



Litigating the Constitutional Right to File an Initiative Petition

BY JOSH HICKS, ESQ.

Nevadans are granted numerous rights in the state constitution. These include, inter alia, the right to vote, rights for victims of crimes, rights to same-sex marriages, rights to a minimum wage, rights to a uniform and equal rate of taxation, and the right to seek changes to the law by way of an initiative petition or a referendum. Many of these rights have been enshrined in the Nevada Constitution by way of a citizen-proposed initiative petition.

The constitutional right to file an initiative petition was enshrined in the Nevada Constitution in 1912.¹ Nevada joined several other western states in providing such rights to its citizens.² As some have observed, “[t]he expansion of

initiative and popular referendum in the West fit more with the Westerners belief of populism – that the people should rule the elected and not allow the elected to rule the people.”³

To qualify a petition for the ballot, petitioners must collect and submit signatures from at least 10 percent of the number of voters who voted in the preceding general election.⁴ Petitioners have a limited amount of time to gather signatures. For petitions to amend the state constitution, the signature-gathering window is approximately nine-and-a-half months, from September 1 of an odd-numbered year to 15 days following a primary election.⁵ For petitions to amend statutes and for referendums, the signature-gathering window is approximately 10-and-a-half months, from January 1 of an even-numbered year to 15 days following the general election.⁶ Any changes to a petition, whether through an amended petition or a court-ordered change, invalidates the signatures gathered on the original petition⁷ but does not extend the time to gather signatures.

Aside from the prescribed time-period to gather signatures, the Nevada Legislature has imposed additional rules on the initiative and referendum process.

In 2005, the Nevada Legislature enacted two significant conditions on the petition process. First, a petition must be limited to a single subject.⁸ Second, a petition must include on each page a description of effect in 200 words or less.⁹

Legal challenges premised on the single-subject rule and the description of effect rule must be filed within 15 business days after a petition is filed with the Secretary of State.¹⁰ Legal challenges must be filed in the First Judicial District Court, and the district court “shall set the matter for hearing not later than 15 days after the complaint is filed and shall give priority to such a complaint over all other matters pending with the court, except for criminal proceedings.”¹¹

In addition to legal challenges premised on the single-subject rule and the description of effect rule, legal challenges alleging that a petition creates an unfunded mandate can also, at least sometimes, be filed at the preelection phase.¹²

While these rules are intended to protect against confusing and costly ballot questions, a side effect of these changes has been to provide fertile ground for litigants who oppose a petition.

A review of ballot petitions filed by Nevadans in the past four years

demonstrates that a lawsuit to invalidate a petition is more likely to occur than not. In 2021-22, there were six petitions filed to amend the Nevada Constitution. Four of those petitions were legally challenged, and only one of those survived.¹³ Seven petitions were filed to amend the Nevada Revised Statutes. Four were legally challenged, and none of those survived.¹⁴ One referendum was filed, was legally challenged, and did not survive.¹⁵ In 2023-24, there were five petitions filed to amend the Nevada Constitution. Four of those petitions were legally challenged, and one of those survived.¹⁶ Four petitions were filed to amend the Nevada Revised Statutes. Two were legally challenged, and to date, none of those have survived.¹⁷ One referendum was filed, legally challenged, and did not survive.¹⁸

Putting this into context, of the 24 initiative and referendum petitions filed since 2021, 16 (or 2/3rds) have ended up in court shortly after they were filed.

Given that the right to seek changes to the law through an initiative petition is a constitutional right, the expeditious processing of legal challenges is important. While the requirement to hold a hearing on a petition case within 15 days and expedite the case over all other civil cases would seem to result in an expeditious processing of petition cases, the Nevada Supreme Court has held that these rules are directory, instead of mandatory, and therefore these rules have no real teeth.¹⁹ Compounding this issue is the fact that the First Judicial District Court consists of two sitting judges. If one judge is challenged or recused, days or weeks are lost while the case is reassigned. If both judges are challenged or recused and a senior judge is assigned to the case, even more time is lost.²⁰ Unsurprisingly, petition opponents have taken advantage of these opportunities and routinely challenge judges to take more time off the signature-gathering clock while the case is in district court. Coupled with the fact that the Nevada Supreme Court reviews petition cases on a de novo basis,²¹ petition proponents are often left frustrated at the amount of downtime spent in district court while attempting to exercise their constitutional rights.

Given that the Nevada Supreme Court has been unwilling to reconsider or revise its holding in *Reid* that the expedited hearing process set forth in NRS 295.061(1) is merely directory, is there another way to protect constitutional rights to file a petition while still ensuring that petitions are legally vetted?

Article 6, Section 6 of the Nevada Constitution provides that the district courts have original jurisdiction of all cases except

for certain cases before the justice courts. As such, the Nevada Supreme Court cannot accept original jurisdiction of ballot petition cases. However, there are other steps that can be taken to expedite ballot petition challenges. While it seems unlikely, the court could reconsider its holding in *Reid* that the 15-day rule in NRS 295.061(1) is merely directory. Alternatively, the Nevada Legislature could clarify that the 15-day rule should be mandatory. The Nevada Supreme Court could preemptively task another sitting district court judge, outside of the First Judicial District Court, to be ready to immediately take on a ballot petition case when a judge from the First Judicial District Court is unavailable.²² Similarly, the Nevada Supreme Court could task a senior district judge with a light docket and who is experienced in ballot petition cases to be ready to immediately take on a ballot petition case when needed.²³ Any of these options will expedite proceedings at the district court level and protect the constitutional right of Nevadans to propose a petition while still ensuring that legal concerns with a petition are properly vetted by the courts.

The right to file an initiative petition or referendum is a constitutional right granted to all Nevadans. While it is a right that should be exercised with caution in order to avoid mischief and unworkable laws, the rights of citizens to seek changes to their laws is fundamental to the Nevada system of governance and should not be unnecessarily delayed or denied. In the words of James Madison, “[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority ... whenever it may be necessary to enlarge, diminish, or new-model the powers of government.”²⁴

ENDNOTES:

1. Statutes of Nevada 1909 p. 347; Statutes of Nevada 1911 p. 446.
2. Political History of Nevada, 178 (12th Ed. 2016).
3. University of Southern California, USC Gould School of Law, Initiative & Referendum Institute (<https://www.initiativeandreferenduminstitute.org/ballotwatch/>)
4. NV Const., Art. 19, Sec. 2(2).
5. NV Const., Art. 19, Sec. 2(4); NRS 295.056(3).
6. NV Const., Art. 19, Sec. 2(3); NRS 295.056(2).
7. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 949-950 (2006).
8. NRS 295.009(1)(a).

9. NRS 295.009(1)(b).
10. NRS 295.061(1).
11. *Id.*
12. See *Fair Maps Nevada v. Jeng et. al.* Case No. 88263, *6 (May 10, 2024) (unpublished decision) (accepting a preelection unfunded mandate challenge to a petition that would have created an independent redistricting commission); *Fleischmann v. Aguilar et. al.* Case No. 88307, *2-3 (May 24, 2024) (unpublished decision) (rejecting a preelection unfunded mandate challenge to a petition that would require voter identification on the grounds that “we have held that substantive challenges to the constitutionality of initiatives are improper at the preelection phase.”).
13. 2022 Petitions & General Election Ballot Questions | Nevada Secretary of State (nvsos.gov)
14. *Id.*
15. *Id.*
16. 2024 Petitions & General Election Ballot Questions | Nevada Secretary of State (nvsos.gov)
17. *Id.* One of the challenged petitions which would limit attorney’s fees remains pending at the Nevada Supreme Court on appeal from a dismissal by the District Court.
18. *Id.*
19. *Education Freedom PAC v. Reid*, 138 Nev. Adv.Op. 47, *6-8 (June 28, 2022).
20. This scenario occurred on three initiative petitions challenged during 2023-24. In one of those cases, a senior judge did not hold a hearing until seventy days after the complaint was filed and did not issue a dispositive order until twenty days after the hearing. See *Jeng*, at 4 (“In this case, we find no reversible error based on the district court’s failure to set the matter for hearing within NRS 295.061(2)’s 15-day time frame.”).
21. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41 (2013).
22. NRS 3.040.
23. Nevada Supreme Court Rule 10(7).
24. Federalist Paper No. 49.

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