

**OPINION
67-71**

May 15, 1967 (OPINION)

Honorable Ben Meier

Secretary of State

RE: Elections - Referral petitions - Validity

This is in response to your letter to which you attached a copy of a referendum petition to refer House Bill No. 782 relating to corporate farming and ranching operations.

You call to our attention some information on the petition which you suggest was to encourage the signing of the petition as well as instructions to circulators of the referral petition. You further state that the petition has been presented to your office for filing and you ask us to give our opinion as to the sufficiency of said petition.

The North Dakota Constitution, Section 25, provides as follows:

The Secretary of State shall pass upon each petition, and if he finds it insufficient, he shall notify the 'Committee for the Petitioners' and allow twenty days for correction or amendment. All decisions of the Secretary of State in regard to any such petition shall be subject to review by the Supreme Court. But if the sufficiency of such petition is being reviewed at the time the ballot is prepared, the Secretary of State shall place the measure on the ballot and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon. If proceedings are brought against any petition upon any ground, the burden of proof shall be upon the party attacking it."

The North Dakota Supreme Court in Wood v. Byrne, 60 N.D. 1, 232 N.W. 303, on page no. 10, in a special concurring opinion by Justice Birdzell said as follows:

* * * The constitution vests in the secretary of state the primary duty of passing upon the sufficiency of such a petition, and his action is rendered subject to judicial review in the supreme court. * * *."

Justice Birdzell went on to say:

* * * The court should not in the first instance exercise the discretion which the constitution vests in the secretary of state."

The North Dakota Supreme Court in Preckel v. Byrne, 62 N.D. 634, 244 N.W. 781, on page no. 639, said:

Section 25 of the constitution requires the secretary of state to 'pass upon each petition' filed with him. In Schumacher v.

Byrne, 61 N.D. 220, 232, 237 N.W. 741, we held that this constitutional requirement places upon the secretary of state 'the duty of determining, in the first place, whether the petition conforms to whatever is required by the constitution and the laws of the state.'

While some of the foregoing comments pertain to initiated measures, nevertheless the rule of law and expressions by the Supreme Court have full application to the referendum. Neither the Constitution or other provisions make a distinction between initiated and referred measures as to the duties of the Secretary of State.

This clearly indicates that the primary duty to determine the sufficiency of a petition rests upon the Secretary of State. Not only does the Constitution so provide but the North Dakota Supreme Court has construed this provision to mean exactly what it says. The initial determination of the sufficiency rests with the Secretary of State - his decision, however, shall be subject to review by the Supreme Court.

In *Schumacher v. Byrne*, supra, the court said as follows:

The referendum petition is attacked as being in the form of an initiative petition because it says, 'Be it enacted by the people of the state of North Dakota.' It is true that the provision for the use of the sentence quoted is used in connection with initiated measures and that nowhere in the Constitution is there a requirement for such provision in a referendum petition; but even though contained in the referendum petition it does not necessarily invalidate the petition. As pointed out there is no prescribed form; but no one can read the petition without understanding and knowing that it is a petition to refer to the electorate a law passed by the legislature." The court also observed or defined a petition as follows:

A petition is 'a formal written request addressed to an official having power to grant it.' (Webster.) To petition requires signatures; but the constitution makes no requirements on the part of the electors other than to state what is desired and to sign the statement."

The court also observed that we have no statutes providing a form for a referendum petition and that while Section 25 of the Constitution clearly implies that the legislature may provide such legislation, yet the laws enacted must be to facilitate the operation of the referendum power and not to hamper or restrict or impair the exercise of such power.

In the *Wood v. Byrne* case, supra, the Secretary of State rejected a petition and stated amongst the reasons for such rejection that the petition contained a statement appearing below the constitutional measure the following: "Against prohibition for repeal." "For prohibition against repeal."

The Secretary of State considered this to be contrary to the provisions of Chapter 133 of the 1925 Session Laws, which requires

the ballots to simply show a "yes" or "no." The court sustained the rejection of the petition on other grounds and did not specifically rule on this precise point, yet it indicates that such language was not proper. This is based upon the statement in *Schumacher v. Byrne*, supra, where the court, on page no. 231, said:

The law in force today requires that 'a constitutional amendment, initiated or referred measure, or other question shall be stated fully and fairly on such ballot, and the words "yes" and "no" shall be printed on the ballot at the close of the statement of the question, etc.' * * * Section 979 of the Comp. Laws requires the secretary of state to certify to the county auditor of each county any 'proposed constitutional amendment or other question' to be submitted 'to the people of the state for popular vote.' Clearly then, the secretary of state has the duty of seeing that a constitutional amendment, or an initiated or a referred measure is fully and fairly stated on the ballot, as well as having the 'ballot title' printed. This is the means adopted to remove temptation to deceive, and to obtain uniformity of issue throughout the state. It is his duty to so state the question that the electorate may vote 'yes' if it desires to approve the act of the legislature, or 'no' if it disapproves it."

In *Schmidt v. Gronna*, 68 N.D. 488, 281 N.W. 57, the court had under consideration the question of identifying the measures as No. 1, No. 2, etc., in the publicity pamphlet and on the ballot. The secretary of state had proposed to number the measures whereupon an action was instituted to enjoin him from so doing. It was argued that such procedure would inform the electorate. The court, however, rejected this theory and said that the publicity pamphlet was designed for this purpose. The court held that the numbering of measures as proposed was not within the contemplation of the Constitution and statutes controlling and may not be put into effect.

In this respect it is also significantly noted that Section 25 of the Constitution also provides, " * * * In submitting measures to the electors, the Secretary of State and all other officials shall be guided by the election laws until additional legislation shall be provided." In the *Schmidt v. Gronna* case the court simply rejected and proposed numbering on the basis that the Constitution and the statutes did not contemplate such action.

The North Dakota Legislature adopted Section 16-01-11 which regulates the petitions for initiative, referendum or recall. This section provides as follows:

REGULATIONS GOVERNING INITIATIVE, REFERENDUM, OR RECALL PETITIONS. No person shall sign any initiative, referendum, or recall petition circulated pursuant to the provisions of Sections 25 and 202 of the constitution of this state, and of article 33 of the amendments of such constitution, unless he is a qualified elector. No person shall sign any such petition more than once and each signer shall add his residence, post office address, and the date of signing. Each copy of any petition provided for in this section, before being filed, shall have attached thereto an affidavit to the effect that

each signature to the paper appended is the genuine signature of the person whose name it purports to be, and that each such person is a qualified elector. Any person violating any provision of this section is guilty of a misdemeanor."

The main body of the referendum petition seems to have complied with Section 25 of the North Dakota Constitution. It also appears that the space provided for the signatures contain the blocks or spaces to indicate the date when it was signed, the residence and post office as required by Section 16-01-11 of the North Dakota Century Code. The petition also contains the affidavit in accordance with the provisions of Section 16-01-11.

Your letter does not indicate specifically what information you have reference to. It is assumed you are referring to the language appearing on the reverse side, which is as follows:

The 1967 Legislature passed House Bill 782 over the Governor's veto to open North Dakota agriculture to corporation farming and ranching. This Bill does not require stockholders to be residents of North Dakota or to be actual farmers.

STOP CORPORATIONS FROM TAKING OVER NORTH DAKOTA AGRICULTURE

SIGN THESE REFERRAL PETITIONS

to suspend this Bill until it can be voted on in November of 1968.

Back your signature with a contribution to save North Dakota farms for North Dakota farmers and ranches. Send your contribution to: Fund to Stop Corporation Farming, Box 976, Bismarck, N.D.

Instructions to circulators of referral petitions:

1. Encourage everyone who signs this petition to make a contribution.
2. When you have your signatures, take this petition to a local Notary Public to have it notarized.
3. After the petition has been notarized, send it to: Stop Corporation Farming, Box 976, Bismarck, N.D."

Neither the Constitution nor the statutes as pertaining to a petition provide for arguments for or against a measure. As to arguments for or against a measure, the publicity pamphlet was designed for such purpose by Section 25 of the North Dakota Constitution, which was amended by Senate Concurrent Resolution "0", Chapter 451, as sponsored by the Legislature in 1963 and was approved by the electorate in 1964, whereby such provision was repealed. It is also noted that the petition is soliciting funds to be sent to "Stop Corporation Farming, Box 976, Bismarck, N.D." The language also contains instructions to the circulators of the petition. The instructions to the circulators would not appear to be objectionable but the other material which is campaigning and soliciting funds is

clearly beyond any contemplation of a petition in either the Constitution or the statutes of this state. Whether this "extra" material is sufficiently objectionable to invalidate the entire petition is apparently the major question.

It would also appear that the question of how far may one go in the petition and still permit same to be considered valid and what preventative action is necessary to preserve the legitimate use of a petition has not yet been resolved by the courts. While it appears that the petition other than the information referred to meets all of the requirements, the question remains - should a petition be permitted to be used in a manner which is completely foreign to the substance of a petition as contemplated by Section 25 of the North Dakota Constitution and Section 16-01-11 of the North Dakota Century Code? In other words, has the petition in this instance gone so far afield so as to constitute a misuse of the petition and thus deem it objectionable.

This question can be summarized by stating what action is necessary to preserve the dignity and legitimate use of the petition under Section 25 of the North Dakota Constitution.

Fortunately or unfortunately, depending on one's viewpoint, there are no North Dakota Court decisions on this point or question. We have reviewed all decisions which we believe are in any manner pertinent to the question. We recognize that the question under consideration is one which will never fully or definitely be answered without a Supreme Court decision, or unless the Legislature enacts appropriate legislation.

As we have referred to earlier, any action taken by your office is subject to review regardless of your decision. In the final analysis, in accordance with the constitutional provisions and the court's construction of same, this is a matter in which you as Secretary of State will be required to exercise sound judgment and determine whether or not the petition should be deemed sufficient or should be rejected because of the language appearing on the reverse side.

HELGI JOHANNESON

Attorney General