IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHLEEN MURPHY JONES; JEFFREY W. STEMPEL; SARI AIZLEY; AND RICHARD W. MYERS,
Petitioners,
vs.
DEAN HELLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF NEVADA,
Respondent.

No. 43940

FILED

SEP 18 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus seeks to remove Question 3, the "Keep Our Doctors In Nevada" (KODIN) initiative, from the ballot for the November 2004 general election. The petitioners assert that the condensation and explanation prepared by the Secretary of State do not adequately, fairly and sufficiently describe the initiative and its ramifications, that the argument and rebuttal in support of the initiative contain factual inaccuracies and misleading statements that the Secretary should have rejected, and that the fiscal note for the initiative does not accurately state the financial impact that the initiative will have on the state Medicaid fund.

Question 3's condensation and explanation are facially deficient. The condensation states that the Nevada Revised Statutes would "be amended to limit . . . damages which a plaintiff may recover in an action regarding professional negligence." The explanation states that the initiative would "limit noneconomic damages . . . to $350,000." NRS 41A.031, however, already limits noneconomic damages to $350,000, with two exceptions: gross negligence and exceptional circumstances shown by

clear and convincing evidence.[1] Neither the condensation nor the explanation accurately reflects that, if passed, the initiative would simply remove the two statutory exceptions to the existing $350,000 cap. Additionally, the explanation does not mention that third parties, such as Medicaid, private insurance, or workers' compensation, would no longer be permitted to recover expenses paid on behalf of a medical malpractice victim if the measure passes. One effect of this provision would be an increased burden on the state Medicaid fund, which consists of taxpayer dollars. It appears that the average taxpayer would find this information important in determining how to vote on this measure. Further, the explanation fails to apprise voters that joint and several liability has already been abrogated for noneconomic damages and does not indicate that abrogating joint and several liability for economic damages imposes the risk, to the injured plaintiff, of a defendant's nonpayment.[2]

Under NRS 293.250(5), the Secretary must prepare the condensation and explanation, which must be "in easily understood language and of reasonable length," by August 1 whenever feasible. This statutory provision contains no express standards for the Secretary's descriptions. Nevertheless, we have previously recognized that while it might be impossible to include all possible ramifications of a measure in

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[1]NRS 41A.031(2)(a) & (b).

[2]For example, the tortfeasor could have insufficient insurance or be judgment proof.

the explanation, the explanation should not omit pertinent information so as to become misleading.[3]

In addition, other courts reviewing similar parts of a ballot's language have held that this language must be neutral or impartial and must fairly summarize the key provisions of the initiative.[4] For example, the Ohio Supreme Court has held that the obligation to summarize an initiative implicitly requires an accurate summary.[5] If all aspects of a measure cannot be included because of length restrictions, then the summary must at least indicate that additional effects exist so that voters are aware that they need to look further for full information.[6] But the summary need not be exhaustive or contain the best language possible. According to the Missouri Court of Appeals, the important test is whether the language fairly and impartially summarizes the purposes of the

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[3]Nevada Judges Ass'n v. Lau, 112 Nev. 51, 59-60, 910 P.2d 898, 903-04 (1996).

[4]See Fairness & Acct. in Ins. Reform v. Greene, 886 P.2d 1338, 1346-47 (Ariz. 1994) (holding that the relevant statute required an "impartial" summary); Thirty Voters of Cty. of Kauai v. Doi, 599 P.2d 286, 289 (Haw. 1979) (holding that to be sufficient, the ballot must neither mislead nor advocate, but simply state the question clearly); Ward v. Priest, 86 S.W.3d 884, 891 (Ark. 2002) (stating that language must be intelligible, honest and impartial, must give voters a fair understanding of the issues presented and the scope and significance of the proposed changes, must "be free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issues presented," and cannot omit material information that "would give the voter serious grounds for reflection").

[5]Christy v. Summit Cty. Bd. of Elections, 671 N.E.2d 1, 4 (Ohio 1996).

[6]See Carson v. Myers, 951 P.2d 700, 704 (Or. 1998).

measure, so that the voter is not deceived or misled.[7] In addition, the burden is on the objector to demonstrate that the language is insufficient.[8]

We agree with these courts that, while perfection is not demanded, the language used must fairly and accurately summarize the initiative's key provisions so that the voters are informed and not misled. In this case, petitioners have demonstrated that the Secretary's condensation and explanation actually misinform the voters about the law that is subject to being changed and about what may occur if the initiative is approved. Consequently, these descriptions are deficient and cannot stand.[9]

We recognize that election laws must be liberally construed to effectuate the will of the electors,[10] and we appreciate the importance and "great political utility in allowing the people to vote" on a measure.[11] In this instance, however, in light of the misleading statements in the Secretary's condensation and explanation, the electors' will could be subverted on an important ballot question. Allowing a defectively

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[7]Bergman v. Mills, 988 S.W.2d 84, 92 (Mo. Ct. App. 1999); see also Ward, 86 S.W.3d at 891 (noting that language is sufficient if it fairly alleges the general purposes of the initiative and contains enough information to sufficiently advise voters of the proposal's true contents).

[8]Bergman, 988 S.W.2d at 92; Ward, 86 S.W.3d at 891.

[9]Nevada Judges Ass'n, 112 Nev. at 59-60, 910 P.2d at 903-04; Choose Life Campaign '90' v. Del Papa, 106 Nev. 802, 807, 801 P.2d 1384, 1387 (1990).

[10]NRS 293.127(1)(c).

[11]Las Vegas Chamber of Commerce v. Del Papa, 106 Nev. 910, 917, 802 P.2d 1280, 1282 (1990).

presented ballot question to proceed through the election process would serve no public or political good.[12] In the past, we have acted to remedy deficient ballot language, and we conclude that it is appropriate to do so now.[13]

We are aware that, given the short amount of time available to prepare ballots for the November 2004 election, our order places a burden on election officials throughout the state. Unfortunately, the Secretary of State has contributed to the instant emergency. First, the Secretary had a duty to accurately explain KODIN's effects. He did not do so. Second, he had a duty to prepare his explanation and condensation by August 1, if feasible.[14] KODIN's scheduled appearance on the November 2004 ballot has been public information since June 2003; it was certainly "feasible" for the Secretary to complete his explanation and condensation by August 1, 2004, the statutory deadline. Had he met the first duty, this petition could have been summarily denied. Even if he had met his second duty, the admittedly large burden placed on the election officials who must now print a revised ballot in a shortened time frame would have been avoided because the timing of our order would not have impacted the ballot's printing schedule. We regret the predicament that election officials across the state now face.

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[12]Inasmuch as the other arguments asserted in the petition concern disputes over factual accuracies, this court is an inappropriate forum to address these issues. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

[13]See Nevada Judges Ass'n, 112 Nev. at 60-61, 910 P.2d at 903-04; Choose Life, 106 Nev. at 807, 801 P.2d at 1387.

[14]NRS 293.250(5).

Accordingly, we grant the petition in part. The clerk of this court shall issue a writ of mandamus compelling the Secretary of State to either (1) revise the condensation and explanation of ballot Question 3 so that they accurately reflect the proposed changes to Nevada law, if he determines that these revisions can be made in time to print the ballot, or (2) strike Question 3 from the 2004 ballot.[15]

It is so ORDERED.

Becker, J.
Becker

Gibbons, J.
Gibbons

Douglas, J.
Douglas

cc: Bradley Drendel & Jeanney
Gillock Markley & Killebrew
Robert H. Perry
Attorney General Brian Sandoval/Carson City

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[15]See, e.g., Eastmoore v. Stone, 265 So. 2d 517, 520 (Fla. Dist. Ct. App. 1972) (pointing out that mandamus lies to compel Secretary of State to perform his or her duties in compliance with the law); Fairness, 886 P.2d at 1348-49 (issuing writ of mandamus directing legislative council to draft impartial analysis); accord Redl v. Secretary of State, 120 Nev. ___, 85 P.3d 797 (2004).

SHEARING, C.J., with whom ROSE, J., joins, concurring in part and dissenting in part:

Although I agree with the majority's decision to direct the Secretary of State to either correct the inaccuracies in his condensation and explanation or remove Question 3 from the ballot, I would also direct the Secretary of State to either correct the inaccuracies in the arguments or leave them off the ballot altogether.

Although NRS 293.252 establishes that volunteer committees are responsible for preparing arguments in favor of or opposed to the ballot measure, the Secretary of State is required to review these arguments and to reject any factually inaccurate or libelous statements.[1] Additionally, the Secretary of State may revise the committee's language so that it is "clear, concise and suitable for incorporation in the sample ballot."[2] The voters are entitled to a clear, concise, and factually accurate argument for and against the initiative. The arguments of the proponents are being challenged in this case as being factually inaccurate. Most of the arguments put forth by the proponents are pure hyperbole. Many of the arguments are specious, extravagant, and misleading. The Secretary of State did not exercise his duty to correct the arguments.

The voters of Nevada are entitled to better information when they are called upon to make important decisions regarding the law and public policy of this state. Therefore, I would grant the petition for a writ of mandamus and require the explanation to be corrected or Question 3 to be removed from the ballot. I would also require that the arguments in

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[1]NRS 293.252.

[2]NRS 293.252(8).

support of and in opposition to the initiative be either deleted or corrected so that they are factually accurate. We are told that the ballots are being printed and that it is too late to make changes. Even if it is too late to make changes, it is not too late to delete Question 3 from the ballot. Since the Legislature set a target date of August 1 for the completion of the ballot statements and this completion was not accomplished until the beginning of September, it is disingenuous for the Secretary of State to argue that now it is too late for changes.

_____, C.J.
Shearing

I concur:

_____, J.
Rose

AGOSTI, J., concurring in part and dissenting in part:

I concur in part. I agree that the Secretary of State ought to be required to revise the explanation that accompanies the KODIN initiative ballot question because, as written, it is deficient. It must, even at this late date, be changed so that it is accurate, impartial and disinterested. The logistics and time difficulties that exist for correcting the sample ballots should not trump the need to correct substantial and misleading inaccuracies in the explanation meant to neutrally inform Nevada voters. For the sake of the publication of ballots in a timely fashion, the voters should not be misinformed.[1]

The explanation's current language deprives the voters of an adequate appreciation of some fundamental issues implicated by the KODIN initiative when they decide these issues with their vote. One might say that such is the nature of popular elections that we are never fully aware of all the issues. However, in this case, the Secretary has a duty to be accurate and informative in explaining the legal consequence of an initiative.[2] Necessarily, the explanation must be disinterested and

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[1]I do not imply either a motive of partiality or a neglect of duty on the part of the Secretary by joining the majority on this issue or by commenting here on my own assessment of the explanation in question. To be sure, the Secretary's explanation, as written, embodies his attempt to discharge his obligation to provide an explanation of reasonable length concerning a measure that addresses, as observed by Justice Maupin, some of the most difficult and complex legal doctrines existing in law, and the many substantial public policy considerations behind them.

[2]Nevada Judges Ass'n v. Lau, 112 Nev. 51, 59-60, 910 P.2d 898, 903-04 (1996); see NRS 293.250(5); see also Fairness & Acct. in Ins. Reform v. Greene, 886 P.2d 1338, 1346-47 (Ariz. 1994).

impartial.[3] This was not accomplished.[4] Additionally, as noted by the majority, the Secretary instigated the delay. He was to complete his task by August 1. This was not accomplished. Petitioners also delayed, but only in the sense that two weeks amounts to delay given the time constraints imposed by the pending election date. Unlike the Secretary, Petitioners are under no legal obligation to file a petition with this court by a date certain.

We quibble when we weigh the question of which party bears the greater fault for the no-win situation that now exists. This court's options are limited and all are bleak. Each choice is a Hobson's choice. If the ballots go out as currently written, the voters may not know the legal consequences of their vote on the KODIN initiative, because the Secretary's explanation leaves them misinformed. If this court orders the explanation to be rewritten, the potential for havoc on the entire election

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[3]It is for the proponents and opponents of the measure to argue the merits. NRS 293.252(5)(d).

[4]For example, the explanation fails to inform the public that $350,000 caps already exist to limit compensation to tort victims for their noneconomic losses. These caps are subject to two exceptions: a tort victim may receive more if a jury finds by clear and convincing evidence presented at trial that the tortfeasor has committed gross malpractice or if the jury finds by clear and convincing evidence presented at trial exceptional circumstances to justify an award in excess of the cap, all per NRS 41A.031. By failing to inform the public that this restraint against excessive jury awards currently exists in the law, the Secretary suggests that the initiative creates a power to limit noneconomic damages, implying that this power does not currently exist in law. As noted by the Arizona Supreme Court in Fairness & Accountability in Insurance Reform v. Greene, 886 P.2d 1338 (Ariz. 1994), "[a] disinterested analysis would not suggest the creation of a power that already exists."

process is very real. This concern implicates not just the KODIN question, but every national, statewide and local race and question because they all appear on the same ballot. If we offer the Secretary the option of rewriting or pulling the question and he elects to pull the question, we nullify the process and arduous work it took to get the initiative on the ballot. In effect, we punish the voters for the human mistakes that brought us to this perilous point. Not one of these options is palatable. The court has been placed in the position of having to respond at the point when the issues are at critical mass and therefore we must do so swiftly, so swiftly that we are without the benefit of the measured and thoughtful review these issues warrant.

In the end, the majority chose the path of apparent least harm. I cannot quarrel with the first aspect of that choice and so I concur. But I do so with no enthusiasm and with the gnawing sense that if the Secretary must at this late date clarify the language of the explanation, the public is being cheated by the havoc that is certain to follow as all affected entities scramble to address the hardships imposed by the new deadlines for printing new ballots. I do quarrel with the other aspect of that choice.[5] I dissent with the certainty that if the question is pulled from the ballot, the voters are being cheated.

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[5]The majority has not addressed Petitioner's complaint that the arguments in favor of passage are inaccurate. Chief Justice Shearing would have those revised as well. I disagree with Chief Justice Shearing on this point as I believe the voters will understand the arguments printed in the sample ballot for and against passage of the initiative are advocacy and will evaluate them as such.

First, they will be deprived of their constitutional right to vote on the initiative in the upcoming election.[6]

Second, I am not certain if the majority intends to defer the question to 2006, at the Secretary's option, or dismiss the question entirely, at the Secretary's option. Dismissing the question in its entirety is purely unacceptable. By deferring the question until the 2006 election, many new legal issues will come into play. For example, the 2003 Legislature took no action on this measure, which is how it ends up on the ballot this year.[7] We enter uncharted territory when we turn over to a newly composed 2005 Legislature the opportunity to ignore the measure, pass it or modify it. If the 2005 Legislature does nothing, the measure will return to the ballot posed as the same question that is now pending. Other than the unacceptability of waiting two years to vote on this question, this would not be such a bad result. But if the 2005 Legislature modifies the measure, one wonders, does the initiative return to the ballot in 2006 as the pure question that it is now, or as a choice between it and the modified version passed by the Legislature in 2005.[8] After all, the 2005 Legislature is not the one contemplated by the Constitution to respond to the initiative.

Third, those who signed the petition which created this initiative had every right to expect that if the 2003 Legislature did not adopt the measure, it would be placed on the ballot in November, 2004.

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[6]Nev. Const. art. 19, § 2(1).

[7]Id., § 2(3).

[8]Id.

Fourth, while this court may strike the language of the explanation if it falls short of the statutory mark, I do not relish the implication that this court or any court will become the supervisor of the Secretary's work. We are to return the explanation to the Secretary. We may tell him to clarify the language. We must presume that in short order he will discharge his legal duty and craft an appropriate explanation. We should not expect, the parties should not expect, and the public should not expect this court to peer over his shoulder and micro-manage his responsibilities. We must trust him to do his job in a timely fashion so the question can be presented to the voters in November.

Nevadans, in my opinion, are better served if the question appears in November 2004, accurately explained by the Secretary. I disagree with giving the Secretary the option of pulling the question altogether. I believe that path leads to too much mischief.

Agosti, J.
Agosti

MAUPIN, J., dissenting:

While the Secretary of State's condensation and explanation of the "Keep Our Doctors in Nevada" initiative should be clarified, the petitioners and the Secretary have left us with insufficient time to craft a remedy that adequately addresses the deficiencies, which are either noted by the majority or noted below by me. Any relief at this point will inevitably and seriously disrupt the process of printing and mailing election ballots to Nevada voters. Accordingly, we should deny this petition. Most importantly, we should not alternatively order that the initiative be removed from the ballot.

At the outset, I wish to stress that the Secretary was faced with providing an explanation of "reasonable length" of a measure that addresses some of the most difficult and complex legal doctrines in the law, and the myriad public policy considerations behind them. Having said that, I agree that the Secretary's explanation falls considerably short in several respects. First, as stated by the majority, the explanation inaccurately implies that the measure, if passed, creates a limitation upon non-economic damages in medical malpractice cases. Instead, the initiative seeks to eliminate statutory exceptions to an already existing limitation. Second, the explanation only obliquely discusses the initiative's proposals to eliminate joint and several liability of multiple defendants in medical malpractice cases, and to allow malpractice defendants to admit evidence that the plaintiff has received benefits from a collateral source. The voter is not clearly advised of the implications of abrogating joint and several liability in these matters, including that the measure allows a physician found liable for malpractice to avoid payment of damages that he or she has in part caused. Further, the voter is not

advised in the condensation and explanation that the abrogation of the collateral source rule does not in any respect prevent double recovery. The problem is that an adequate discussion of this highly complex ballot initiative cannot be provided for inclusion on the ballot in time to deal with the overarching consideration in such matters, which is that the people of this state get to make their choice.

We should not, in any case, order that the measure be striken from the ballot in the event the Secretary is unable to amend the condensation and explanation in time for printing. As stated by the majority, "election laws must be liberally construed to effectuate the will of the electors." That the editorial explanations and arguments may be misleading does not prevent the citizens of the state from reading the measure itself and obtaining information for and against it. I am acutely aware of the complexity of the choices facing the voters in connection with this particular initiative. Notwithstanding these complexities and the problems presented via this petition, the initiative must stand or fall within the crucible of the election process.

Maupin, J.

Maupin