constitutional amendments. *See* NRS 293.1276-NRS 293.12793. Where there are more than 500 signatures to examine, the Registrar verifies by randomly sampling 5% of the signatures. *See* NRS 293.1277(2); *see also Citizens*, 116 Nev. at 950, 11 P.3d at 128.

After completing the sample verification, the Registrar will also consider the Withdrawals. *See* NRS 293.1278. When they could leave the otherwise sufficient petition with fewer signatures than needed, the Registrar verifies all of the Withdrawals. *Id.* Should the sample verification of the petition or the full verification of the Withdrawals leave the petition with a total number of valid signatures somewhere between 90% and 100% of the required threshold, the Registrar will then conduct a full verification of all petition signatures. *See* NRS 293.1279.

If, after all of this, the recall petition has enough valid signatures, the

Secretary of State issues a "Notice of Sufficiency," and the recall petition is filed with the election filing officer. NRS 306.015(4), NRS 306.035(2), and NRS 306.040(1). Once filed, only a resignation or a successful court challenge can stop a special recall election. NRS 306.040.

Nevada lawmakers, though, created one more tool to thwart recalls. Recall petition signers can use Strike Requests to remove their names after the recall petition qualifies pursuant to NRS 306.040(2). But this is a tool not found in the Nevada Constitution, or allowed anywhere but recalls.

III. NRS 306.040(2) Is Unconstitutional

a. The plain language of the Nevada Constitution prohibits Strike Requests

"In interpreting an amendment to our Constitution, we look to rules of statutory interpretation to determine the intent of both the drafters and the electorate that approved it." *Ramsey*, 392 P.3d at 617 (citing *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (Nev. 2011); *Halverson v. Sec'y of State,* 124 Nev. 484, 488, 186 P.3d 893, 897 (Nev. 2008)).

"We first examine the provision's language . . . [i]f it is plain, we look no further . . . ." *Id.* "[W]hen a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent.'"

Strickland, 126 Nev. at 234, 235 P.3d at 608 (quoting *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (Nev. 2008)).

"In interpreting [the Recall Amendments], [this Court], like the United States Supreme Court, [is] 'guided by the principle that '[t]the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.*, 126 Nev. at 234, 235 P.3d at 608 (quoting *District of Columbia v. Heller*, 128 S.Ct. 2783, 2788 (2008) (quoting *U.S. v. Sprague*, 282 U.S. 716, 731, 51 S.Ct. 220 (1931)).

A recall petition is not filed until the Registrar and Secretary of State qualify it, but once "filed" the Recall Amendments plainly state "a special election *shall* be ordered." Nev. Const. Art. 2, Sec. 9. (Emphasis added). The language is not qualified; it does not say a special election may be stopped if enough signers have a late-breaking change of heart after the recall petition has survived review. The Secretary of State and the Registrar have a clear duty to call the elections. Indeed, they have no constitutional, statutory, or legal discretion to do otherwise.

This Court considered a similar duty in *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 208 P.3d 429 (Nev. 2009). There, the Las Vegas City Council refused to place a procedurally proper municipal initiative on the ballot, having decided that the petition was

substantially invalid. *Id*., at 125 Nev. 171, 208 P.3d at 433. This Court rejected the City Council's position. "Nothing in the language of these statutes grants the City Council authority to decide, despite a measure's procedural validity, that it should not be placed on the ballot for other reasons, such as objections based on its asserted substantive defects." *Id.*, 125 Nev. at 173, 208 P.3d at 434. "[T]he plain language of Nevada's statutory provisions . . . do not allow a local governing body to refuse to place a procedurally valid measure on the ballot." *Id.* 125 Nev. at 174, 208 P.3d at 435.

Tellingly, long before the *Las Vegas Taxpayer* decision, the Nevada Attorney General and this Court had already used similar reasoning to reject Strike Requests.

When asked in 1921 (only nine years after the voters ratified the Recall Amendments) "whether or not an elector who had signed a recall petition is possessed of the privilege of withdrawing his name therefrom after the petition has been filed," Attorney General L.B. Fowler said no. *See* AGO 84 (8-19-21.) (Vol. VI, at 001299.)

He was "satisfied" that the Nevada Constitution did not contemplate "any amendment by way of additional or subtraction of a petition for the recall of any officer *after* the filing thereof has occurred." *Id.* (emphasis added). More,

"[i]mmediately upon the filing, the machinery relative to a recall of any officer is put into operation. No officer or officers are possessed of any discretionary power in regard therefore." *Id.*

In other words, once the petition qualifies, no one may stop the elections by removing valid signatures. "If electors give their names for the purpose of making possible a petition for the recall of an officer, and thereafter, by means of various and sundry ways, they are persuaded or coerced into making a request that their names be withdrawn and thereby destroy the basis upon which a recall election must rest, the objects and purposes of the [Recall Amendments] will be unjustly frustrated and practically prevent any attempt on the part of the people to ever have a public officer recalled." *Id.*

In 1930, this Court, in *State v. Scott,* echoed General Fowler and prohibited Strike Requests, reasoning that "[n]either the recall amendment nor the statute enacted pursuant thereto make any provision for [Strike Requests]." *Scott*, 52 Nev. at 230-31, 285 P. at 514. More to the point, "[t]he clerk is given no authority to consider or determine matters outside of the petition. His discretion is limited to ascertaining if the petition on its face is such as the law requires." *Id.*

"The correct rule as to when jurisdiction attaches under such a state of facts is stated in *Siebert v. Lovell*, 92 Iowa 507, 61 N.W. 197, 199 (Iowa 1894).: *Id.* 52

Nev. at 230-31, 285 P. at 515. That "correct rule" says "'[t]hat the question of jurisdiction is to be determined from the petition as it was filed, and without regard to the subsequent acts of the petitioners. So far as affecting the jurisdiction which had already attached was concerned, the protests and remonstrances were of no effect." *Id.*

"The power to act having been conferred . . . by virtue of a *legal* petition . . . could not be impaired or taken away by the protests, remonstrance's or attempted withdrawals of some of the petitioners.'" *Id*. (Emphasis in original.); *see also Coghlan v. Cuskelly*, 62 N.D. 275, 244 N.W. 39, 41 (N.D.1932) ("[t]he filing of the petition sets in motion the machinery which results in the election . . . There is no provision for protest or remonstrance. There is no provision for the withdrawal of signatures . . . When a petition is filed, it is in fact either good or bad, either sufficient or insufficient."); *Judson PTO v. New Salem School Bd.*, 262 N.W.2d 502, 506 (N.D. 1978).

In the same year as *Scott*, the Nevada Attorney General opined that Strike Requests were not allowed for ballot referendum petitions either. "[J]urisdiction attached on the day when the legal petition was filed." AGO 379 (7-14-1930) (Vol. VI, at 001301-001302.)

/ / /

i. NRS 306.040(2) amends the Nevada Constitution

NRS 306.040(2) effectively amends the Nevada Constitution, allowing the Secretary of State (or a court) to use Strike Requests to shirk the duty to call recall elections after a petition qualifies. The Recall Amendments now read "[i]f the [target of the recall] shall not resign within five (5) days *or enough petition signers recant* after the petition is filed, a special election shall be ordered to be held within thirty (30) days after the issuance of the call therefor."

The Legislature cannot amend the Nevada Constitution with mere statutes. *See Strickland*, 126 Nev. at 242, 235 P.3d at 613 (prohibiting legislation related to the Recall Amendments that change "the constitution's substantive terms without submitting the change to popular vote.").

ii. There is still room for judicial review

RPII are not arguing for automatic recall elections once petitions qualify. There is still constitutional room for judicial review of the Recall Petitions and the process that qualified them. As with any final legal action, Woodhouse and Cannizzaro are free to contest the results, to argue that the Registrar's signature count was wrong or somehow improper, or to try and have invalid signatures tossed out. Indeed, they did just that. But there is a world of difference between contesting factual findings by an agency and actually changing the relevant factual

record. Having a court decide that the Recall Petitions should not have qualified is one thing. Having recall opponents subsequently disqualify the Recall Petitions is another thing entirely.

b. The history of the Recall Amendments shows that Strike Requests are unconstitutional.

In addition to the plain language of the Nevada Constitution, the history, purpose, and policy behind the Recall Amendments is strong evidence that Strike Requests are unconstitutional.

"[I]f a constitutional provision's language is ambiguous, meaning that it is susceptible to 'two or more reasonable but inconsistent interpretations,' we may look to the provision's history, public policy, and reason in determining what the voters intended.'" *Strickland*, 126 Nev. at 237, 235 P.3d at 610 (quoting *Burk*, 124 Nev. at 590, 188 P.3d at 1120 (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (Nev. 1998))). "The goal of constitutional interpretation is 'to determine the public understanding of the legal text' up to and 'in the period after its enactment or ratification.'" *Id.* (quoting Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)).

"Not all legislative history is created equal. Although '[c]ontemporary

construction of the Constitution is very relevant,' and 'legislation enacted immediately following the . . . adoption of the amendment [is given great weight] in determining the scope of a provision,' later statutes 'inconsistent with the Constitution [cannot] furnish a construction that the Constitution does not warrant.'" *Id.*, 126 Nev. at 234-35, 235 P.3d at 608-09 (quoting Rotunda & Novak, at 23.33) (internal citations omitted).

i. History

To the extent any evidence exists as to what the public thought when ratifying the Recall Amendments in 1912, it all points in one direction: they did not intend for Strike Requests. Contemporaneous statutes did not permit them, and neither the Attorney General in 1921 nor this Court in 1930 recognized a right to them.

The Nevada Legislature first allowed something like Strike Requests 50 years after the voters ratified the Recall Amendments. In 1963, the Legislature enacted the first version of NRS 306.040, which, among other things, required automatic court hearings to review the legal sufficiency of all recall petitions. *See* 1963 Statutes of Nevada, at Page 1386 § 46. (Vol. VI, at A.A. 001304-001307.) The court was the first and final petition reviewer; the Legislature only gave the Registrar the task of verifying recall petitions in 1985. *See* 1985 Statutes of

Nevada, at Page 1090 § 2, and Page 1114 § 90.

At that mandatory court hearing, petition signers could have their names removed by demonstrating good cause to the judge. *See* 1963 Statutes of Nevada, at Page 1386 § 46. (Vol. VI, at A.A. 001304-001307.) Prior to this in-court, Strike-Requests process, Nevada law did not allow anyone to remove their names—before or after the petition was submitted—by Withdrawal or Strike Request. In fact, the Nevada Legislature did not allow Withdrawals for recall petitions until 1991. *See* 1991 Statutes of Nevada, at Page 2215 § 3.[7] The 1963 statutory court procedure was thus the *only* method for verification and the *only* avenue for petition signers to remove their names.

Despite being the exclusive outlet for signature removals, there is no evidence that public officers ever invalidated a recall petition with Strike Requests. Nor did anyone ever challenge the procedure's constitutionality. At most, Strike Requests appear to have been a rarely (if ever) used part of an exclusively judicial scheme to verify recall petitions.

After approving Withdrawals in 1991, the Nevada Legislature amended the recall statutes again in 1993 to remove the required court hearing. Rather than

[7] Withdrawals for initiatives, referendums, and constitutional amendments were first allowed in 1985. *See* NRS 295.055, and 1985 Statutes of Nevada, at Pages 550-51 § 2.

simply abandon Strike Requests in a world with Withdrawals and without a mandatory court hearing, the Legislature passed the buck to the Secretary of State.[8] *See* 1993 Statutes of Nevada, at Pages 2408-09 § 7. (Vol. VI, at A.A. 001309-001320.)

In 1998 and 2000, the Secretary of State passed the procedural regulations for Strike Requests. *See* NAC 306.010-NAC 306.014. Finally, in 2001, the Legislature passed the current version of NRS 306.040(2), adding language requiring the Secretary of State to remove names if doing so could "affect the sufficiency" of a recall petition. (Vol. VI, at A.A. 001323-001324.) *See* 2001 Statutes of Nevada, at Page 650 § 11.

In sum:

> 1912-1962: No Withdrawals or Strike Requests allowed.
>
> 1963: Strike Requests permitted as part of a mandatory judicial process to verify recall petitions.
>
> 1985: The Registrar takes over the verification process.
>
> 1991: Withdrawals allowed for recall petitions.

[8] During the testimony on the 1993 amendments, though, the amendment's sponsors said that the in-court removal process should continue if there was a court challenge to a petition. The Secretary of State would only pursue the removals if no court hearing occurred. (Vol. VI, at A.A. 001313.)

1993: The mandatory court hearing is abolished, and Strike Requests are given to the Secretary of State.

1998-2000: The Secretary of State enacts regulations for Strike Requests. *See* NAC 306.010-NAC 306.014.

2001: Final addition to NRS 306.040(2), requiring the Secretary of State to remove names pursuant to a Strike Request if it could affect the sufficiency of a petition.

There is absolutely nothing in the legislative history of the Recall Amendments or NRS 306.040(2) to indicate that anyone intended Strike Requests, or intended them to be used as Woodhouse and Cannizzaro used them. Strike Requests were 50 years late to the recall party. Then they spent nearly 30 years as part of a judicial verification process in a Withdrawal-free world. Only in the last 25 years have Strike Requests found their current form—a form totally unmoored from constitutional bedrock and its own statutory roots.

ii. Other states

As this Court has recognized, Nevadans were not alone when they authorized recalls. They were part of a state-by-state, national movement. How other states shaped their own recall process sheds light on Nevada's. *See Ramsey*, 392 P.3d at 617-18

Nevada is one of 19 states with recall for state officers.[9] Despite similar legal frameworks, Nevada is an unusual outlier when it comes Strike Requests:

Alaska: Strike Requests prohibited. Alaska Stat. § 15.45.590.

Arizona: Strike Requests prohibited. Ariz. Rev. Stat. § 19-113(A).

California: In June of 2017, the California Legislature passed new law providing for a 30-day Strike Request process to specifically thwart a recall. Prior law authorized Withdrawals only. (Vol. VI, at A.A. 1330-1331.) Cal. Elec. Code § 11108(b).

Colorado: Strike Requests prohibited. Colo. Rev. Stat. § 1-40-109(3).

Georgia: Strike Requests prohibited. Ga. Code § 21-4-5(e).

Idaho: Strike Requests prohibited. Idaho Code § 34-1713(3).

Illinois: Strike Requests prohibited. *In re Struck*, 41 Ill.2d 574, 577, 244 N.E.2d 176, 178 (Ill. 1969).

Kansas: Strike Requests prohibited. Kan. Stat. § 25-4310.

Louisiana: Both Strike Requests and signature additions allowed. La. Stat. § 18:1300.3(B)(1).

Michigan: Unclear. *But see Rutledge v. Board of Sup'rs of Marquette*

[9] Alaska, Arizona, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin. (Vol.

County, 160 Mich. 22, 124 N.W. 945 (Mich. 1910).

Minnesota: Unclear. *But see Domeir v. Golling*, 243 Minn. 237, 242, 67 N.W.2d 898, 901 (Minn. 1954) (The general rule "emerges that withdrawals are not timely if they are presented after the officer or body charged with the duty of certifying the adequacy of the original petition has performed the function.").

Montana: Unclear. But state law governing local government ballot petitions does not allow Strike Requests. Mont. Code Ann. § 7-2-2604(4); *see also State v. Taylor*, 90 Mont. 439, 4 P.2d 479 (Mont. 1931).

New Jersey: Strike Requests prohibited. *Mocco v. Piccone*, 203 N.J. Super. 443, 497 A.2d 512 (N.J. Supp. Ct. App. Div. 1985) (Strike Requests "could serve to protract unduly the entire recall process by permitting systematic and planned obstruction of the petition process through the soliciting of withdrawals by personal confrontation or even coercion of the signators to the filed petition… We are convinced that the democratic process of free election is best served by limiting withdrawals to the period prior to the filing of the recall petition.")

North Dakota: Strike Requests prohibited. *Coghlan v. Cuskelly*, 62 N.D. 275, 244 N.W. 39, 41 (N.D.1932); *see also Judson PTO v. New Salem School Bd.*, 262 N.W.2d 502 506 (N.D. 1978).

Oregon: Strike Requests not allowed. Or. Rev. Stat. § 249.876.

Rhode Island: Unclear.

Washington: Unclear. There is conflicting case law. Petition signers "should not be allowed to withdraw their signatures so as to arrest the petition on its [way] to the voters after it has received the number of signers required by law, been examined [and] found sufficient . . . ." *People v. Hinkle*, 130 Wash. 419, 434-35, 227 P. 861, 866-67 (Wash. 1924); *but see Rominger v. Nellor*, 97 Wash. 693, 167 P. 57 (Wash. 1917).

Wisconsin: Strike Requests not allowed. Wis. Stat. § 9.10(2)(d).

Only California, Louisiana, and Nevada clearly allow Strike Requests. Louisiana permits both signatures additions and subtractions, and California's recent example shows that Strike Requests do not "aid" recall operations. (Vol. VI, at A.A. 001330-001331.)

iii. Policy

The competing public policies behind the Recall Amendments and NRS 306.040(2) collide. Nevadans gave themselves a constitutional right to recall their legislators. Certain legislators then gave themselves—many decades later—nearly insurmountable statutory protections.

The Recall Amendments do permit "such additional legislation as may aid the operation of" the recall process. Nev. Const. Art. 2, Sec. 9. To that end, this

Court has approved recall-related laws "intended to safeguard" the operation of the recall procedures. *Fiannaca v. Gill*, 78 Nev. 337, 345, 372 P.2d 683, 687 (Nev. 1962). Nevertheless, this Court has refused to rubber stamp so-called statutory "safeguards" to direct democracy, when they "significantly hinder the people's [constitutional] power." *Educ. Init. v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 293 P.3d 874, 881 (Nev. 2013). There are limits to legislative "restriction[s]" on petitioning that "far exceed the Nevada Constitution's grant of authority to the Legislature." *Id.*

1. Strike Requests differ from Withdrawals

Both Respondents and the District Court relied on this Court's approval of Withdrawals in *Citizens* to support Strike Requests. But allowing signers to remove their names *before* the petition is turned in is both constitutional and rational. During the time the petition proponents are gathering signatures, the opponents should be free to engage the same universe of people. Just as potential voters may change their minds many times before casting a vote at the polls, signers should be able to do likewise. As soon as the petition is turned in, Withdrawals are no longer allowed. That makes sense.

Such a process "clearly gives the electorate greater flexibility and voice in the exercise of its recall right. This procedure helps to avoid unnecessary special

elections and provides direct recourse for when signatures are improperly obtained despite the existing safeguards." *Citizens*, 116 Nev. at 949-50, 11 P.3d at 128. As a legitimate "safeguard," Withdrawals exists for all petitions—ballot initiatives, referendums, and constitutional amendments. But Withdrawals and Strike Requests fundamentally differ. And the District Court was wrong to equate them.

Some major differences:

First, with Withdrawals, Woodhouse, Cannizzaro, and RPII all "campaigned" at the same time, for the same amount of time (no more than 90 days), targeting the same, limited universe of *potential* petition signers. Remember, eligible signers must be still-registered voters who actually voted in the relevant election who still live in the relevant district. The Registrar made a list of eligible signers available to each side. (Vol. I, at A.A. 000049 ¶ 22, and Vol. X, at A.A. 002109 ¶ 21.) With Strike Requests, though, Woodhouse and Cannizzaro campaigned beyond these 90 days. They had extra time RPII did not, effectively having a chance to change the score after the final whistle blew—while RPII sat on the sidelines.

Second, Strike Requests allowed Woodhouse and Cannizzaro to engage an even smaller universe—known petition signers. They received copies of the Petitions with the names and addresses of the signers. (Vol. I, at A.A. 000043, and

Vol. X, at A.A. 002105 ¶ 4.) Armed with this information, Woodhouse had 10 days and Cannizzaro 35 days to convince specific signers to recant. At no point prior to submission did RPII know who turned in Withdrawals, or who told Woodhouse and Cannizzaro they opposed the recalls. During the 90 days of campaigning, they, like Woodhouse and Cannizzaro, competed freely and equally for support from the same limited group of constituents.

Indeed, not only was it inequitable to let Woodhouse and Cannizzaro have exclusive informational advantages, but also this list-aided campaigning invited undue pressure and abuse. When directly confronted by friend, neighbor, family member, union boss, or employer about one's signature on the Recall Petitions, agreeing to publicly sign a Strike Request may have proved the path of least resistance, if not the path of true conviction. We use secret balloting for a reason.

Third, Withdrawals have a definitive time frame. But the time frame for Strike Requests is effectively far longer and far more indefinite than the statute suggests. And the District Court misunderstood the relevant deadlines, believing that the Legislature gave the recall opponents "only 5 days after submission, which is a very limited amount of time." (Vol. XVII, at 003812:5-6.) But the District Court was wrong both as a matter of law and on the facts of these cases. Because they took legal action, Woodhouse and Cannizzaro had five *business* days

after the Recall Petitions *qualified* to *turn in* Strike Requests. They could "obtain" them anytime. In fact, they gathered Strike Requests before RPII even submitted the Recall Petitions. (Vol. V, at A.A. 001181, and Vol. XVIII, at A.A. 003104.)

The deadline the District Court looked to is the deadline to turn in Strike Requests, not "obtain" them. That deadline's clock did not start until the Recall Petitions qualified, which necessarily happened after (long after in the Cannizzaro matter) RPII submitted them. From the filing of the Notices of Intent to the filing of the Complaints, Woodhouse had 103 days and Cannizzaro 133 days to collect Strike Requests. They simply had to turn them in before taking legal action.

Fourth, unlike Withdrawals, Nevada law permits Strike Requests for recall petitions, but not for initiative petitions, referendums, and constitutional amendments. What justifiable public policy behind the Recall Amendments explains this disparity? There is none.

Finally, although Withdrawals and Strike Requests wear similar clothes, they serve very different purposes. Withdrawals promote flexibility and accuracy; Strike Request add rigidity and uncertainty. One is a shield; the other a sword, with Withdrawals like the safety net that breaks falls, and Strike Requests like the hunter's net that captures prey. Withdrawals have many functions; Strike Request

have but one: stopping recalls. And if stopping recalls alone enough justifies Strike Requests as statutory "aids," then the Recall Amendments contain the seeds of their own demise.

Surely there must be constitutional lines that legislators cannot cross under the guise of sparing Nevadans the so-called horror of unnecessary recalls. Severely limiting the hours or locations recall supporters can gather signatures would also reduce recall elections, so too would mandates that petitions be printed on parchment or sealed with wax. Like these hypothetical absurdities, Strike Requests (unlike Withdrawals) are merely rules to protect the rulers.

III. The Strike Requests Should Not Have Affected The Sufficiency Of The Petitions Because They Had Not Been Reconciled In Five Business Days

By the Hearing, the Secretary of State had not reconciled any of the Strike Requests (Vol. XV, at A.A. 003383:13-003385:7.), which would have required all of the following to occur:

First, the Secretary of State had to determine the name of the person requesting removal; match the signature on the Strike Request to the signature on the voter registration application; decide whether the requestor demonstrated good cause for removal; and notify the Registrar about the request. *See* NAC 306.010; NAC 306.012; and NRS 306.040(2).

Then the Registrar needed to verify whether the requestor actually signed the petition, sending back a copy of the page of the petition with the signature to the Secretary of State. *Id.*

After that, the Secretary of State had to match the signature on the Strike Requests with the signature on the Petition. *Id.*

Finally, the Registrar had to confirm that he counted the signature when he verified the Recall Petitions. If so, the Secretary of State would then remove the name from the Petition. *Id.*

And the above process has a deadline. "The *removal* of names from a petition pursuant to subsection 2 of NRS 306.040 after the fifth business day after the Secretary of State completes the notification required by subsection 1 of NRS 306.040 does not affect the legal sufficiency of the petition." NAC 306.014. (Emphasis added).

NAC 306.010-NAC306.014 became law in 1998 and 2000. *See* Regulations R217-97 (5-26-98) and R086-00 (8-22-2000). Presumably the Legislature was aware of these regulations and incorporated them when amending NRS 306.040(2) in 2001 to include language mandating a signature removal when "the number of [Strike Requests] received by the secretary of state could affect the sufficiency of the petition . . . ." *See* 2001 Statutes of Nevada, at Page 650 § 11.

Paradoxically, the District Court gave ample deference to the legislators who approved NRS 306.040(2), but no deference at all to the plain language of the regulations implementing and effectuating the statute. Moreover, the regulations themselves shine a bright light on the mess that is NRS 306.040(2), and tries to rectify its many problems.

The District Court refused to believe that NAC 306.014 says what is says. Only those names "removed" within five business days can affect the legal sufficiency of the Recall Petitions. *See* NAC 306.014. The District Court interpreted the rules to bar only Strike Requests not "submitted" in five business days. (Vol. XVII, at A.A. 003812:8-21.) But such a reading makes little sense given the procedural requirements in NAC 306.010 and NAC 306.012, and the time requirements set by NRS 306.040(2), which already limits submission of Strike Requests to five business days when a Complaint is filed.

The time bar in NAC 306.014, though, makes perfect sense when read in context with the entire regulatory scheme. With the 2001 amendments, NRS 306.040(2) requires the Secretary of State to strike names only when doing so will affect the legal sufficiency of the petition, but the statute is silent as to how or when the Secretary of State makes that call. The regulations provide needed answers.

The District Court spurned NAC 306.014's clear mandate; claiming it would lead to an "absurd result" and "potential for abuse" by giving the Secretary of State nearly unfettered power to defeat a recall. That is not correct; her handling of Strike Requests would still be subject to judicial review. And the statutes already give the Secretary of State the power the District Court so fears. For instance, under NRS 306.040(2) the Secretary of State accepts or rejects Strike Requests for "good cause." If the Secretary of State wanted to arbitrarily and improperly defeat a recall petition, she could have simply rejected all the Strike Requests for lack of "good cause."

NRS 306.040(2) opens many doors to potential abuse; the plain language of NAC 306.014 is not one of them. At least the regulations require reviewable action and ordered procedure.

More importantly, though, Woodhouse and Cannizzaro presented no evidence and made no argument that the Secretary of State was anything but diligent with the Strike Requests. Nor could they. Woodhouse turned in nearly half of her Strike Requests at the deadline. (Vol. VI, at A.A. 001238.) The law does not ask the impossible; instantaneous reconciliation was impossible.

Lastly, the Court's reading of NAC 306.014 shuts down a possible escape hatch that would allow Strike Requests without running afoul of the Nevada

Constitution. There is nothing in NAC 306.014 that would stop the removal of names after five business days. NAC 306.014 simply limits the time Strike Requests can affect the sufficiency of the petition. Let people change their minds and clear the record, but let the recall elections go forward.

IV. The District Court Should Not Have Ordered Full Verifications

To decide the number of valid signatures, the District Court had three options in the Woodhouse matter: (1) The Registrar's 14,877; (2) Woodhouses's 14,818; or (3) RPII's 15,110. No matter which number the District Court chose, the Woodhouse Petition was sufficient if Strike Requests were prohibited. (For the Registrar's Findings: Vol. I, at A.A. 000039; for Woodhouse's Findings: Vol. I, at A.A. 000002:22-23, A.A 000012:7-8, A.A. 000051:25-27, and Vol. VI, at A.A. 001669:6-001676:11; and for RPII's findings: Vol. VI, at A.A. 001343 ¶ 8 and ¶ 11, and A.A. 001349 ¶ 66.)

With the Cannizzaro Petition, the District Court's factual options were less clear cut. The three numbers: (1) The Registrar's number of 15,018; (2) Cannizzaro's number of 14,519; or (3) RPII's number of 15,488. (For the Registrar's Findings: Vol. X, at A.A. 002101; for Cannizzaro's Findings: Vol. X, at A.A. 002036:26-27, Vol. XIV, at A.A. 3179:13-14, and Vol. XV, at A.A. 003414:9-003421:2; and for RPII's findings: Vol. XV, at A.A. 003280 ¶ 8 and ¶

11, and A.A. 003287 ¶ 74.)

If the Court had prohibited Strike Requests, it would still have had to determine whether Cannizzaro met her burden of proving the Registrar's results wrong. No such showing was made.

Siding with Respondents on the issue of the Strike Requests was all that the District Court needed to do. Yet the District Court ordered both a full counting of the Strike Requests *and* a full verification of all petition signatures. The District Court mistook the need to reconcile the Strike Requests—something that still had to be done—with the need to fully verify the Petitions themselves—something that had already been done, multiple times by multiple parties. There was no legal or factual support justifying the District Court's total rejection of the Registrar's work and the facts in evidence. The District Court claimed "numerical inconsistencies" or "partial incompleteness" that did not exist. (Vol. XVII, at A.A. 003814:1-3.)

The District Court should have trusted the Registrar's sample results, especially given Woodhouse's and Cannizzaro's own factual findings. Ordering a full verification months after the original signatures had been gathered and voter rolls had grown less reliable was a recipe for disaster.

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a. The District Court turned the statutory verification process on its head

The District Court upended the established, legal process for verifying petitions per NRS 293.12796-NRS 293.12793. Under that scheme, petitioners have the right to appeal to the Secretary of State if their petitions fail the verification. *See* NRS 293.12793. By ordering the Registrar to do full verifications on petitions that the Registrar had already verified and qualified, the District Court excised RPII's normal rights that would follow a normal failed verification. And when RPII tried to appeal the results with the District Court, it refused to hear their arguments, falling back on the erroneous results of the full verifications. (Vol. XVII, at A.A. 003827-003879, and Vol. XVIII, at A.A. 003905:14-003906:18.) Had the District Court simply made its own factual findings based on the evidence the Parties presented, rather than ordering a redo of what had already been done, the process would have remained within the statutory guardrails.

V. The District Court Should Not Have Accepted The Results

Even if the District Court was right to order the full verification, it clearly erred in accepting the results, which radically differed from the facts in evidence. Everyone had been wrong. And wrong in the same way by the same magnitude.

Somehow two different random samples at two different times grossly inflated the number of valid signatures for two different recalls. Even more, Woodhouse's, Cannizzaro's, and RPII's own independent reviews failed just as spectacularly as the Registrar's earlier sampling.

What is more likely? That the parties, the samples, and the Registrar were all wrong—substantially so—months ago when they verified the Petitions relatively soon after RPII collected the signatures? Or that something went wrong with the full verifications done long after the Recall Petitions had been turned in, signers had moved, and voter rolls had changed?

Further, the results were provably wrong with record evidence of mistakes—admitted and corrected mistakes that the District Court ignored. (Vol. XVII, at A.A. 003878-003879, and Vol. XVIII, at A.A. 003905:14-003906:18.)

In the short time frame between receiving the full verification results and the final hearing, RPII pointed out hundreds of errors. (Vol. VVII, at 003827-003879.) The Registrar agreed and changed his results. (*Id.*, at A.A. 003878-003879) This was strong, direct evidence that something was amiss. But the District Court still accepted the results, rejecting the Registrar's fixes. (Vol. XVIII, at A.A. 003905:14-003906:18.)

Given the mistakes, and the lack of any factual or legal foundation for

ordering the full verifications in the first place, the District Court should have used the sample results instead, and then subtracted the Strike Requests that had be reconciled; the consequences would have been the same. The Recall Petitions were doomed.

VI. The District Court Erred With Respect to Woodhouse

By the April 18, 2018 hearing, the Registrar had reviewed 335 of the 389 alleged mistakes that RPII had found in the full verification of the Woodhouse Petition. Of those, the Registrar had agreed with 175 (52%) and added them to the signature total, leaving the Woodhouse Petition just 21 signatures short, before Strike Requests. (Vol. XVII, at A.A. 003878-003879.) Through no fault of his own, the Registrar ran out of time to review RPII's remaining 54 alleged mistakes. (Vol. XVII, at A.A. 003897:6.) If those 54 signatures had the same 52% success rate as the first 335, at least 28 more would have been added back, putting the Woodhouse Petition over the threshold without Strike Requests. (*Id.*)

RPII also pointed out that the Registrar had refused 10 Declarations from individuals whose signatures were wrongly rejected during the sample verification. (Vol. XVII, at A.A. 003831 ¶ 14.) The District Court had ordered the Registrar to count everything, and RPII had given him these 10 Declarations long before the full verifications began. (Vol. VI, at A.A. 001357 ¶ 130, and

001587-001598, and Vol. XVII, at A.A. 003814:3-11.)

Finally, RPII showed 34 additional Woodhouse Withdrawals that the Registrar should not have counted. (Vol. XVII, at A.A. 003832 ¶ 19.) In fact, the Registrar's count of 449 Woodhouse Withdrawals exceeded Woodhouse's own count of 406. (*Id.*, at A.A. 003832 ¶ 17 and ¶ 21.)

Notwithstanding plain evidence of mistake, the District Court accepted the inaccurate Woodhouse results. At a minimum, the District Court should have adopted the Registrar's amended findings, and then decided (or ordered further investigation) into the remaining 96 disputed signatures to determine whether there were at least 21 that should have been added back. If so, the Woodhouse Petition would be sufficient without Strike Requests.

CONCLUSION

The judgment of the District Court should be reversed.

DATED this 31st day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **APPELLANTS REAL PARTIES IN INTEREST STEPHEN SILBERKRAUS'S, CHELYN SAWYER'S, DAVID SATORY'S, CLAIRE ROTH'S, NEIL ROTH'S, and KATHERINE MCKENZIE's OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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