STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD

IN RE PETITION
TO RECALL SENATOR JIM HOLPERIN
OF THE 12TH SENATE DISTRICT

BRIEF OF AMICUS CURIAE KENNEDY ENTERPRISES, LLC

COMES NOW Kennedy Enterprises, LLC ("Kennedy"), by and through counsel Graves Bartle Marcus & Garrett LLC, and as friend of the Government Accountability Board, states as follows:

Introduction

On page one of his initial brief, Senator Jim Holperin gets right to the point. Employing an increasingly common tactic in petition litigation, he defames the "other side's" signature-gatherers. The story is all too predictable. An officeholder's opponents have hired someone who, ominously, comes from "out of state." Worse, the out-of-staters are gathering signatures for "profit." Finally, a Google search uncovers a few old press releases and blog posts from the circulators' previous opponents, and without further inquiry, these are happily cited to "prove" the circulators' long and dark history of defrauding unsuspecting citizens.

While such tales fire up the legislator's supporters and create content for friendly blogs or local newspapers, they seriously undermine the petition process by skewing public perceptions and—occasionally—causing an agency or court to throw out even valid signatures. The targeted legislator's political consultants tell him that this is a home run—and it is. What they do not tell him is that it is a net loss for voters and for our democracy.

When someone like Senator Holperin makes sweeping allegations of fraud, local proponents who hired a professional circulation firm understandably focus their efforts on ensuring the success of their own petition. But that is not the only interest at stake in a petition challenge. As Senator Holperin points out, the Government Accountability Board is tasked not just to resolve a dispute between the petition's supporters and opponents; it must protect the process as a whole. It must ensure that Wisconsin's voters will continue to enjoy the privilege—one enjoyed by citizens in just over half of the states—of a robust and open petition process.

Reckless and intemperate allegations of fraud, coupled with naked hostility to citizens of Wisconsin's sister states who visit to engage in political speech with their fellow citizens, are transparent efforts to silence the "voices available" to Senator Holperin's opponents "to convey political messages." *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000) (invalidating district-residency requirement for circulators) (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 210 (1999) (Thomas, J., concurring)). In a climate where Wisconsin citizens have leveled death threats against their own state legislators and their families, unmeasured allegations of fraud and criminal conduct against "dangerous" outsiders should not be allowed to chill the signature-gathering process by intimidating petition proponents or the associates that serve as their political voices. *See John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2821, 177 L. Ed. 2d 493 (2010) (as-applied challenges can be mounted to compelled disclosure of petition signers' names if there is "a reasonable probability" that disclosure "will subject them to threats, harassment, or reprisals from either Government officials or private parties").

For this reason, Senator Holperin's crude caricature of Kennedy Enterprises should play no role in the Board's signature review. Wisconsin voters deserve a review process untainted by *ad hominem* attacks, unconstitutional bias against other states' citizens, and false claims of fraud.

I. Kennedy Enterprises Has a Long and Successful History as a Petition Firm

Kennedy Enterprises, LLC, was founded in 1994 by Dan Kennedy.[1] Since that time, Kennedy's circulators have met with perhaps tens of millions Americans to discuss important public policy issues.[2] After weighing the issues, millions of citizens have signed the petitions of Kennedy's clients.[3] Millions of citizens have not. Whether citizens agree to sign a petition or not, the United States Supreme Court recognizes all of this activity as "core political speech," the lifeblood of our democracy. *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (striking down Colorado's ban on payments to petition circulators).

Kennedy is proud to have made a material contribution to this relatively recent expansion of democracy in the states. Among a handful of truly national signature collection firms, Kennedy has brought its experience to 16 states that recognize some form of direct democracy.[4] Kennedy has gained substantial experience in dealing with a variety of challenges, including short signature-gathering periods, "blocking" campaigns mounted by opponents, and gross exaggerations about the company and its circulators.[5] But in perhaps fifty million interactions between Kennedy circulators and voters over a 17-year period,[6] there have been very few allegations of wrongdoing.

II. Senator Holperin's Challenge Makes False and Reckless Claims About Kennedy Enterprises' Record in an Attempt to Create "Circumstantial" Evidence in Wisconsin

On the first two pages of his challenge, Senator Holperin claims that Kennedy is "notorious" and promises that his attached "Exhibit 2" "document[s] misconduct and

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[1] See Daniel Kennedy Affidavit, ¶ 3.
[2] *Id.*, ¶ 6.
[3] *Id.*
[4] *Id.*, ¶ 4.
[5] *Id.*, ¶ 5.
[6] *Id.*, ¶ 6.

controversy generated by Kennedy Enterprises' activities."[7] But even a cursory review of Senator Holperin's attached exhibit, coupled with publicly-available press reports, shows that Senator Holperin has grossly misrepresented the record. As discussed below, each disembodied quotation has been traced through to the cited source. There have been no findings "documenting" that Kennedy committed "misconduct," and any *allegations* against Kennedy in other states were ultimately rejected as baseless.[8]

a. A Formal Complaint Alleging that Two Kennedy Clients Violated Their Tax Status and Failed to Register as an Issue Committee Has Nothing to Do With Kennedy Enterprises' Conduct or the Issue of Signature Fraud

Unnumbered page 5 of Exhibit 2 attempts to tar Kennedy with wrongdoing because of allegations against the sponsor of a petition drive, a Colorado non-profit named Active Citizens Together ("ACT"). The only formal complaint, filed in 2010, alleges that ACT violated state law *by not registering as an issue committee.*[9] Obviously, this allegation has nothing to do with Dan Kennedy or Kennedy Enterprises, who served only as a vendor hired by ACT to collect signatures.[10] The allegation relates to a campaign finance (and possibly tax) violation, and has nothing to do with signature or petition fraud. The suggestion that GAB should even consider such an allegation in deciding on the validity of Wisconsin signatures is ridiculous.

b. The Implication That Kennedy Enterprises was In Any Way Involved With Potential Fraudulent Activities by a Contractor of Silver Bullet, LLC, During

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[7] See Exhibit 2 of the Democratic Party's Challenge Consolidated Exhibits. Exhibit 2 boldly claims that "Dan Kennedy...[has] a history of election fraud using paid circulators that [sic] intentionally mislead voters." As discussed below, this reckless statement is objectively false.
[8] Counsel's false representations to the contrary in this proceeding may or may not be protected by judicial or administrative privilege, but any person repeating false allegations about Kennedy in the media is subject to liability in tort.
[9] John Schroyer, *Bruce a No-Show at Campaign Finance Hearing*, Colorado Springs Gazette (Dec. 12, 2010).
[10] See Kennedy Affidavit, ¶ 9.a.

the 2010 Colorado Ballot-Access Campaign for Gubernatorial Candidate Joe Gschwendtner Is Entirely Without Merit

In 2010, allegations arose that the campaign of Colorado gubernatorial candidate Joe Gschwendtner had been the victim of fraudulent, and potentially criminal, activities by a contractor of the petition-gathering firm Silver Bullet, LLC.[11] *See* Exhibit 2, unnumbered page 4. During the final days of the signature-gathering process, in order to petition onto the primary ballot, Gschwendtner determined that his campaign needed a second firm to gather signatures. As a result, the campaign contracted with Kennedy Enterprises to help aid in its effort to petition onto the ballot.[12]

Kennedy Enterprises was not a contractor of Silver Bullet, LLC; instead, as even the cited article in Exhibit 2 discloses, Kennedy Enterprises contracted directly with the Gschwendtner campaign.[13] There is no evidence whatsoever that Kennedy is connected to any criminal behavior or fraudulent activities surrounding Silver Bullet's contractor, nor is there even an "allegation" against Kennedy. Again, Senator Holperin's representation that Exhibit 2 somehow contains evidence of Kennedy's "misconduct" –let alone "documented" misconduct—is blatantly false.

c. The Lawsuit Filed by Jess Knox of Protect Colorado's Future Following the Petition Drive to Add Amendment 47 to the 2008 Ballot in Colorado Was Dismissed on All Counts

Senator Holperin cites only the *allegations* against Kennedy Enterprises arising from a successful petition drive in 2008, neglecting to mention that the lawsuit was dismissed on all

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[11] Lynn Bartels, *Failed Name-Gathering; Fraud Alleged in Work By Firm*, Denver Post (June 19, 2010).
[12] See Kennedy Affidavit, ¶ 9.b.
[13] *Id.*

counts. *See* Exhibit 2, unnumbered pages 1, 2.[14] In 2008, Kennedy Enterprises was contracted to gather a sufficient amount of signatures in order to add Amendment 47 to the fall ballot in Colorado. Following the successful petition drive and certification of Amendment 47 to the ballot, Jess Knox of Protect Colorado's Future filed a lawsuit alleging 29 violations of Colorado law by Kennedy Enterprises and another signature-gathering company.[15] The lawsuit contained allegations that signature gatherers had evaded residency requirements, deceived voters, submitted duplicate signatures and used phony notaries in their efforts to obtain enough signatures to get the amendment certified on the 2008 ballot.[16]

Each and every one of the 29 counts was dismissed by Denver District Court Judge Christina Habas.[17] In addition to finding the lawsuit to be frivolous, the ruling stated that the court was without the jurisdiction to alter a secretary of state's certificate of sufficiency. Senator Holperin's Exhibit 2—repeating a disturbing pattern—only mentions the lawsuit's allegations without informing this Board that the lawsuit was dismissed or found to be frivolous. Again, Senator Holperin has failed to deliver on his promise to attach "documentation" of Kennedy's prior misconduct.

d. The Protests Filed in the Recall Election of Two Colorado Springs School District 11 Board Members Were Found Not Only to Be Unsubstantiated, But Kennedy Enterprises Was Not Even Contractually Involved in the Petition Drive

Senator Holperin also cites several Colorado articles repeating allegations about circulators in a Colorado Springs School District recall drive in 2006. See Exhibit 2,

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[14] The allegations on page 1 of Exhibit 2 are simply pasted from a partisan Colorado blog, styled as the Colorado Independent, which in turn cites allegations raised in a Jess Knox lawsuit—discussed on page 2, footnote 3, of Exhibit 2—which was later dismissed as frivolous.
[15] Chris Bragg, *Right-to-Work Backers Go Directly to Plan B*, The Colorado Statesman (July 4, 2008).
[16] *Id.*
[17] *Judge Dismisses Lawsuit to Stop Right-to-Work Amendment*, Denver Business Journal (Aug. 21, 2008); see also Kennedy Affidavit, ¶ 9.c.

unnumbered pages 2, 3. During the petition drive for a possible recall election of Colorado Springs School Board members Sandy Shakes and Eric Christen, two protests were filed by Toby Norton and one was filed by Herbert Ruth.[18] All three protests alleged that improper actions were taken by signature gatherers during the drive.

The El Paso County Clerk determined that the protests could not be verified by any evidence other than the protester's opinions, and dismissed the protests in their entirety.[19] Further, Kennedy Enterprises had no contract to gather signatures for this recall election and did not run the drive.[20] Mr. Kennedy merely contacted petition circulators and directed them to the recall organizers, who contracted with the circulators and ran the drive.[21] Once again, Senator Holperin reports only the allegations, not the outcome, and has failed to show any "documentation" of petition fraud by Kennedy or its circulators.

e. The Allegations Referencing a 2000 Indiana Investigation Into a Petition Drive to Get Gary Bauer Onto the Presidential Primary Ballot were the Result of a Rogue Petition-Gatherer Acting Outside the Guidelines of Kennedy Enterprises

In 2000, Kennedy Enterprises contracted to gather signatures in an attempt to get Gary Bauer onto the presidential primary ballot in Indiana. During a review of the signatures, a county clerk found the names of four deceased people, three forgeries, and twelve unregistered voters on the petitions.[22] When Dan Kennedy was alerted to this, he immediately met with the

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[18] Shari Chaney Griffin, *Challenges Mounting in Possible D-11 Recall*, Colorado Springs Gazette (Sep. 6, 2006).
[19] Jason Kosena, *Methods Used in Petition Drive Under Scrutiny*, Fort Collins Coloradoan (Jan. 16, 2008).
[20] See Kennedy Affidavit, ¶ 9.d.
[21] *Id.*
[22] Pam Zubeck, *Signs of Trouble / Names of Dead Found on Bauer Petitions*, Colorado Springs Gazette (Feb. 2, 2000).

Indiana State Police and aided them in locating the rogue circulator.[23] There was no allegation against Kennedy Enterprises or so much as a suggestion that Kennedy had committed any wrongdoing.[24] Indeed, rather than indicating that Kennedy Enterprises is a "notorious" or fraud-loving organization, this example of its good faith and indispensable effort to help locate a rogue circulator after a petition drive had ended show that the company takes its reputation seriously and is committed to clean elections.

f. Miscellaneous Other Press Excerpts Fail to Support Senator Holperin's Allegations

Finally, Senator Holperin attaches miscellaneous other clippings from blogs or newspaper articles, perhaps hoping that "some news is bad news." On unnumbered page 3 of Exhibit 2, an excerpt from a rambling blog entry mentions Kennedy Enterprises, but a review of the longer blog entry (at the back of the Exhibit) discloses that there were no allegations against Kennedy Enterprises in Oklahoma, and the Oklahoma work of another group, National Ballot Access, did not even generate allegations fraud. One article alleges mishaps by one Scott Lamm, which have nothing to do with elections, petitions, or Kennedy Enterprises. *See* Exhibit 2, unnumbered page 4. Another article involving Lamm and Kennedy allege no improprieties at all. *Id.*, unnumbered page 3.

g. Senator Holperin Fails to Show that "Many" Kennedy Circulators Have Criminal Backgrounds or Have Engaged in Voter Registration Fraud

Citing Exhibits 4 and 5, Senator Holperin claims that the credentials of "many" Kennedy circulators involved "long and colorful criminal histories" and "voter registration fraud." But while the two exhibits attached by Senator Holperin do contain criminal histories of one circulator whom was fired by the campaign and one other circulator, *they indicate no criminal*

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[23] See Kennedy Affidavit, ¶ 9.e.
[24] *Id.*

records—let alone allegations—for any other circulator. Further, Exhibits 4 and 5 contain no evidence whatsoever that any Kennedy circulator in Wisconsin had a "long and colorful history" (or for that matter, any history at all) of "voter registration fraud." In short, Senator Holperin was unable or unwilling to back up with actual evidence the colorful allegations against Kennedy which were apparently so easy to scatter throughout his memorandum of law. The Board should discredit all of this innuendo, and instead consider each signature on the evidence.

III. The Board Should Approach Any Allegation of Fraud or Forgery With Skepticism

Finally, as it reviews the signatures gathered by Kennedy, the Board should view with skepticism any allegations of fraud or forgery. While fraud is by no means non-existent in American petition drives, a July 2010 study by the Citizens in Charge Foundation has found that in the last several election cycles, there have been very few verified instances of signature fraud. *See* Exhibit B ("Is the "F-Word Overused? A Truth in Governance Report on Petition Signature Fraud"). Citizens in Charge Foundation ("CIC"), a non-partisan social welfare organization, is "the only national organization committed to defending the ballot initiative process in states where it exists and expanding it to those states where citizens currently lack the process."[25]

CIC's report was compiled by using open records (or "Sunshine") laws in each of the 26 states that allow for some form of statewide initiative or referendum petition circulation. *Id.* at 6. CIC asked each Attorney General and Secretary of State to produce all records relating to instances in which a "court of law" had "verified forgery or fraud of signatures submitted for initiatives and referenda between 1999-2008." *Id.* CIC then followed up with these offices, eventually contacting various state boards and local officials who would likely contain records of

[25] *See* the Citizens in Charge website at http://www.citizensinchargefoundation.org/about-us/cicf.

petition signature fraud. *Id.* The responses covered the five biannual election cycles from 2000 to 2008. Id.

Based on the responses, CIC determined that during the five election cycles, at least 81,635,847 signatures were submitted,[26] and there were just 17 verifiable cases of petition signature fraud. *See* Exhibit B at 8. Twelve states—including Colorado, Kennedy's home state—indicated that they had *no* records of verified forgery or fraud of signatures on petitions. *Id.* at 7. Even assuming that only 81 million signatures were gathered during this time, there has been only one petition fraud conviction for every 4.7 million signatures submitted. *Id.* at 4.

Further, of the 17 cases of verifiable fraud, all but one involved in-state residents—not "out of state" circulators sometimes derisively referred to by petition opponents as "nomads." *See* Exhibit B at 5. The "vast majority" of these cases were reported by states that, unlike Wisconsin, either limited petition circulation to state residents, or banned payments to petition circulators based on the number of signatures they collect. *Id.*

While it is true that the CIC study did not count mere allegations of fraud or civil court findings that certain circulators had engaged in "fraudulent" practices, this only adds to the accuracy of the survey. First, allegations of fraud have become a tactic, and as the CIC study points out, "fraud" is often used to describe a range of activities, most of which are not actually fraudulent (if they are wrongful at all). *See* Exhibit B at 6. Second, many judicial findings in petition litigation occur in abbreviated, "fast-track" civil proceedings in which the circulator and petition company are not themselves present or represented by counsel. A petition proponent

[26] CIC notes that many states only counted the number of signatures that were verified, meaning that officials stopped counting signatures once the number needed to qualify the petition was reached. Id. at 7. Further, "very few" states counted the number of signatures for petitions that failed to qualify for the ballot, and some states did not keep signature records for the full time period. *Id.* For this reason, CIC found that it was "reasonable to assume many millions of additional signatures had been submitted during the studied ten years." *Id.*

may decide not to contest the allegations, focusing his or her limited resources and time on reclaiming blocks of challenged signatures that are easier to "claw back" because they do not involve contested issues of fact or can be recovered by reference to self-authenticating public records. In the absence of a defense by the proponent, some "findings" of fraud have been made based solely on out-of-court statements and affidavits, without any possibility of cross-examination and without confrontation by the affected circulator. Accordingly, the most reliable measure of actual fraud is criminal convictions, when there is no doubt that both sides were incented to fully litigate the issue.

The frequency and scope of petition "signature fraud" have been vastly exaggerated by press reports and bloggers. Like the United States Supreme Court, this Board should recognize that "'the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.'" *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203-04 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 427 (1988)). Absent evidence to the contrary, the Board should reject Senator Holperin's invitation to "assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.* (citing *Meyer,* 486 U.S. at 426). CIC's report shows that the national data for the past ten years bears out the intuition Justice Ginsburg expressed in *Buckley*.

Conclusion

Kennedy's reputation for competence and integrity is its most important asset. If a circulator submits fraudulent or forged signatures, Kennedy loses as well—right alongside Wisconsin voters, the recall proponents, and Senator Holperin. As Justice Ginsburg observed in

Buckley, Kennedy has every incentive to use circulators with good reputations and good validity rates. Likewise, Kennedy's circulators—if they want to work for Kennedy again—have every incentive to follow the law and turn in valid signatures. While the circulator is ultimately responsible for his or her own conduct and each signature challenge will rise or fall on the quality of the proponent's and opponent's evidence, there is no rational reason to assume that Kennedy, its circulators, or any person in the initiative process is dishonest or lacks integrity. There is every reason to believe that the circulators are doing their jobs with honor, pride and integrity. For that reason, before casting aside any Wisconsin voter's signature based on the alleged "fraud" of a Kennedy circulator, the Board should be convinced that the voter did not in fact intend to sign the petition. This state's voters, and the future of direct democracy in Wisconsin, demand no less.

Respectfully Submitted,

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Exhibit A

STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD

IN RE PETITION TO
RECALL SENATOR JIM HOLPERIN
OF THE 12th SENATE DISTRICT

IN RE PETITION TO
RECALL SENATOR ROBERT WIRCH
OF THE 22ND SENATE DISTRICT

WGAB ID#0600004

IN RE PETITION TO
RECALL SENATOR DAVE HANSEN
OF THE 30TH SENATE DISTRICT

AFFIDAVIT OF DANIEL KENNEDY

STATE OF Colorado)
) ss,
COUNTY OF El Paso)

DANIEL KENNEDY, being first duly sworn, states as follows:

1. I am an adult resident of Colorado Springs, Colorado.

2. I am the founder of Kennedy Enterprises, LLC ("Kennedy").

3. I founded Kennedy in 1994.

4. Kennedy is among a handful of truly national signature collection firms, and has brought its experience to 16 states that recognize some form of direct democracy.

5. Kennedy has gained substantial experience in dealing with a variety of challenges, including short signature-gathering periods, "blocking" campaigns mounted by opponents, and gross exaggerations about the company and its circulators.

6. There have been perhaps fifty million interactions between Kennedy circulators and voters over the 17-year history of Kennedy. On behalf of petition proponents, Kennedy has gathered millions of signatures during this timeframe.

7. My duties with respect to the petitions to recall Senators Jim Holperin, Robert Wirch, and Dave Hansen, included aiding each recall committee in the gathering of signatures.

8. Each recall target has filed a challenge to the petition. I have reviewed those portions of the challenges that make allegations about the history of my firm, Kennedy. The challenges are substantially similar with respect to those allegations.

9. Many of the allegations about Kennedy's history and reputation (including the statements contained in or purported to be supported by the challengers' consolidated Exhibit 2) are false or, at best, misleading. These include the following:

a. It has been alleged that, in 2010, a sponsor of a petition drive, a Colorado non-profit named Active Citizens Together ("ACT"), which had a formal complaint filed against it for a campaign finance violation, was the result of Kennedy Enterprises' conduct. Kennedy Enterprises is not affiliated with ACT, and furthermore, the complaint had nothing to do with signature gathering.

b. It has been alleged that, in the 2010 Colorado gubernatorial petition drive of Joe Gschwendtner, a different petition-gathering firm, Silver Bullet, LLC had a contractor of it that potentially commited fraudulent and criminal activities. Kennedy Enterprises contracted directly with the campaign of Gschwendtner. Kennedy Enterprises was not a contractor of Silver Bullet, LLC and had no connection with any fraudulent activities that may have occurred.

c. It has been alleged that a lawsuit was brought claiming circulator misconduct, after a successful signature-gathering drive to get an amendment to Colorado's constitution onto the ballot in 2008. Kennedy Enterprises was absolved of any wrongdoing, as every single count of the lawsuit was dismissed by the trial judge.

d. It has been alleged that protests were filed claiming improper actions were taken by signature gatherers in the petition drive to recall two Colorado Springs school board members in 2006. Kennedy Enterprises had no contract to gather petitions in that recall campaign and did not run the signature-gathering drive. I contacted potential petition circulators personally and directed them to the recall organizers, who then ran the drive. I assume but, because I was not involved, do not have personal knowledge, that the petition proponents then contracted with circulators whom I had sent their way.

e. It has been alleged that Kennedy Enterprises was involved in a 2000 Indiana investigation into the names of four deceased people being placed on petitions in the campaign to get Gary Bauer onto the presidential primary ballot. When I was alerted to this problem by a county clerk, I immediately met with the Indiana State Police and helped them locate this rogue circulator. Without my assistance, the circulator could not have been identified or located. Since that investigation concluded, there was never any allegation against Kennedy Enterprises or a suggestion that Kennedy committed any wrongdoing.

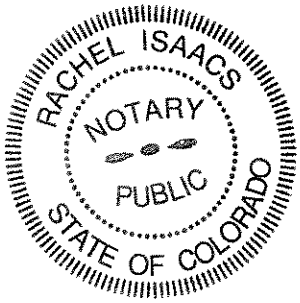
10. Before signing and submitting their challenges, neither the recall challengers nor their counsel or agents contacted me or, to my knowledge, any of my employees, regarding

the truth or falsity of the specific allegations they have made about the prior history of Kennedy Enterprises.

Dated this 20 day of May, 2011.

Daniel Kennedy

Subscribed and sworn to before me this
20 day of May, 2011.



Notary Public, State of Colorado
My Commission 9/7/2011

Exhibit B

Citizens in Charge
FOUNDATION

Is the "F-Word" Overused?

Truth
IN GOVERNANCE

Citizens in Charge
FOUNDATION

July 2010

Is the "F-word" Overused?

A *Truth in Governance* Report on Petition Signature Fraud

Executive Summary

In recent years, widespread allegations of petition signature fraud have been used as justification for a number of legislative changes to the citizen initiative process. These changes have in turn sparked controversy, culminating in court challenges over regulations that initiative proponents contend are unconstitutionally restrictive. As a result, a number of these laws have already been enjoined by federal courts or overturned as violating the First Amendment rights of citizens.

In hopes of better informing the debate over initiative and petition process reform, this *Truth in Governance Report* seeks to assess the degree to which signature fraud can be verified in the 26 states in which citizens enjoy a statewide petition process for placing initiatives and/or referendums on the ballot.

In the 20 states that responded to requests for information under state open records and freedom of information laws, there were 17 cases of individuals convicted of forgery or fraud in the initiative and referendum petition process in five states between 1999 and 2008. The rarity of convictions for fraud or forgery in the initiative petition process (1.7 per year) only tells us so much, but the data certainly suggest that to the extent there is a problem with petition fraud, the first step would be to enforce laws already on the books.

Though more research needs to be done, the evidence thus far shows that cases of verified fraud or forgery are not pervasive in initiative or referendum petitions. Furthermore, many of the "reforms" passed by state legislatures to address fraud have shown no positive results. Virtually all the verified instances of fraud have been found in states with such laws in place.

Citizens in Charge
FOUNDATION

July 2010

Is the "F-word" Overused?

A *Truth in Governance* Report on Petition Signature Fraud

Petition signature fraud is everywhere, or so one might conclude from glancing at media clippings. The headline of a 2008 Associated Press story in Oregon reads: "Group alleges petition signatures riddled with fraud." North Dakota's *Bismarck Tribune* hollered that same year: "N.D. tax measure approved for ballot despite possible fraud." In 2008, a Colorado website reported, "Woman alleging fraud a prominent diversity activist," which was followed the next year by a *Denver Post* headline: "[Governor] Ritter signs bill targeting petition fraud."

With increasing frequency, the "F-word" — fraud — is hurled at efforts by citizens to put initiatives or people's veto referendums on the ballot.

The consequences go well beyond the success or failure of any given ballot measure. In recent years, allegations of fraud have been used as justification for a number of legislative changes to the citizen initiative process.

These legislative acts have in turn sparked controversy, culminating in court challenges over regulations initiative proponents contend are unconstitutionally restrictive. As a result, a number of these laws have already been enjoined by federal courts or overturned as violating the First Amendment rights of citizens.

Fraud is a serious charge. But it is a core American principle that charges must be verified, that people remain innocent until proven guilty. In hopes of better informing the debate over initiative petition reform, this *Truth in Governance* report seeks to assess the degree to which signature fraud has been verified in the 26 states where citizens enjoy a statewide petition process for placing initiatives and/or referendums on the ballot.

The data from 1999 through 2008, a ten-year period, may surprise you. The 20 states that have thus far substantially responded to requests for information under state open records and freedom of information laws, reported a total of 17 cases, all in just five states, wherein individuals petitioning for initiatives or referendums were convicted of forgery or fraud. For context,

in these same states during this same period, more than 81 million petition signatures were submitted to election officials — meaning an average of less than one fraud conviction for every 4.7 million petition signatures submitted.

Most of the states that have thus far provided substantial information (15 of 20) had no cases of verified fraud during this entire ten-year period.

It should be noted that six states have not substantially compiled with the request for information, accounting for 23 percent of the states being surveyed. Meanwhile, though California's Secretary of State has not reported any cases of verified fraud, the office did disclose that there are currently cases under investigation.

Verified fraud or forgery is not at all pervasive in initiative petition campaigns. There was only one fraud conviction for every 4.7 million petition signatures submitted.

Nonetheless, such a relatively low number of convictions in so few states over a decade indicates that the F-word may indeed have been overused.

Still, any fraud is too much fraud. Moreover, there may be fraud that goes undetected or unprosecuted.

Whatever the actual degree of fraudulent behavior, the data certainly suggests that to the extent there is a problem with petition fraud, a first step might be to more aggressively enforce the laws currently on the books. After reviewing testimony and evidence about fraud in a recent court case in Colorado, Federal Judge Philip Brimmer found that "very few resources have been devoted to enforcing such laws and very few prosecutions have taken place," declaring, "It is reasonable to conclude that more enforcement would lead to more deterrence of fraud and therefore less fraud in the ballot initiative process."

In that case, *Independence Institute v. Buescher*, Judge Brimmer imposed a preliminary injunction against enforcing a restriction that no more than 20 percent of pay for circulating a petition can to be tied to how many signatures are collected. The judge concluded that "pay-per-signature compensation is no more likely than pay-per-hour compensation to induce fraudulent signature gathering or to increase invalidity rates."

Eight states ban or restrict payment by the signature for initiative campaigns. Federal courts have struck down such bans in five different states, not counting the likelihood that Colorado's law will be ultimately overturned. Fifteen states refuse to count signatures collected by non-resident circulators. Banning out-of-state petition circulators has been ruled unconstitutional in ten different states. In each case, courts have found that such restrictions infringe on First Amendment rights by reducing the amount of political speech available to initiative supporters.

A 2008 decision by a unanimous three judge panel of the federal 10th Circuit Court of Appeals struck down an Oklahoma law mandating that petition circulators be state residents, concluding that "the record does not support the district court's conclusion that non-resident circulators as a class engage in fraudulent activity to a greater

degree than resident circulators."

The vast majority of the verified cases of fraud or forgery (during this period) were reported by states that limited petition circulation to state residents (Idaho, Maine, Ohio, North Dakota), and/or banned payments to petition circulators based on the number of signatures they collect (Ohio, North Dakota). Only Nebraska, with a single instance of fraud, had neither a residency requirement nor a ban on per-signature payments during this period. (Nebraska now has both laws, passed by its unicameral legislature in 2009.) These two restrictions are popular "reforms" enacted by state legislators to prevent fraud, but both have been found unconstitutional in a number of federal courts, and now appear to correlate with increased fraud.

Very few resources have been devoted to enforcing laws against fraud and very few prosecutions have taken place.
— Federal Judge Philip Brimmer

An astonishing 94 percent of verified cases of fraud (16 of 17) concerned state residents, not circulators from another state. Additionally, the state with the most fraud convictions — North Dakota — prohibits paying petition circulators by the signature. A pay-per-signature ban in Ohio — which also had several fraud cases — was ruled unconstitutional in 2008. Whether this correlation means that residency requirements and restrictions on per-signature pay tend to increase fraudulent behavior, it certainly seems clear that these legislative measures do little if anything to reduce such activity.

More research needs to be done, but thus far the evidence indicates that verified fraud or forgery is simply not at all pervasive in initiative or referendum petitions. Moreover, enforcing existing laws against fraud and forgery is likely to be a far more effective approach than legislation that has already been enacted or is being debated in many initiative petition states.

What is Petition Signature Fraud?

Twenty-six states allow citizens to place state laws, people's veto referendums or amendments to the state constitution on their statewide ballot by collecting a sufficient number of signatures from registered voters on a petition. By signing such a petition, a voter simply indicates that he or she would like the opportunity to have a statewide vote on the matter.

Even with public support, qualifying a ballot measure through the petition process is difficult, requiring tens of thousands of voter signatures in the smallest population states and hundreds of thousands in larger states — over a million total signatures are usually submitted to state officials to secure a proposition's place on the ballot in California and Florida.

By requiring a certain minimum number of signatures before placing a question on the ballot, state governments ensure that only issues with a reasonable degree of public interest appear on the ballot. But signature requirements are high enough that the vast majority of attempts to put questions on statewide ballots by petition fail to garner enough signatures.

When petition fraud or forgery occurs, it can deceive state officials into believing

there is more support for a question appearing on the ballot than is actually the case. It can also mislead initiative proponents into believing they have enough valid signatures on a petition, when they do not, potentially undermining the success of their campaign. Even when initiative supporters catch signatures they believe are fraudulent, they have often already paid for them and are thus still defrauded.

Therefore, it is in the interest of state governments, voters and initiative leaders to establish clear rules and open, transparent and diligent enforcement of those rules against fraudulent activity.

If fraud is occurring, authorities should be making full use of the existing laws to go after the perpetrators.

It is important, however, to distinguish *alleged* fraud from *actual* fraud. An allegation must not be equated with a conviction.

Oftentimes, the F-word is misapplied to mix-ups in paperwork, to obtaining more invalid signatures than usual, or to accidental violations of petition laws that cannot qualify as attempts to deceive elections officials about the validity of signatures. These are, instead, honest mistakes, not attempts to defraud.

Examples of fraudulent actions include forging signatures, paying voters to sign, coercing voters into signing, and tricking people into signing a petition. It is also fraud to fill out a legal petition form in a purposely dishonest, misleading way — whether done by a petition circulator or a notary public or a campaign worker.

Forging a signature on a ballot petition or fraudulently collecting a signature is a purposeful attempt to deceive elections officials or initiative proponents into accepting a signature as that of a registered voter who supports the issue in question appearing on the ballot, when that is untrue.

Method

Every one of the 26 states that have some form of statewide initiative or referendum has laws against forgery of petition signatures or fraud in the process. The best way to measure the extent of the problem is to discover the number of verifiable instances of fraud, i.e. those prosecuted *and convicted* under these laws.

If fraud is occurring and authorities rightly seek to combat it, they should be making full use of the existing laws to go after the perpetrators.

Using state open records, or "Sunshine" laws, Citizens in Charge Foundation sent a formal request to officials in the 26 states with an initiative and/or referendum process and asked for the following information:

> *"Pursuant to the state open records law, [citation of open record statute], I write to request access to and a copy of records of any and all instances in which your office and a court of law have verified forgery or fraud of signatures submitted for initiatives and referenda between 1999-2008. I would also like to know how many total signatures for initiatives and referenda were submitted for each year during the same time period. If your agency does not maintain these public records, please let me know who does and include the proper custodian's name and address."*

Because states differ as to which office is responsible for verifying signatures or prosecuting election crimes, Citizens in Charge Foundation sent requests to both Secretaries of State and Attorneys General. In some cases, those offices then referred us to others, such as state boards of elections or local officials, who would likely retain records of petition signature fraud.

In order to differentiate between instances where fraud was merely alleged and where it had actually been proven, we used the justice system as our guide. By asking for instances where a court of law had verified the fraud — i.e., had found someone guilty — Citizens in Charge Foundation focused only on instances where state fraud laws were proven to be violated.

To make the survey sufficiently broad, Citizens in Charge Foundation captured data from the 2000, 2002, 2004, 2006 and 2008 election cycles.

Responses

We initially requested records from 52 offices — 26 Secretaries of State and 26 Attorneys General. Forty-six offices sent complete responses as of the time of publication. In three states — Nevada, Oklahoma and Oregon — Secretaries of State failed to provide complete responses.

In four states — Florida, Idaho, Montana, and Ohio — we were referred to county-level authorities, with whom we subsequently filed records requests. In Illinois and Maryland, our requests to the Secretary of State were forwarded to the state Boards of Elections.

The overall response from six states — Florida, Massachusetts, Montana, Nevada, Oklahoma, and Oregon — has been incomplete. Citizens in Charge Foundation is following up with all state and county offices that have not fully responded according to state open record laws, and this report will be updated as additional data is received.

Cases of forgery or fraud have so far been reported in five states — Idaho, Maine, Ohio, Nebraska, and North Dakota — with a total of 17 convictions. California's Secretary of State indicated that investigations were pending, and as such documents could not be obtained under state law.

Many states did not keep full records of the number of signatures that were turned in by various petition campaigns. Several states only count the number of signatures that officials verified — meaning they stop counting once the number needed to qualify a petition is reached. Many states keep records on file for less time than the scope of our inquiry. Very few states count the number of signatures collected for petitions that fail to qualify for the ballot. Therefore, Citizens in Charge Foundation used the best data available from various state officials to ascertain an absolute minimum number of signatures that were collected during the time of our survey. It is reasonable to assume many millions of additional signatures had been submitted during the studied ten years.

Results: A Widespread Lack of Verified Signature Fraud

The responses from state officials showed a widespread lack of signature fraud, with a national average of 1.7 cases per year. Twelve states — Alaska, Arkansas, Arizona, Colorado, Illinois, Maryland, Michigan, Mississippi, Missouri, South Dakota, Utah, and Washington — reported that they had no records of verified forgery or fraud of signatures on petitions. California also

reported no convictions for petition signature fraud, but investigations are ongoing. Records of fraud were returned from five states — Idaho, Maine, Nebraska, Ohio and North Dakota. Two states — New Mexico and Wyoming — did not have any petitions turned in between 1999 through 2008.

Idaho

Idaho's Secretary of State indicated that records of forgery or fraud would lie with the county clerks. With 40 of the 44 counties responding, a total of two fraud convictions have been reported. In both cases those convicted were Idaho residents, and minimum sentences of one year in prison and minimal court costs were imposed.

Maine

The office of the Maine Attorney General indicated that one instance of fraud and aggravated forgery was on file. One individual, a state resident, was convicted of turning in forged signatures in twelve counties for a 2005 initiative. A punishment of 45 days in jail and $25 in costs was imposed upon conviction.

Ohio

Ohio's Secretary of State indicated that the responsibility for verifying forgery or fraud lie with the county boards of election. With 73 of 88 counties responding to the request, a total of six fraud convictions were reported from four counties. In all six cases, the perpetrators were Ohio residents. Fines ranged from $50 to in excess of $1000, and punishments of up to six months in prison for each of multiple counts were meted out. Further, the courts barred some defendants from ever collecting signatures for a petition.

Nebraska

Records of the Attorney General indicate that one individual, a resident of the state, was convicted in 2005 for placing two signatures "other than her own" on two different petitions. A fine of $400 ($200 per offense) was imposed.

North Dakota

North Dakota's Attorney General returned records on seven verified cases of forgery and fraud on initiative petitions from 2006 and 2008. Six of the individuals convicted were state residents; the other one was from Minnesota. Penalties included probation, fines and court costs in excess of $1000, and one individual was restricted from owning firearms.

Putting the F-word in Perspective

Citizens in Charge Foundation has received substantial responses to our open records requests from 20 of the 26 states surveyed. During the ten years between 1999 and 2008, the responses document at least 81,635,847 petition signatures were submitted to election officials and there were 17 verifiable cases of petition signature fraud. All 17 fraud convictions took place in just five of those 20 states, with three-fourths of the states reporting no instances of fraud related to initiative petitions.

Citizens in Charge Foundation will continue to collect data from several states, and more cases of verified fraud may be returned. However, with most of the data reported and most states having no cases of verified fraud or forgery, it seems clear that the F-word has been overused.

Status of Study on Verified Signature Fraud

State	Compliance SoS	Compliance AG	Status
Alaska	✓	✓	Fully responded with no reports of fraud
Arizona	✓	✓	Fully responded with no reports of fraud
Arkansas	✓	✓	Fully responded with no reports of fraud
California	✓	✓	Fully responded with no reports of fraud
Colorado	✓	✓	Fully responded with no reports of fraud
Florida	✓	✓	Awaiting responses from county officials
Idaho	✓	✓	37 of 44 counties responded with one instance of fraud
Illinois	✓	✓	Fully responded with no reports of fraud
Maine	✓	✓	Fully responded with one instance of fraud
Maryland	✓	✓	Fully responded with no reports of fraud
Massachusetts	✓		Failed to respond, further request issued to AG
Michigan	✓	✓	Fully responded with no reports of fraud
Mississippi	✓	✓	Fully responded with no reports of fraud
Missouri	✓	✓	Fully responded with no reports of fraud
Montana	✓	✓	23 of 56 counties responded with no reports of fraud
Nebraska	✓	✓	Collecting data from county officials
Nevada			Failed to respond, further request issued to AG and SoS
New Mexico	✓	✓	Fully responded with no reports of fraud
North Dakota	✓	✓	Fully responded with no reports of fraud
Ohio	✓	✓	73 of 88 counties responding with five instances of fraud
Oklahoma			Failed to respond, further request issued to AG and SoS
Oregon		✓	Failed to respond, further request issued to SoS
South Dakota	✓	✓	Fully responded with no reports of fraud
Utah	✓	✓	Fully responded with no reports of fraud
Washington	✓	✓	Fully responded with no reports of fraud
Wyoming	✓	✓	Fully responded with no reports of fraud

Citizens in Charge FOUNDATION

July 2010

Is the "F-word" Overused?

A *Truth in Governance* Report on Petition Signature Fraud

Signature Fraud: State-by-State

Alaska

0 cases of fraud reported

783,582 signatures processed

Status: Fully Responded

In response to our inquiry about forgery or fraud, both the Office of the Lieutenant Governor and the Attorney General indicated that after extensive searches of both offices no records of forgery or fraud were found.

Arkansas

0 cases of fraud reported

1,021,879 submitted

Status: Fully Responded

In response to our inquiry about forgery or fraud, the Secretary of State indicated that they did not have records of verified fraud on file. The Attorney General indicated that his office does not maintain any records that fall within the description we seek.

Arizona

0 cases of fraud reported

7,911,726 signatures submitted

Status: fully responded

In response to our inquiry about forgery or fraud, Arizona's Secretary of State indicated that any such records would be with the Attorney General, and the Attorney General indicated that if any records existed they would be with that Secretary of State.

California

0 cases of fraud reported

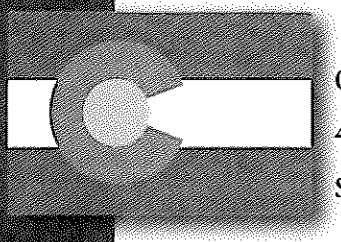
26,541,044 signatures verified

Status: Fully Responded

In response to our inquiry about forgery or fraud, California's Secretary of State informed us that they did have records responsive to our request, but those records were part of an ongoing investigation by the Secretary's Election Fraud Investigation

Unit and as such were exempt from public records law. Citizens in Charge Foundation is following up with the Election Fraud Investigation Unit to determine if charges will be filed related to incidents of fraud during the time we surveyed. The Attorney General indicated the records of fraud would not be housed with the Department of Justice.

Colorado



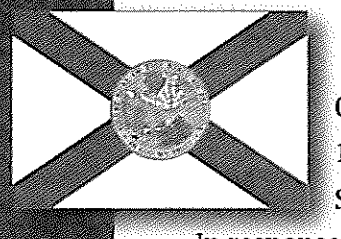
0 cases of fraud reported

4,913,257 signatures submitted

Status: Fully Responded

In response to our inquiry about forgery or fraud, the Secretary of State gave the following reply: "Our office has not identified any 'instances in which [this] office and a court of law have verified forgery or fraud of signatures submitted for initiatives and referenda between 1999-2008.'" The Attorney General's office indicated that they would not be the custodian of such records.

Florida



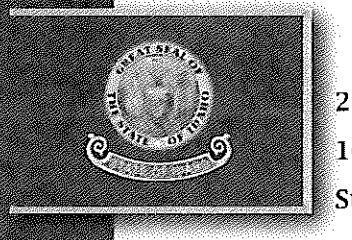
0 cases of fraud reported

10,349,730 signatures submitted

Status: Awaiting further data

In response to our inquiry about forgery or fraud, the Secretary of State indicated that if any such records did exist they would be housed with county elections supervisors. Citizens in Charge Foundation in the process of contacting election supervisors in Florida's sixty-seven counties. Florida's Attorney General indicated that they were not the custodian of the records we are seeking.

Idaho



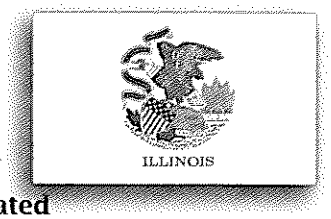
2 cases of fraud reported

161,276 signatures validated

Status: 37 out of 44 counties responded

In response to our inquiry about forgery or fraud, the Secretary of State indicated that records of any instances of forgery or fraud of signatures submitted would be maintained by the county clerks. We forwarded our request on to Idaho's 44 county clerks, 37 of which had responded at the time of publication. Records of two fraud convictions were returned. In both cases the convicted were Idaho residents, and minimum sentences of one year in prison and minimal court costs were imposed. The Attorney General had no documents related to verified forgery or fraud.

Illinois



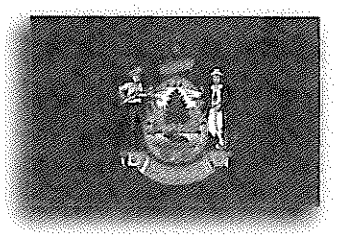
0 cases of fraud reported

444,226 signatures validated

Status: Fully Responded

In response to our inquiry about forgery or fraud, the Secretary of State gave the following response: "Neither the State Board of Elections nor a court of law in Illinois has ever verified such forgery or fraud of signatures for initiatives and referenda between those years." The Attorney General indicated that such records would not be maintained in that office.

Maine

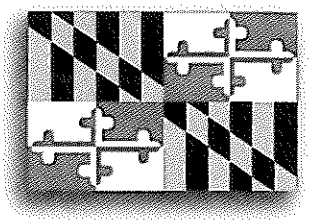


1 instance of fraud

Status: Awaiting further data

In response to our inquiry about forgery or fraud, the Attorney General was only able to identify only one case responsive to your request in which a Maine court ruled that voter signatures on a citizen initiative petition had been forged. At the time of publication Maine's Secretary of State had not responded to our request.

Maryland



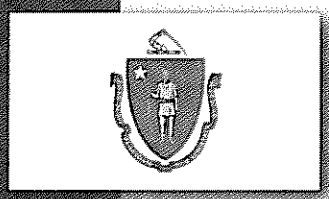
0 cases of fraud reported

Status: Fully Reported

Maryland's Secretary of State forwarded our inquiry about forgery or fraud to the state

Board of Elections, who's Director of Election Management said that "To the best of my knowledge the state Board of Elections has never referred any petition signatures to prosecuting authorities." The Attorney General indicated that their office was not the custodian of those records.

Massachusetts



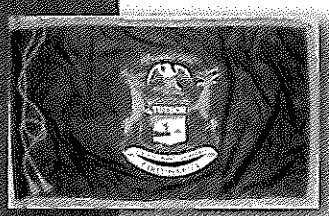
0 cases of fraud reported

2,675,794 signatures filed

Status: Awaiting further data

In response to our inquiry about forgery or fraud, the Secretary of State indicated that their office did not have the jurisdiction to pursue fraud cases, and that any records of verified forgery or fraud would be with the Attorney General. Despite multiple attempts to contact Massachusetts's Attorney General, we have not received a response at the time of publication.

Michigan



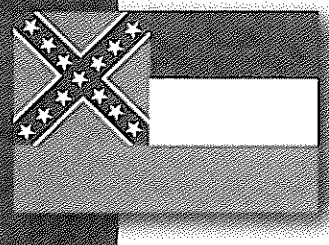
0 cases of fraud reported

7,453,341 signatures filed

Status: Fully Reported

In response to our inquiry about forgery or fraud, the Secretary of State said that "To the best of the Department's knowledge, information, and belief, this Department does not possess records under the descriptions given in your request." The Attorney General indicated that after a search of their records they do not poses any documents related to verified fraud.

Mississippi

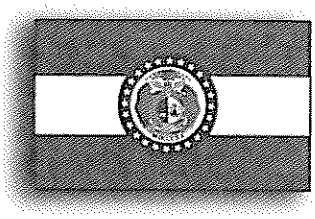


0 cases of fraud reported

Status: Fully Reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that the authority to prosecute fraud lies with the Attorney General. The Attorney General indicated that their office possesses no records of fraud.

Missouri



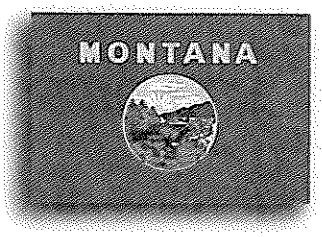
0 cases of fraud reported

2,595,894 signatures submitted

Status: fully reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that their "review did not reveal any instances in which this office and a court of law verified forgery or fraud of signatures submitted for initiatives and referendums between 1999-2008." The Attorney General's office indicated that they had no records of fraud.

Montana



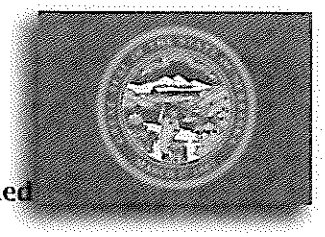
0 cases of fraud reported

540,691 signatures submitted

Status: 23 out of 56 counties reporting

In response to our inquiry about forgery or fraud, the Secretary of State indicated that the any records of fraud would be held by the county elections officials. At the time of publication 23 of the state's 26 counties had responded with no reports of verified fraud. The Attorney General indicated that they did not have any records responsive to our request.

Nebraska

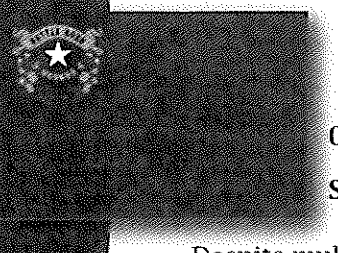


1 case of fraud reported

1,381,305 signatures turned

Status: Fully Reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that their office does not prosecute any criminal activity. The Attorney General was only able to find one instance of verified forgery or fraud on a petition.

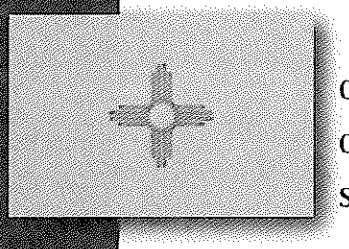


Nevada

0 cases of fraud reported

Status: Awaiting further data

Despite multiple attempts to contact Nevada's Secretary of State, we have not received a response at the time of publication. Nevada's Attorney General sent a letter indicating their intention to complete the request, however at the date of publication the Attorney General had not fulfilled our request.



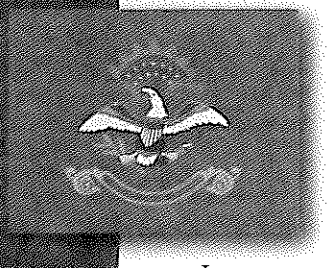
New Mexico

0 cases of fraud reported

0 signatures turned in

Status: fully reported

New Mexico's Secretary of State indicted that no petitions for referendum (New Mexico does not have any form of initiative) had been received by the state between 1999 and 2008.



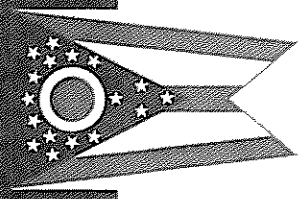
North Dakota

7 cases of fraud reported

209,799 signatures submitted

Status: Fully Reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that there had been two instances of fraud during the time period in question, and that records would be housed with the Attorney General. The Attorney General provided records indicating a total of seven prosecutions for petition fraud.



Ohio

5 cases of fraud reported

2233224 signatures submitted

Status: 74 of 88 counties reporting

In response to our inquiry about forgery or fraud, the Secretary of State and Attorney General indicated that under Ohio law, county boards of election verify signatures. With 74 of the state's 88 counties reporting, five cases of fraud have been identified.

Oklahoma

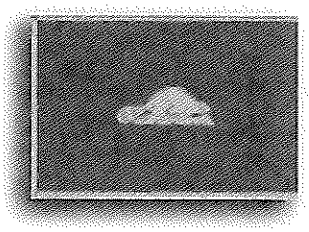
0 cases of fraud reported

1403709 signatures submitted

Status: Awaiting further data

Both Oklahoma's Attorney General and Secretary of State returned replies that did not answer or address our request for records of forgery or fraud in their offices, and follow up requests are being sent.

Oregon

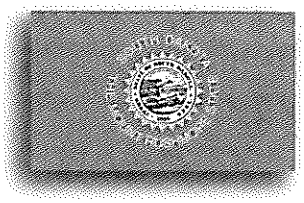


0 cases of fraud reported

Status: Awaiting further data

In response to our inquiry about forgery or fraud, the Attorney General gave the following indicated that the Department of Justice is not the custodian of the records. At the time of publication Oregon's Secretary of State had not completed fulfillment of our request.

South Dakota



0 cases of fraud reported

122738 signatures submitted

Status: Fully reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that their office did not have any such records on file. The Attorney General replied that "This office does not have any record of verified forgery or fraudulent signatures submitted for initiatives and referendums between 1999-2008."

Utah

0 cases of fraud reported

437,006 signatures verified

Status: Fully Reported

In response to our inquiry about forgery or fraud, the Office of the Lieutenant Governor indicated that they had no records of verified forgery or fraud. The Attorney General replied that "I have been unable to find any records within the Attorney General's Office that fit within your request. Nor am I aware of any other agency that has such records."

Washington

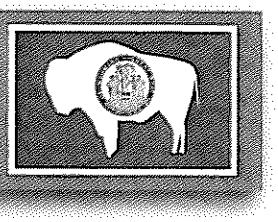
0 cases of fraud reported

9,909,602 signatures submitted

Status: Fully reported

In response to our inquiry about forgery or fraud, the Secretary of State said that "We have found no verified forgery or fraud for initiatives or referendums." The Attorney General indicated that any such records would be housed by the Secretary of State.

Wyoming



0 signatures submitted

0 cases of fraud reported

Status: Fully reported

In response to our inquiry about forgery or fraud, the Secretary of State indicated that there had been no signatures turned in during that time. The Attorney General indicated that his office had never even investigated allegation of signature forgery or fraud: "We have found no record of any investigated allegation of signature forgery or fraud in citizens' initiatives or referenda during the time period 1999-2008."

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