

# Staff Study on Elections

Legislative Counsel Bureau

Bulletin No. 09-10

January 2009

# LEGISLATIVE COMMISSION'S STAFF STUDY ON ELECTIONS

**BULLETIN NO. 09-10** 

**JANUARY 2009** 

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#### I. <u>INTRODUCTION</u>

During the 2007 Session of the Nevada Legislature, the Assembly Committee on Elections, Procedures, Ethics, and Constitutional Amendments (EPE&CA) considered several proposals for changes to Nevada's election laws. Committee members believed many of the ideas may have had merit but were not prepared to approve any proposals without further study. As a result, Chairwoman Ellen M. Koivisto drafted a letter requesting that the Legislative Commission approve a study of certain elements of Nevada's election system to be conducted by staff of the Legislative Counsel Bureau (LCB) during the 2007-2008 Interim (Appendix A). The Legislative Commission unanimously approved the study request.

In her letter, Chairwoman Koivisto specifically asked that staff be directed to study Nevada's requirements concerning voter registration and identification as well as the conduct of elections, including:

- The use of electronic voting machines;
- Voting by mail;
- Overseas voting; and
- Staffing and operation of polling places.

In addition to these topics, Chairwoman Koivisto requested that staff provide analyses of the arguments for and against two proposals:

- Adoption of election day or same-day voter registration (EDR) legislation, which allows voters to register and vote on election day; and
- Adoption of legislation to enact the National Popular Vote for President (NPV) plan.

There are currently nine states that offer some form of EDR, but legislation for its implementation has also been defeated in several states. Since 2006, the NPV proposal has been introduced in legislatures across the country with mixed results.

This study primarily examines how Nevada's statutory provisions in the areas identified above compare with those in other states. Where a comparative approach is impractical, information has been gathered from a variety of sources offering differing views on a subject in order to provide the Legislature with as full a picture of the issues as possible.

Research for the study was conducted from September 2007 through January 2009 to allow for consideration of the results of the 2008 General Election. With the approval of Chairwoman Koivisto, publication of this report was held until the conclusion of the 2009 Legislative Session in order to include any relevant changes to election law approved

by the Legislature during the Session. Where appropriate, the reader will find updates to the report resulting from legislative action under the heading "Postsession Update."

Following an "Executive Summary," Part III provides a brief overview of relevant federal and State election law. Part IV examines voter registration and identification requirements, including a discussion of EDR. Part V is devoted to the conduct of elections in Nevada. Part VI addresses the NPV plan, and Part VII reviews the status of Nevada's signature gathering requirements for statewide initiative and referendum (I&R) petitions. To conclude, the report offers some general observations on the future of elections in Nevada.

#### **Disclaimer**

It is important to note that the LCB is a nonpartisan agency and that, as such, LCB staff members do not advocate for or against any issue, position, or ideology. The purpose of this report is to present information in an unbiased manner so that legislators may make better informed decisions regarding the subjects addressed herein.

#### II. EXECUTIVE SUMMARY

Early in the run-up to the 2008 General Election it became clear that voters were about to take part in a hotly contested election that was expected to generate very high voter turnout. These expectations, coupled with memories of irregularities experienced in various parts of the country during the 2000 and 2004 Elections, raised concern across the country that 2008 would again prove problematic. Concern for voter disenfranchisement and suppression loomed large, as did voter registration fraud and worries of faulty or fraudulent vote counting caused by voting machine tampering or malfunctions. For over a year, the media reported the results of one study after another conducted by both partisan and nonpartisan groups predicting problems on the horizon.

Despite having held largely trouble-free elections in 2000 and 2004, Nevada was not immune from these concerns. The State's newfound status—both as an early predictor of success in the Democratic Party's presidential primary and as an important swing state in the general election—focused national attention on our election system and its administrators.

Both nationally and in Nevada, the General Election of November 4, 2008, went much better than some had predicted. In the Silver State, we experienced only minor, isolated problems that did not significantly impact the conduct of the election or the outcome of any race. Nonetheless, every election season brings to light issues that the Legislature may wish to address in order to ensure that Nevada's election system remains an example of accessibility, reliability, and integrity to which the rest of the country can look for guidance. Following is a brief overview of the issues that arose in 2008 and are analyzed in this study:

- Confusion Regarding the Close of Voter Registration (Nevada Revised Statutes [NRS] 293.5235 and 293.560)—Part IV. A(1) of this report explains concerns surrounding provisions found in Chapter 293 of NRS governing the close of voter registration. The complexity of these provisions create challenges for election officials in communicating clearly to the public the various dates upon which new voter registration materials must be received in order for a voter registration application to be accepted. The deadlines also cause confusion for third parties conducting voter registration drives and for members of the general public who try to ascertain by what date they must complete and submit a voter registration form.
- Third-Party Voter Registration (NRS 293.507 and 293.805)—Part IV. A(3) of this report examines the statutory guidelines for nongovernmental or third-party voter registration drives, including the practices third parties use to employ and compensate employees.
- Statewide Initiative and Referendum Signature Gathering Requirements (NRS 295.012)—Part VII of this report examines the status of Nevada's initiative and referendum signature gathering requirements. In the summer of 2008, the Legislature's most recent effort to craft a fair, representative signature gathering requirement that would survive a legal challenge was overturned in federal court.

# III. OVERVIEW OF RELEVANT FEDERAL AND STATE ELECTION PROVISIONS

#### A. Federal Law

While it is beyond the scope of this study to conduct thorough analyses of federal and State election law, it is useful to provide readers with a brief overview of those statutes that are relevant to understanding how election law is structured.

#### 1. Elections and The Constitution of the United States of America

The *United States Constitution* and amendments adopted over the years govern the qualifications for seeking federal office and for voting, as well as the broad responsibilities and prohibitions federal and state government must observe in granting voting rights and administering elections. Most relevant to this study are constitutional provisions addressing how states are to administer elections, the rights of individual voters, and how the President of the United States is to be elected.

• Manner of Conducting Elections—In establishing the Legislative Branch of federal government, Article 1, Section 4, grants state legislatures the authority to set the "times, places, and manner of holding elections for Senators and Representatives."

- **Election of U.S. Senators**—The Seventeenth Amendment shifted the election of U.S. Senators from state legislatures to the public.
- Electoral College—Article 2, Section 1, and the Twelfth Amendment provide that the President be elected by a group of electors (commonly known as the Electoral College) drawn from each state and the District of Columbia, to equal the number of Senators and Representatives each is granted in Congress. These constitutional provisions are a key element of the discussion found in Part VI of this study regarding the NPV proposal.
- Race and Gender Restrictions—The Fifteenth and Nineteenth Amendments, respectively, removed race and gender restrictions on voting.
- **Poll Taxes**—The Twenty-fourth Amendment outlawed the use of poll taxes as a voting requirement.
- Voting Age—Finally, the Twenty-sixth Amendment lowered the voting age to 18.

#### 2. The Voting Rights Act of 1965

Building on the Fifteenth Amendment, the Voting Rights Act of 1965 put in place further voting protections for minorities and enacted strict federal oversight of election administration, especially in specific areas of the country with a history of minority disenfranchisement.

# 3. The Uniformed and Overseas Citizens Absentee Voting Act of 1986

As its name implies, the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA) requires that states and territories allow members of the United States military and their families, as well as qualified U.S. citizens living overseas, to register and vote absentee in federal elections. States must provide for absentee voting in local elections by these same individuals. The Federal Voting Assistance Program (FVAP) is responsible for implementation and oversight of the UOCAVA.

#### 4. The National Voter Registration Act of 1993

The National Voter Registration Act of 1993 (NVRA), also known as the "Motor Voter Act," sought to increase voter registration and participation by requiring "that individuals be given the opportunity to register to vote or to change their voter registration data when applying for or receiving services or assistance at any office designated as a voter registration agency" (FVAP). For example, uniform voter registration services are provided through motor vehicle departments, disability centers, libraries, and via mail-in registration. The NVRA is also overseen by the FVAP.

#### 5. The Help America Vote Act of 2002

Passed by Congress at least partially in response to the problems experienced during the 2000 Presidential Election, the Help America Vote Act of 2002 (HAVA) is a far-reaching election administration reform measure. The Act's main goals include:

- Replacing outdated punch-card voting systems;
- Creating computerized statewide voter registration lists;
- Allowing for the casting of provisional ballots;
- Improving polling place accessibility for the disabled;
- Creating the federal Election Assistance Commission (EAC);
- Setting minimal voter registration identification guidelines; and
- Improving voting access to military and other overseas citizens.

States are eligible for federal monetary assistance to implement the changes mandated by HAVA, and the measure allows states considerable flexibility in meeting those requirements. Secretaries of State oversee HAVA implementation and must provide the EAC with annual reports on their progress if they are to continue receiving HAVA-related funds. More in-depth information on Nevada's HAVA compliance efforts may be obtained from the office of Secretary of State Ross Miller (<a href="http://sos.state.nv.us">http://sos.state.nv.us</a>; 775-684-5705).

#### B. State Law

#### 1. The Constitution of the State of Nevada

Article 2 of the *Nevada Constitution* addresses the "Right of Suffrage" or the right to vote. Within this broad heading, the various sections address such topics as:

- Voting age;
- Residency requirements;
- The form of voting;
- General voter registration requirements;

- Recall elections; and
- Campaign contribution limits.

Article 4 creates the Legislative Branch of the State government.

Article 5 establishes the Executive Branch. Section 4 of Article 5 sets the guidelines for how votes from general elections are to be turned over to the Secretary of State and canvassed by the State Supreme Court, and for breaking any ties by a vote of the State Legislature.

#### 2. The Nevada Revised Statutes

Nevada's state laws are codified in the NRS and divided into 59 titles, which are further subdivided into some 720 chapters. Title 24 of NRS addresses elections and comprises the following chapters:

- 293—"Elections";
- 293B—"Mechanical Voting Systems";
- 293C—"City Elections";
- 294A—"Campaign Practices";
- 295—"Initiative and Referendum";
- 298—"Presidential Electors and Elections";
- 304—"Election of United States Senators and Representatives"; and
- 306—"Recall of Public Officers."

The chapters of NRS most relevant to this study are 293, 293B, 295, and 298.

#### 3. The Nevada Administrative Code

Regulations developed by State agencies to implement Nevada's statutory provisions are contained in the *Nevada Administrative Code* (NAC). Chapter headings in NAC generally correlate with those in NRS. The *Nevada Constitution*, NRS, and NAC can be accessed online through the Nevada Legislature's website (www.leg.state.nv.us).

# IV. <u>VOTER REGISTRATION AND IDENTIFICATION</u> (NRS 293.485 THROUGH 293.675)

The *U.S. Constitution* requires that a person be at least 18 years of age and a United States citizen in order to vote. In addition to meeting these requirements, Nevada law provides that a person must be a resident of the State and of a certain county for 30 days, and have lived in his precinct for at least 10 days preceding any election, in order to register and vote in that election. A person who will be 18 years old or who will have met the residency requirement at the time of the election is also eligible to register to vote. If a person misses the registration deadline for voting in the upcoming election, he can still register and be eligible to vote in succeeding elections.

There is no legal requirement for election officials in Nevada to verify the validity of every new voter registration application that is turned in to them. However, identification is required in order to register to vote, and anyone who registers voters is bound by both federal and State law to follow certain steps relating to the validity of the registration applications under their control. Falsifying information on or otherwise tampering with a voter registration application is a felony and is subject to strict penalties. An excellent summary of the legal requirements concerning voter registration applications is available on the Clark County Election Department's website (Voter Registration—Unlawful Acts).

In Nevada, an application to register to vote must contain space for the applicant to enter the number of his current and valid Nevada driver's license or the last four digits of his Social Security number if he does not have a driver's license. If the applicant does not have a driver's license or a Social Security number, the applicant must sign an affidavit stating this to be the case, and the county clerk must then assign the applicant a unique number that will identify him on the statewide voter registration list.

In order to register to vote, Nevada law requires that one present some form of "official identification" that provides "proof of his residence and identity" (NRS 293.517). The NAC interprets "official identification" to include many forms of identification, most of which contain a photograph. Many items are accepted as proof of residence (such as a bank statement, property tax statement, or utility bill), most of which do not contain a photograph (NAC 293.395).

The county clerk or registrar is granted discretion to determine the validity of the items offered when proving identity and residence. If a clerk determines that an application is valid, he must send the applicant a voter registration card. If he finds the application to be incomplete, he must send the applicant a letter explaining the deficiency and requesting that the applicant supply the necessary information.

Under the broad heading of voter registration, this section examines voter registration deadlines (including election day or same-day voter registration, online voter registration, and third-party voter registration) and voter identification.

# A. Voter Registration Deadlines

States have the authority to set deadlines by which voter registration must be completed prior to an election. In Nevada, NRS 293.560 prescribes that, except in the case of a special or recall election, "registration must close at 9 p.m. on the third Tuesday preceding any primary or general election." Further, anyone wishing to register to vote during the period beginning on the "fifth Sunday preceding any primary or general election and ending on the third Tuesday preceding any primary or general election" must do so in person at the clerk's office or at another office designated by the clerk. In practice, this statute allows one to register to vote in person for an additional ten days beyond the close of mail-in registration and is designed to ensure that election officials have enough time to receive and process mail-in registrations prior to the close of registration. For 2008, July 12 was the deadline for the Primary Election, and October 4 was the deadline for the General Election for those who registered to vote by mail. The deadlines for in-person registration were July 22 and October 14, respectively. For 2010, May 8 is the deadline for the Primary Election, and October 2 is the deadline for the General Election for those who register to vote by mail. The deadlines for in-person registration are May 18 and October 12, respectively.

In 2005, the Nevada Legislature approved <u>Senate Bill 224</u> (Chapter 504, *Statutes of Nevada*), which provides that, when a voter chooses to register by mail, "if the application is received by the county clerk or postmarked <u>not</u> more than 3 working days after the applicant completed the application," he will be deemed to have registered on the date he completed it (NRS 293.5235, emphasis added). But, if the application is "received by the county clerk or postmarked <u>more</u> than 3 working days after the applicant completed the application," he will be deemed to have registered on the date the clerk received the application (emphasis added). Finally, from the same statute, "an application must be mailed or delivered in person to the office of the county clerk within 10 days after it is completed."

A review of testimony concerning the three working day provision shows that it was intended to help ensure that persons who both filled out a voter registration application and signed an initiative petition at the same time (especially over a weekend or holiday) would become registered voters prior to their signature being verified on the initiative petition. The statute does not, however, include a requirement that petition circulators submit or mail voter registration forms within three working days of completion.

Discussing election laws in Nevada for the purposes of this study, Clark County Registrar of Voters Harvard L. (Larry) Lomax noted that the multiple deadlines and exceptions make it difficult for clerks and registrars to comply with State laws requiring public notice of when registration closes. Equally troublesome is that applicants may unintentionally submit—or allow someone else to submit—their applications too late for them to vote

in an upcoming election. While his office did not track the exact number of applicants who were not able to vote in 2008 as a result of problems related to registration deadlines, Mr. Lomax reports that the number was significant enough for him to believe that the issue should be addressed.

A review of voter registration deadlines (see Appendix B) across the country conducted by the National Conference of State Legislatures (NCSL) demonstrates that a majority of states provide for a single-day deadline ranging anywhere from allowing registration all the way through election day to closing registration as much as 30 days before an election. Several states, however, are similar to Nevada in requiring that mail-in registrations be postmarked earlier than in-person registration must be completed.

Two voter registration models may address these concerns: In 2007 the Legislature considered, but did not approve, election day registration. In 2009, a bill draft request (BDR) proposing EDR was again submitted. Also in 2009, Secretary of State Ross Miller included provisions in his omnibus elections bill (Assembly Bill 82) providing for the creation of an online or Internet-based voter registration system. Both of these options, which may raise other concerns or challenges if implemented, are discussed below.

#### Postsession Update

To address the problems discussed above regarding the close of voter registration, the 2009 Legislature approved Senate Bill 162 (Chapter 295, Statutes of Nevada), which revises voter registration guidelines to provide that an applicant will be deemed registered either on the date the application is postmarked or on the date it is received by the county clerk, whichever is earlier.

This measure also moves the date of Nevada's primary election to the second Tuesday of June in each even-numbered year and revises other pertinent election-related dates accordingly.

#### 1. Election Day Voter Registration

In 2007, the Legislature considered a measure to allow for election day or same-day voter registration. Assembly Bill 506, introduced by the Assembly Committee on EPE&CA, proposed to remove the deadline for registering to vote in an election. The Committee voted to amend the bill to require instead that Nevada's election officials study the feasibility of moving to an EDR system, but no further action was taken on the bill prior to the passage deadline. For the 2009 Legislative Session, the Committee submitted BDR No. 754, which again proposed to remove Nevada's voter registration deadlines. However, this BDR was withdrawn prior to drafting in support of Secretary of State Miller's proposal to move forward with online voter registration.

The following ten states currently offer some form of EDR:

- Maine, Minnesota, and Wisconsin have offered EDR since the 1970s;
- Idaho, New Hampshire, and Wyoming enacted EDR legislation in the 1990s;
- Montana switched to EDR in 2006; and
- Iowa and North Carolina implemented EDR in 2007. North Carolina is unique among these states in that it allows same-day voter registration during its early voting period.

Most recently, in September of 2008, state and federal courts ruled that Ohio must allow same-day registration during its early voting period.

#### **Pros** and Cons

Opponents of election day registration express concerns that EDR increases opportunities for voter fraud and threatens voter roll security. In contrast, advocates report that states where EDR is allowed on average record 10 to 12 percent higher voter turnout rates than states where EDR is not an option. Supporters also cite statistics demonstrating that EDR does not increase opportunities for voter fraud or threaten voter roll security. For example, according to a study conducted by Dēmos, a voter advocacy group that supports EDR, a review of the 2004 Presidential Election conducted in six EDR states found no resulting federal voter fraud convictions.<sup>1</sup>

Similarly, in an editorial appearing in *The New York Times* on May 11, 2007, Secretaries of State Ben Ysursa (R-Idaho) and Matthew Dunlap (D-Maine) wrote:

While opponents are concerned that this option might encourage voter fraud, such crime is exceedingly rare or nonexistent in states that offer Election Day Registration. Citizens of Maine, for instance, have benefitted from same day registration since the early 1970s and no case of voter fraud has ever been attributed to the policy.

Evidence may suggest that EDR does not increase fraud or threaten voter roll security, but it is important to remember that election systems vary widely from one state to another and that what works in one may not work in another. For instance, Clark County Registrar of Voters Lomax has testified before the Legislature that, if Nevada were to enact EDR without revising current voter identification standards, there would be no way for

<sup>&</sup>lt;sup>1</sup> Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security, Lorraine C. Minnite, Dēmos.org

his office to verify the identity of those who registered and voted on an election day until well after the election had taken place.

#### Early Voting Period in Nevada and Election Day Registration

It is also important to note that the majority of states that offer EDR do not allow registration to take place during early voting, choosing instead to keep early voting and EDR separate by requiring that those partaking in EDR do so only at their own precinct polling place and only on election day.

At present, only registered voters can vote early in Nevada and voter registration is not available at early voting centers. Nevada's early voting period has proven popular with the public. In 2008, 46.5 percent of all General Election votes were cast early. The early voting period has also eased pressure on election administrators and voters alike by allowing for the establishment of polling centers at libraries, shopping malls, and supermarkets, none of which are precinct specific. In other words, early voters can vote at any early voting station in their county rather than having to go to their precinct polling place.

While adding voter registration capability during early voting might be convenient for voters, it may also result in costs beyond what the State is prepared to incur in the present budget climate. This is also the case in regard to EDR—it may be more convenient for some voters, but it may also be cost prohibitive and may put the outcome of a close election in doubt until new voter registrations and votes that were processed on election day could be verified.

## How Much Does Election Day Registration Cost?

Comprehensive analyses of the implementation costs for EDR are not readily available. However, Dēmos reports that it surveyed "twenty-six election officials in six Election Day Registration states (Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming) in March 2007" to ascertain, among other information, the costs of EDR implementation. The survey targeted jurisdictions ranging in size from fewer than 600 residents to 450,000, and included several that had "significant student populations." According to the survey, "Clerks agreed that the incidental expense of administering EDR is minimal," and "can include the deployment of an extra poll worker at each precinct to handle registration." Smaller jurisdictions reported not needing any extra staff to handle registrations.

Regarding postelection costs, Dēmos reports that many jurisdictions are able to process election day registrations with in-house staff, while some jurisdictions hire temporary workers to handle data input. New Hampshire is offered as an example, where one city clerk estimated that EDR work amounted to approximately 140 hours of temporary help. An Idaho clerk estimated a need for one or two extra persons working full-time for approximately ten days; a Wisconsin clerk in a jurisdiction with about 70,000 residents reported spending \$5,000 on

<sup>&</sup>lt;sup>2</sup> "Local Election Officials Report Administering Election Day Registration Without Significant Costs, Administrative Burdens or Fraud," EDR Issues Survey, 2007, Dēmos.org.

temporary workers to process EDR registrations after the November 2006 Election. The study notes, "One Idaho election administrator whose service predated her state's adoption of EDR in 1993 could not recall any rise in election expenses." A different Dēmos publication titled "About Election Day Registration" concludes that, "the cost of implementing EDR in new locations in 2000 ranged from zero to a maximum of \$250 per precinct."

While this anecdotal evidence sounds promising, it should also be noted that, according to a study conducted by <u>electionline.org</u>, a nonpartisan election reform initiative conducted through the Pew Center on the States, when Minnesota enacted EDR in 1973, the state initially allocated \$125,000 for the program, but "Local jurisdictions soon discovered it was far from enough." In all, \$800,000 was required for that year (using the Consumer Price Index as a measure, the above amounts translate into approximately \$590,000 and \$3,728,000, respectively, in 2007 dollars). "Eventually, the state left jurisdictions to fund EDR themselves as part of regular election expenses." In his testimony concerning EDR during Nevada's 2007 Legislative Session, Carson City Clerk/Recorder Alan Glover suggested that implementing EDR would be costly, and he expressed his strong hope that the Legislature would not approve EDR in the form of an unfunded mandate for the counties to shoulder.

# Election Day Registration and Voter Identification

Each of the states offering EDR requires that registrants provide, at a minimum, proof of identity or an affirmation of their identity in the form of an oath or a check box on the registration form. Research conducted by <u>electionline.org</u> indicates that EDR states generally require the same level of identification from both non-EDR and EDR registrants (see Appendix C). Where this is not the case, a stricter requirement has been enacted, as in Idaho which requires photographic identification from EDR voters along with proof of residence. What variation there is in these states between non-EDR and EDR identification requirements suggests that, should Nevada consider enacting EDR in the future, part of the discussion will focus on creating a reasonable identification requirement.

One final concern associated with implementing EDR is that most statewide voter registration databases cannot be accessed from satellite locations such as polling precincts, but only from the main clerk or registrar's office. This limitation precludes election officials from verifying new registrations against their databases to ensure that a registrant has not already voted early or been sent an absentee ballot. Resolving this issue may also be a focus of any discussions addressing the implementation of EDR.

#### 2. Online Voter Registration

Two states, Arizona and Washington, currently make voter registration available via the Internet. Arizona instituted online voter registration in 2003. The Arizona Secretary of State's Office reports that in 2003, 25 percent of voter registration transactions were conducted online.

<sup>3</sup> Election Reform Briefing 16, "Election-Day Registration: A Case Study." February 2007. Electionline.org.

By 2007, that number had increased to over 70 percent. The state also reports a 9 percent increase in total voter registrations between 2002 and 2004, after online registration became available.

Washington's Legislature approved House Bill 1528 in 2007, which provided for the implementation of online registration in January of 2008 (see Appendix D). According to data provided by the Washington Secretary of State's Office, nearly 130,000 voters took advantage of online registration the first year it was offered.

Both Arizona and Washington require applicants to have a valid state driver's license or state-issued identification card in order to register online. The applicant's digitized signature is used on the registration application and then used for verification purposes. Both states also require that online registrations be completed one month (Arizona 29 days, Washington 30 days) prior to an election in order for the registrant to be able to vote in that election. Arizona administers its online registration program through a private vendor called ServiceArizona that also provides virtually all public online services related to motor vehicles. In Washington, online registration is conducted through a website run by the Secretary of State's Office. Despite these differences in administration, neither state reports experiencing any security problems related to online voter registration.

Similar to what Arizona has seen, election administrators in Washington expect that the availability of online voter registration will continue to increase total voter registrations, especially in the 18 to 25 age group. Data collected by the Elections Division of the Washington Secretary of State's Office shows that the state had more registered voters in 2008 than ever before in state history. One should not ascribe that record increase to online voter registration alone, however, given that the 2008 General Election generated a great deal of interest and produced high voter registration numbers across the country.

As more people gain access to computers, online voter registration may have the potential to reduce the need or demand for other forms of voter registration including EDR. While Arizona and Washington have shown that online registration can be conducted safely, it is not clear—and there may be no way to predict accurately—how providing online registration would impact other forms of voter registration in Nevada. Lower income groups and elderly voters typically have less access to computers and the Internet, and those who wait until the last minute to register may be likely to do so regardless of what registration options are available. In the future, online voter registration may serve as one of several tools Nevada can use to improve election participation.

#### Postsession Update

<u>Assembly Bill 82</u>, which contained Secretary of State Miller's proposal to provide for online voter registration, failed to pass the Legislature on the final day of the 2009 Regular Session. Because the bill included several significant changes to Nevada election law, it is impossible to

attribute its failure to any one provision, and it is possible that online voter registration will be revisited during the 2011 Legislative Session.

#### 3. Third-Party Voter Registration

Signed into law in 1993, the NVRA, also known as the "Motor Voter Act," requires that states make voter registration available at a number of public service agencies, most notably motor vehicle departments. Most states, including Nevada, also allow voters to register by mail using either a standardized federal form that is provided by the EAC, a voter registration form created by the state, or both.

Aside from registering to vote in person or by mail, in Nevada (and elsewhere) one can register to vote through a third party. While third-party voter registration drives can take place at any time, they are common during the run-up to federal elections, and become especially prevalent in presidential election years. During 2008, there were an unprecedented number of third-party voter registrations in Nevada. The Secretary of State does not track the exact number of registration forms submitted by third parties, but staff in Secretary Miller's office confirmed that the presidential campaigns of Senator Barack Obama (D-Illinois) and Senator John McCain (R-Arizona) requested over 100,000 registration forms prior to the 2008 General Election.

The Secretary of State's Office also reports that Democratic Party registrations of total voters (as opposed to active or inactive voters) rose in Nevada by 117,413 between January 2008 and the close of registration for the General Election in October, while Republican Party registrations of total voters rose by 31,142 during the same period. These numbers suggest that third parties played a significant role in registering voters in 2008. While third-party voter registration was largely trouble-free and successful, county clerks and registrars did report minor problems associated with third-party registration drives, typically with persons arriving to vote and finding out that their registration form had not been turned in by a third party as promised.

#### 2008 Investigation of Third-Party Voter Registration

*Nevada Revised Statutes* 293.805 prohibits compensating persons for registering voters based on the total number of voters registered or the total number of voters registered from a particular political party.

In 2008, the Secretary of State joined with several federal, State, and local agencies and created the Nevada Election Integrity Task Force to target voter registration fraud and election fraud. As reported in the *Las Vegas Sun* on October 7, 2008, members of the Task Force raided the Las Vegas offices of the Association of Community Organizations for Reform Now (ACORN), "an organization that works with low-income people on everything from voting to neighborhood improvements." The raid took place based on information provided

to the Secretary of State by the Clark County Registrar of Voters which suggested that employees of ACORN were submitting falsified voter registration forms.

On May 4, 2009, Nevada Attorney General Catherine Cortez Masto and Secretary of State Miller announced that they had jointly filed a complaint in Clark County District Court alleging misconduct by ACORN in relation to compensating employees for registering new voters. As reported in the *Las Vegas Sun*:

The Association of Community Organization [sic] for Reform Now, Inc., also known as ACORN, operated a Las Vegas office that helped register low-income voters last year.

Throughout 2008, ACORN employed canvassers to register people to vote in Nevada, the complaint said. ACORN paid the canvassers between \$8 and \$9 an hour, but made continued employment and continued compensation based on the canvasser registering 20 voters per shift. Those who failed to sign up 20 voters per shift were terminated, the complaint said. . . . The complaint includes 26 counts of voter [registration] fraud and 13 counts for compensating those registering voters, both felonies.

A preliminary hearing has been set for September 29, 2009, in Clark County District Court to determine if there is enough evidence to proceed to trial over allegations that ACORN illegally compensated its canvassers who were tasked with registering new voters.

At the time research for this study was initially completed, the Task Force had not released any further information concerning its investigation, and neither the Secretary of State nor the Clark County Registrar of Voters could offer any comment on the investigation. Both agencies, however, emphatically stated that these incidents of voter registration fraud did not lead to fraudulent voting. As Clark County Registrar Lomax remarked, "I'm absolutely convinced this is just people ripping off their boss. I don't think this will have any impact on the election" (Associated Press, October 8, 2008).

#### Postsession Update

<u>Assembly Bill 82</u>, mentioned previously, which failed for lack of action on the last day of the 2009 Legislative Session, sought to increase the penalties associated with election tampering, including voter registration fraud.

#### **B.** Voter Identification

The Help America Vote Act of 2002 stipulates that all states must require identification (ID) at the polling place from first-time voters who have registered to vote by mail and have not provided verification of their identity with the mail-in voter registration form. Nevada law has

contained these provisions for many years, but Nevada does not require already-registered voters to show ID at the polling place.

According to the NCSL, 24 states have broader voter identification requirements than those mandated by HAVA. In those states all voters are asked to show ID at the polls, but only three of those states (Georgia, Indiana, and Michigan) require voters to show a photo ID. In each of these three states, court challenges to the photo ID requirements have run their course and the requirements appear, for the time being at least, to be settled law. Five other states will accept an alternate ID if the voter does not have an ID with a photo. The remaining 18 states accept various forms of ID that do not necessarily include a photo (see Appendix E for two tables compiled by the NCSL delineating various voter identification requirements).

#### Voter Identification Legislation in Nevada

Prior to 2005, no legislation requiring voters to present ID at the polling place had been introduced in Nevada. In 2005 two bills, S.B. 478 and A.B. 269, proposed to require voter identification, but neither bill passed. During the 2007 Legislative Session, <u>S.B. 385</u> was considered but did not pass. The bill would have required:

- A person to provide a current and valid photo ID prior to voting;
- A county clerk to provide a voter ID card free of charge to a registered voter who had no other acceptable form of photo ID; and
- A person requesting an absentee ballot to provide the county or city clerk with a copy of a valid photo ID in order to receive an absentee ballot.

#### Postsession Update

In 2009, <u>Assembly Bill 245</u> was introduced, which would have required voters to present photo ID at the polling place. However, the measure failed to meet a deadline for passage in the Assembly Committee on EPE&CA.

# V. <u>CONDUCTING ELECTIONS (NRS 293.2696 THROUGH 293.361</u> <u>AND CHAPTER 293B OF NRS)</u>

This section addresses the nuts and bolts of conducting elections: (a) by what methods a person can vote; (b) the rules governing hiring and training of poll workers; (c) polling place setup and operation; and (d) methods for casting, securing, and auditing votes. Many of the baseline standards for these elements of election administration are mandated by HAVA, and states receive funds under that federal legislation to implement and improve best practices in many of these areas.

#### A. Accepted Voting Methods

#### 1. Absentee and Overseas Voting (NRS 293.309 through 293.340)

While all states offer voters the option of voting early by mail, voters in Nevada join with those in 27 other states in what is commonly called "no excuse" absentee voting. This process allows a registered voter to request an absentee ballot for any reason and cast his vote by mail. In Nevada, an absentee ballot must be requested no later than one week prior to an election and must be received at the county election office no later than 7 p.m. on election day in order to be counted.

Nevada does not offer permanent absentee voting, meaning that a voter must request an absentee ballot for each election in which he chooses to vote absentee. (Persons 65 years of age or older and disabled persons may request an absentee ballot for all elections in a given year.) A first-time voter who chooses to vote by mail must include a copy of an accepted form of identification along with his absentee ballot application or with his absentee ballot. Accepted identification includes a:

- Current Nevada driver's license;
- Current Nevada state identification card:
- Rent receipt with preprinted address;
- Bank statement or preprinted check;
- Credit card statement;
- Car registration or proof of insurance;
- Government document (tax bill, income information); and
- Current utility bill.

A voter who requests an absentee ballot and then chooses instead to vote in person during Nevada's early voting period or on election day may do so simply by turning in his unused absentee ballot or signing an affirmation at the polling place stating that he has not already cast an absentee ballot.

American citizens living overseas and military personnel and their families who are stationed overseas are allowed to vote in their home states. The guidelines for their electoral participation are largely contained in the federal UOCAVA legislation mentioned previously, and the <u>FVAP</u> is tasked with ensuring that these persons have the opportunity to vote.

Overseas voters may submit a single form to both register to vote and request an absentee ballot using the Federal Post Card Application (FPCA), which may be obtained by visiting the FVAP's website at: <a href="www.fvap.gov">www.fvap.gov</a>. In Nevada, these applications must be received one month prior to a primary or general election. A one-time submission of the FPCA allows one to vote absentee in two federal election cycles following the date on which a local election official receives the request. Changes in address, party affiliation, or other registration information may be made by submitting a subsequent FPCA. If any of these changes occur within the initial two federal election cycles for which a voter registered, the voter must submit a new FPCA to update his registration. In order to make overseas voting less difficult and aid voters in meeting application and voting deadlines, the 1991 Legislature approved a measure allowing overseas voters to request and return their absentee ballot by fax machine. These provisions were revised and clarified in 2007.

Nevada faired well in a January 2009 report published by the Pew Center on the States titled *No Time to Vote: Challenges Facing America's Overseas Military Voters*. The report analyzes how much time each of the 50 states and the District of Columbia allow these voters to receive, complete, and return their ballots, as well as the methods by which states allow for the process to take place—by mail, electronically, by fax, or some combination thereof. States were placed in one of four broad categories:

- No time to vote;
- Time to vote but with concerns;
- At risk; and
- Time to vote.

Nevada was 1 of 25 states to provide military overseas voters adequate time to complete the voting process. Further, within these four broad categories researchers divided the states into smaller groups depending upon criteria including whether the state accepts ballots by fax or e-mail, and whether ballots must be returned prior to, on, or after election day.

While the study found that every state could improve at least slightly in regard to securing the privacy of ballots cast by fax machine or e-mail, Nevada was consistently ranked among the best in addressing the needs of overseas military voters with only two areas noted for improvement:

- First, the study recommends that Nevada move to allow electronic submission of overseas voter registrations.
- Second, the study suggests that Nevada may want to increase from 37 to 45 days the "minimum total transit time" allotted for the voting process to take place. Presumably,

this could be done by allowing these voters either to receive their voting materials earlier or to cast their votes in after election day and still have them counted.

# Postsession Update

The 2009 Legislature made further improvements to Nevada's overseas voting provisions in <u>Assembly Bill 41</u> (Chapter 95, *Statutes of Nevada*). The bill expands the acceptable use of the federal "special absent ballot" form to include primary and special elections for State and local offices and ballot questions. The special absent ballot may also be used by an overseas citizen to register to vote. The bill revises the definition of "approved electronic transmission" to include the use of the Internet, and authorizes the Secretary of State to adopt regulations governing the approved electronic transmission by eligible overseas voters of registration applications, absentee ballots, and other forms.

The bill also expands the availability of late voter registration to include a person, or his spouse or dependent, who is either discharged from the Armed Forces of the United States or who is separated from his employment no more than 60 days before an election, and who can provide evidence of this to the county clerk or registrar.

## 2. Early Voting (NRS 293.356 through 293.361)

Nevada's early voting period, first initiated in 1994, runs from the Saturday two weeks prior to an election until the Saturday immediately preceding an election and is open to all registered voters. A voter may vote at any early voting center within the county where he is registered. Voter registration is not offered at early voting centers in Nevada. Early voting centers are typically set up at libraries, shopping malls, supermarkets, and other locations that voters might visit in the course of their day. In Clark County, the Election Department maintains four mobile early voting centers that are built into the cargo boxes of 18-wheel trucks, some of which were paid for with federal HAVA funds. These mobile voting centers can be deployed to any area within the county and have proven to be a great help in alleviating lines in parts of the county that experience particularly heavy turnout or where some technical or staffing difficulty may slow down voting at a stationary early voting center.

On his website, Secretary of State Miller lists several key advantages of early voting:

- Makes voting more accessible to more citizens;
- Increases voter participation rates;
- Allows more accurate and efficient ballot counts:

- Reduces administrative costs to the taxpayer; and
- Creates a more informed and thoughtful electorate.

Nevada's early voting period prior to the 2008 General Election ran from October 18 through 31. During that time approximately 561,625 people or 46.50 percent of Nevada's actively registered voters cast their votes. Allowing nearly half of the voters to vote early, and at convenient locations, helped alleviate the pressure of what would otherwise have been a very busy election day for both election officials and members of the public. Thirty-one states now offer early voting, and the provisions governing the procedure in those states are similar to those found in Nevada.

Early voting does have its detractors. In a 2006 Las Vegas Sun article, political columnist Jon Ralston derided early voting as "an abomination, a refuge for lazy careless voters... What we are doing is allowing more uneducated, uninformed voters access to choosing our elected officials." Some believe that early voting induces voters to make a choice before they know the candidates or issues well enough or before some late development may cause them to change their mind. These critics argue that such early decisions may result in "voter's remorse." Perhaps more importantly, some also point out that early voting is being tracked more and more closely by campaigns and pollsters seeking to create an advantage for their issue or candidate by conducting exit polls and tallying the numbers of early voters from each party. While no actual early vote tallies are available for tracking, it is possible that certain voters who choose to wait until election day to vote will be swayed by reports of higher turnout by one party or another. Conversely, it is possible that supporters of a given issue or candidate may be more motivated to get to the polls if they hear reports that their side is behind in early voter turnout.

Regardless of how one might feel about its merits, early voting has proven popular across the country with both the public and election administrators, and there is no sign of that popularity decreasing in Nevada or elsewhere.

# 3. Provisional Voting (NRS 293.3081 through 293.3086)

Under HAVA, states must make provisional ballots for federal offices available to persons who are deemed ineligible to vote but who believe that they are or should be eligible. Persons whose names do not appear on the appropriate voter registration list, who did not supply appropriate identification with their mail-in registration and cannot do so on election day at the polling place, or who declare that they are entitled to vote at a polling place after it would normally close as the result of a court order, must be allowed to vote by provisional ballot for federal offices.

Also under HAVA, Nevada must provide free access to a system whereby provisional voters can determine whether their provisional ballot was counted. According to the HAVA-required <u>Fiscal Year 2007-2008 State Plan</u>, the Secretary of State has and will continue to utilize federal

funds to "maintain the free access system," to continue "to develop procedures for provisional voting," and "plan and conduct training and outreach concerning a voter's ability to receive and cast a provisional ballot." The Secretary of State reports that in the 2008 General Election, 6,619 provisional ballots were cast and 2,787 were counted.

It is useful to note here that, should Nevada adopt EDR at some future date, provisional voting may no longer be necessary. In that event, the Legislature may wish to request that the Secretary of State provide information on if or how federal funds may be redirected from programs supporting provisional voting to the implementation of EDR.

# 4. Mailing Precincts (NRS 293.343 through 293.355)

In Nevada, precincts containing less than 200 registered voters are designated mailing precincts, primarily because such a small number of voters does not justify the expense of opening a separate polling place. In 2007, the Legislature amended the law to provide that voters from mailing precincts would be able to vote in person during early voting and on election day so long as they either surrendered their mailing ballot or affirmed in writing that they had not already voted.

There is very little information available on mailing precincts at the national level. However, in order to streamline Nevada's election system and perhaps achieve some cost savings, when the Legislature undertakes reapportionment after the 2010 U.S. Census, it may want to consider ways to eliminate mailing districts. For example, the 2011 Legislature may choose to conduct reapportionment and redistricting using voting precincts as the smallest geographic unit of measure. The 2011 Legislature may also choose to consider drawing Senate and Assembly districts with more coterminous boundaries to help reduce the number of unique ballot styles, which result in more mailing precincts. At present, however, these districts do not appear to be causing any problems for election administrators or voters.

#### Postsession Update

The 2009 Legislature approved Assembly Concurrent Resolution No. 19 (File No. 76, Statutes of Nevada), which directs the Legislative Commission to conduct an interim study of the requirements for reapportionment and redistricting of the election districts of Nevada's members of the United States House of Representatives, the State Legislature, the Board of Regents of the University of Nevada, and the State Board of Education following the conduct of the 2010 Decennial Census.

The interim study must include an examination of any redistricting systems recommended or established by the 75th Session of the Nevada Legislature; a review of all pertinent case law; a review of redistricting programs and plans used in other states; and the continuation of Nevada's participation in programs of the U.S. Census Bureau, including participation in the decennial census to ensure a complete and accurate count of all Nevadans.

As a part of the interim study, the Legislature may also consider what the smallest geographic unit should be and discuss the drawing of more coterminous districts, which may affect Nevada's current mailing precinct configuration.

# **B.** Polling Place Staffing and Operation

Nevada's polling places open at 7 a.m. and close at 7 p.m. (NRS 293.273). During early voting, Monday through Friday, permanent polling places are required to remain open between 8 a.m. and 6 p.m., but clerks can decide to keep a given polling place open until 8 p.m. on any Saturday or any day during the second week of early voting. A review conducted by the National Association of Secretaries of State of polling place hours of operation across the country indicates that Nevada falls within the normal range of hours offered for early voting.

Similarly, according to the "Compendium of State Poll Worker Requirements" published by the federal EAC, Nevada's statutory guidelines governing who may be a poll worker fall within generally accepted standards that are common nationwide. Nevada has joined with at least 38 other states in allowing students to work at the polls. While ages range between 16 and "college age," and the duties students are allowed to perform vary slightly from state to state, it is clear that the general trend across the country is to encourage fuller student participation in the election process, a trend which Nevada has already embraced.

In order to continue receiving federal HAVA funds, the State of Nevada must provide programs for voter education, election official education and training, and poll worker training. These programs assist the State in complying with provisions of the Act requiring the establishment of certain voting system standards, provisional voting, public posting of voter information, a computerized statewide voter registration list, and voter registration application modifications. The Secretary of State administers these compliance efforts.

According to the *State of Nevada Fiscal Year 2007-2008 State Plan*, in 2006, the State implemented a comprehensive centralized training program to ensure that all 17 counties had access to the training necessary to succeed in their roles in achieving HAVA compliance. Among other elements, the training program included general improvements to poll worker recruitment, training and management, and Americans with Disabilities Act accessibility training for poll workers and election staff. A State Training Committee made up of two employees of the Secretary of State's office and four county clerks/registrars was also set up to train election staff on, among other things, voter identification requirements, poll watchers, provisional voting, election security, electioneering, and offering polling place assistance to voters.

This study found no evidence to suggest that Nevada's poll worker requirements or polling place operations are in need of revision. In fact, having conducted an election under extraordinary scrutiny in 2008, Nevada's poll workers and election officials received a great

deal of praise from election observers citing their professionalism, knowledge, and dedication to aiding the voting public (see Appendix F for a sample of letters from election observers).

# C. Mechanical Voting Systems (NRS 293.2696 and Chapter 293B of NRS)

Using federal money received as part of HAVA, in 2004 the State of Nevada supplied all 17 counties with state-of-the-art touch screen Direct Recording Electronic (DRE) voting machines manufactured by Sequoia Voting Systems. Although not required by HAVA, Dean Heller, then Secretary of State, mandated that these machines include a voter-verifiable paper trail or "VPAT" printer, thus allowing every voter to see his choices before finalizing his voting selections. Since implementation, Nevada's experience with DRE and VPAT voting machine technology has been positive, with mandatory postelection audits consistently indicating that the machines record votes properly.

Public concern over the security and reliability of electronic voting machines remains high, however, and in 2007, the Nevada Legislature responded by approving <u>Senate Bill 401</u> (Chapter 424, *Statutes of Nevada*), which established certain reporting requirements for county clerks and registrars concerning elections. The reports must include, but not be limited to, information on the following topics:

- Discarded ballots and the reasons for discarding;
- Mechanical voting system malfunctions, including the reason for and duration of the malfunction;
- Any remedy for the malfunction;
- Any effect the malfunction had on the election process; and
- A list of each polling place not open during prescribed hours and the reasons for the closure.

The bill further requires that the Secretary of State compile these reports and provide the Legislature with the results prior to commencement of the 2009 Legislative Session. The Secretary of State submitted the 2008 General Election report to the Legislature on February 2, 2009, and is available through the Legislature's website at <a href="http://www.leg.state.nv.us/lcb/research/library/">http://www.leg.state.nv.us/lcb/research/library/</a>. The report confirms that Nevada's mechanical voting machines performed well in 2008 with no evidence of any discrepancies between voter-verified paper records and directly recorded electronic results.

#### VI. PROPOSAL TO ELECT THE PRESIDENT BY NATIONAL POPULAR VOTE

In 2000, Democratic presidential nominee Al Gore received a majority of the National Popular Vote but lost the election to George W. Bush, the Republican nominee, based on the number of electoral votes the two men received. Less well known is that in the 2004 Presidential Election, a change of 60,000 votes in Ohio would have won the state, and the election, for John Kerry, who lost the popular vote to President George W. Bush by more than 3 million votes. Similarly, according to proponents of the National Popular Vote plan, "a shift of a handful of votes in one or two states would have elected the second-place candidate in five of the last 12 presidential elections," and we know from history that the second-place candidate was elected in 2000, 1888, 1876, and 1824.

Election results like these have stoked debate in America for nearly a century as to whether the current system of electing the President through the Electoral College has outlived its usefulness and should be replaced by one in which the President is elected strictly by popular vote. In 2006, NPV supporters formally began pushing for such an electoral change by proposing that individual states join an interstate compact guaranteeing that member states award their electoral votes to the National Popular Vote winner. As stated in the NPV plan summary:

At the present time, the Electoral College reflects the voters' state-by-state choices for President in 48 states. In Maine and Nebraska. the Electoral College reflects the voters' district-by-district choices. The United States can have a nationwide popular election of the President if the states change the manner of choosing their presidential electors so that the Electoral College reflects the voters' nationwide choice. This means changing the state laws that establish the state-level winner-take-all rule (or, in Maine and Nebraska, the district-level winner-take-all rule). (NPV plan summary, national popular vote.com)

Since 2006, the NPV plan, titled the "Agreement Among the States to Elect the President by National Popular Vote," has been introduced in legislatures across the country. As of the publication of this report, several legislative houses in various states have passed the measure, and five states (Hawaii, Illinois, Maryland, New Jersey, and Washington) have enacted it.

In 2007, <u>Assembly Bill 384</u> proposed that Nevada adopt the NPV plan. The bill was initially heard by the Assembly Committee on EPE&CA and was then referred to the Assembly Committee on Ways and Means without recommendation. The NPV plan failed to pass out of the Ways and Means Committee prior to the close of the legislative session.

<sup>&</sup>lt;sup>4</sup> Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote, John R. Koza, et al, National Popular Vote Press.

Following is a brief description of how the President is currently elected, how the NPV plan is designed to work, and an overview of arguments offered in support of and opposition to the plan.

# A. The Electoral College

Article II, Section I of the *U.S. Constitution* provides for the election of the President by a group of "presidential electors" who are known collectively as the Electoral College. The total number of presidential electors, 538, is arrived at by adding the total number of members of the House of Representatives (435), to the total number of United States Senators (100), and the three electors representing the District of Columbia. Each state is allotted electors equal to its number of U.S. Senators and Representatives. Accordingly, Nevada is currently allotted five electors (or electoral votes).

The *U.S. Constitution* grants states the authority to decide how to choose their electors. While the methods of choosing presidential electors have varied since the inception of the Electoral College, starting around the middle of the twentieth century, states began adopting the short presidential ballot as a more efficient and less confusing way to choose presidential electors. By 1980, every state in the country had moved to the short ballot. Under this system, the names of the national candidates for President and Vice President are typically offered together (e.g., Obama/Biden, McCain/Palin), and the voter simply marks his choice.

While the voter is in fact voting for a group of unnamed presidential electors, state law typically ties the electors to their party's candidates such that the voter can be confident that the electors will cast their votes for the winning candidate in December. Like most other states, Nevada uses the winner-take-all system of awarding electoral votes. Under this system presidential electors, who are nominated earlier in the election year by each party at its annual statewide convention, become the state's presidential electors once it is known which candidate won the popular vote in the state.

There is no federal or constitutional requirement that an elector vote for a particular candidate. The freedom for an elector to cast his or her vote for someone other than the popular vote winner was built into the Electoral College system with the intention of protecting the public from a bad decision. As former Congressman John B. Anderson (R-Illinois) notes, "The Framers distrusted democracy and saw the Electoral College as a deliberative body that would pick the best candidate" (*Every Vote Equal*, p. xvii).

In practice, very few electors ever cast their votes for someone other than their party's nominee. According to *Every Vote Equal*, "Among the 21,915 electoral votes cast in the 55 presidential elections . . . between 1789 and 2004, there have been 11 cases" when a vote was cast in an "unexpected way" (ibid., p. 85). Nevertheless, states have acted to ensure that electors vote for the winning candidate. In Nevada, NRS 298.050 requires presidential electors to "vote only for the nominees for President and Vice President of the party or the independent candidates that prevailed in this State in the preceding general election."

Changing provisions like this one, which requires that electors vote for the statewide winner rather than the National Popular Vote winner, lies at the heart of the NPV plan.

# B. The Agreement Among the States to Elect the President by National Popular Vote

Supporters of the NPV plan cite two main complaints about the way we elect the President today. First, proponents argue that "the major shortcoming of the current system is that voters in two thirds of the states are effectively disenfranchised in presidential elections because they do not live in closely divided battleground states" (NPV plan summary, p. 2). The second complaint voiced by NPV supporters concerns the possibility under the current system for a candidate to win the National Popular Vote yet lose the election.

#### Creating a Truly National Election

If enough states implement the agreement, argue its supporters, presidential candidates will have to concern themselves with winning the popular vote everywhere, rather than focusing on a handful of battleground or swing states as they do now. States that currently play a small role in presidential elections will find themselves garnering new attention, and future presidential elections will be more national in scope:

Twelve of the 13 smallest states are almost totally ignored in presidential elections because they are politically non-competitive. Idaho, Montana, Wyoming, North Dakota, South Dakota, and Alaska regularly vote Republican, and Rhode Island, Delaware, Hawaii, Vermont, Maine, and DC regularly vote Democratic. These 12 states together contain 11 million people. Because of the two electoral-vote bonus that each state receives, the 12 non-competitive small states have 40 electoral votes. However, the two-vote bonus is an entirely illusory advantage to the small states.

Ohio has 11 million people and has "only" 20 electoral votes. The 11 million people in Ohio are the center of attention in presidential campaigns, while the 11 million people in the 12 non-competitive small states are utterly irrelevant. Nationwide election of the President would make each of the voters in the 12 smallest states as important as an Ohio voter. (NPV plan summary, pp. 5-6)

Opponents argue that the opposite may be true. In a pro-con discussion published by NCSL in September of 2007, John Samples of the Cato Institute suggests that by potentially transferring control of a state's electoral votes to voters from outside the state, the NPV plan "advances the interests of Californians, New Yorkers, and citizens of eight other large states that attain more power under direct election than they have now" (see Appendix G). Mr. Samples suggests that, rather than leading candidates to seek votes in smaller states with less electoral votes, the NPV plan may foster "regionalism in presidential politics and greater polarization" because

campaigns would be "likely to seek additional votes in states where they are strong already, control state government, and have more efficient party organizations."

One can only speculate whether a candidate would prefer to try to turn out more votes in a stronghold state or attempt to shrink the number of votes by which he was sure to lose in a competitor's stronghold. Ideally, the candidate would seek to do both because doing so would mean a more balanced national campaign. The strong arguments offered on both sides of this question illustrate the impossibility of predicting what will happen should the NPV plan be implemented.

#### Losing the Vote, but Winning the Election

As noted above, on four occasions in American history, the second-place vote getter has won the presidency, and the potential remains for this to occur again in the future. Supporters of the NPV plan find this possibility unacceptable. The solution they propose, which avoids requiring a constitutional amendment, is for enough states to agree through interstate compact to award a majority of electoral votes to the popular vote winner to eliminate the potential for the popular vote winner to lose the election. Article III of the Agreement reads, in pertinent part:

The presidential elector certifying official in each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.

In other words, member states would agree to nominate the electors chosen by the party of the National Popular Vote winner, rather than those chosen by the party of the candidate who won the popular vote within the state (or, in Maine and Nebraska, the congressional district). In many instances, there would be no difference between the two and therefore no reason for concern.

However, occasions may arise where the majority of a member state's voters have chosen the candidate who did not win the National Popular Vote, in which case the state's presidential electors would cast their votes in opposition to the majority of the state's voters. In fact, citing this possibility as their main concern, Governors Linda Lingle (R-Hawaii) and Arnold Schwarzenegger (R-California) each vetoed legislation enacting the Agreement twice. In 2008, the Hawaii Legislature overrode Governor Lingle's second veto and adopted the measure. The California Legislature has not overridden Governor Schwarzenegger's most recent veto.

#### C. Why an Interstate Compact?

In addition to the disagreements over how a change in the awarding of electoral votes would impact presidential campaigning, and whether doing away with the state-by-state winner-take-all model is in voters' best interests, there are also differences of opinion

concerning whether it is appropriate to implement a National Popular Vote by means of an interstate compact.

While NPV supporters point to long-term, consistent public support of 60 to 80 percent for a National Popular Vote based on public opinion polling, opponents suggest that the Agreement is an attempt to make an end run around the *U.S. Constitution*. Acknowledging the concern, NPV devotes Chapter 3 of *Every Vote Equal* to analysis of several previously proposed federal constitutional amendments, including those that have sought to implement a National Popular Vote for President. Their evidence suggests strong congressional support has existed for some of these measures. For example, in 1969 the House of Representatives voted 338 to 70 in favor of House Joint Resolution 681, a proposed constitutional amendment creating a national popular election. When it was heard in the Senate, the legislation was filibustered and died (*Every Vote Equal*, pp. 115-119). The measure's failure to pass the Senate may help explain former Congressman John B. Anderson's (R-Illinois) remark that, "The Electoral College has escaped the move to greater democracy only because of institutional inertia and misguided, parochial considerations" (ibid., p. xviii).

Another supporter, former U.S. Senator Birch Bayh (D-Indiana) argues that the NPV plan is "consistent with the Constitution," but that it merely avoids "the arduous process of a Constitutional Amendment" (ibid., p. xx). In 1979, Senator Bayh sponsored Senate Joint Resolution 1, another constitutional amendment creating a National Popular Vote, which was also filibustered and failed.

Regardless of which side one takes in this debate, the reality is that there is no way to be certain how enactment of the NPV plan would change presidential campaigns or which states might benefit or be harmed by the change. It is equally unclear how voters might react the first time they discovered that their presidential electors had voted for the national winner instead of the candidate who had carried their state. The only certainty is that, under the NPV plan, the candidate who won the National Popular Vote would also win the presidency.

#### **Postsession Update**

Interest in the NPV proposal remained in 2009, and the plan was reintroduced as <u>Assembly Bill 413</u>. The measure was approved by the Assembly but failed to meet a deadline for passage in the Senate Committee on Legislative Operations and Elections.

### VII. STATEWIDE INITIATIVE AND REFERENDUM SIGNATURE GATHERING REQUIREMENTS

The initiative and referendum process was popularized in the late nineteenth and early twentieth centuries during a wave of populist feeling that swept the country at the time. The popularity of the I&R process was so great during the early part of the twentieth century that by 1918, 19 of the 24 states that currently have I&R had adopted the process. Mississippi was the last state to adopt I&R in 1992. Interestingly, most of the states that have adopted I&R are west of the Mississippi River. Some theorize that the expansion of I&R in the West fits more with Westerners' independent, populist belief system. For the most part, I&R operated quietly in the background of state politics for much of the twentieth century. However, during the last two decades, it has become an increasingly powerful political tool.

#### The Initiative and Referendum Process in Nevada

Today, more initiatives are circulated, more qualify for the ballot, and more money is spent on the process than ever before. Since its inception in 1898, there have been nearly 2,000 initiative measures on ballots in the 24 I&R states. Nearly half of these initiative measures (about 900) appeared on the ballot in the last 30 years.

The initiative is a procedure whereby citizens, through a petition process, place measures on the ballot proposing changes or additions to laws or state constitutions. There are two types of initiatives—direct and indirect. In Nevada, a *direct initiative* seeks to amend the *Nevada Constitution*, while an *indirect initiative* seeks to amend an existing statute. The direct initiative involves a petition process which, if successful, goes *directly* on the ballot at the next general election. The *indirect* initiative, however, involves the consideration and input of the Legislature and so *does not* go directly to the ballot. In the indirect initiative process, a proposed initiative that has garnered enough qualified signatures is first referred to the Legislature for consideration.

During the 2005 Legislative Session, the Legislature passed measures requiring I&R petitions to address only one subject and matters necessarily connected with that subject. An explanation of the effect of the petition must also appear on each signature page of the petition. These provisions also require the Secretary of State to post a copy of the initiative or referendum petition, the description of the effect of the petition proposal, and the fiscal note on the Internet.

The *Nevada Constitution* and various provisions in Chapter 295 of NRS also provide for I&R at the county and city level, although the filing, signature requirements, approval process, and time frames vary from the statewide I&R process.

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<sup>&</sup>lt;sup>5</sup> For a more thorough discussion of the history of the I&R process, please see Legislative Counsel Bureau 2008-2009 Policy and Program Report titled *Elections*.

#### 1. Constitutional Amendments

An initiative petition to amend the *Nevada Constitution* must be signed by a number of registered voters equal to 10 percent or more of the number of voters who voted at the last statewide general election. Before any initiative petition to amend the *Nevada Constitution* may be circulated for signatures, a copy of the petition must be filed with the Secretary of State not earlier than September 1 of the year prior to the election. The petition may then be circulated for signatures until the third Tuesday in May of the following year (the election year), at which time it must be submitted to the appropriate county election offices for signature verification.

Upon completion of the signature verification process, all petitions must be filed by the county election officer with the Secretary of State no later than 90 days before the general election. If it is determined that the petition contains a sufficient number of valid signatures, the initiative question will appear on the general election ballot. An initiative petition to amend the *Nevada Constitution* must be approved in identical form at two successive elections before becoming law.

#### 2. Enacting or Amending a State Statute

An initiative petition may also be used to enact a new statute or to amend an existing one. The same number of registered voters that are required to sign a constitutional initiative must also sign a statutory initiative. Proponents must first file a copy of the petition with the Secretary of State not earlier than January 1 of the year prior to the next legislative session. The petition may then be circulated for signatures until the second Tuesday in November at which time it must be submitted to the county election offices for signature verification.

Upon completion of the signature verification, all petitions to amend or create a statute must be filed by the county with the Secretary of State no later than 30 days before the start of the next legislative session. If the petition contains a sufficient number of valid signatures, the Secretary of State transmits the initiative proposal to the Legislature as soon as it convenes. The Legislature must either enact or reject the petition without amendment within the first 40 days of the legislative session. Depending on the Legislature's action, the proponents may continue the process by placing it on the ballot. If the Legislature defeats or fails to act on the initiative proposal within the first 40 days, it is automatically placed on the ballot at the next general election for consideration by the voters. Some states, including Nevada, allow the Legislature to place an alternative measure (regarding the same subject) on the ballot to be considered along with an initiative question.

If the Legislature enacts the statute proposed in the petition and it is approved by the Governor, it becomes law. It should be noted that a statutory initiative approved by the voters cannot be amended, annulled, or repealed by the Legislature within three years from the date it takes effect.

#### 3. Geographic Distribution Requirement for Petition Signatures

Until recently, Nevada was one of ten states that had a "geographic distribution" signature requirement to qualify petitions for the ballot, whereby signatures had to be gathered in 75 percent (13 out of 17) of Nevada's counties. In a challenge to this provision, a federal judge agreed with plaintiffs who argued that requiring the collection of signatures in different areas of the State gave added weight or influence to voters' signatures in rural areas and diminished the relative weight of voters' signatures in urban centers. In making his ruling, the judge relied heavily upon an earlier Ninth Circuit Court of Appeals ruling declaring unconstitutional similar signature requirements in the State of Idaho.

In response, the 2007 Nevada Legislature approved <u>S.B. 549</u> (Chapter 484, *Statutes of Nevada*) and <u>Senate Joint Resolution No. 3</u> (File No. 105, *Statutes of Nevada*), both of which require that signatures totaling 10 percent of the number of voters who voted in the preceding general election must be gathered. However, S.B. 549 went further, creating a formula whereby signatures were to be gathered in each county in proportion to that county's share of the State's total population. This provision has come to be known as the "County Population Rule." Instead of the previous geographic distribution requirement, an initiative petition now had to be signed by a number of registered voters from each of the 17 counties in the State. Additionally, S.B. 549 required the Secretary of State to determine the number of signatures required to be gathered from each county for an initiative petition to qualify for the ballot as soon as practicable after each general election.

However, the County Population Rule provisions of S.B. 549 were challenged in federal court in 2008. In *Marijuana Policy Project v. Miller*, federal judge Philip M. Pro ruled that, "One voter's vote in Clark County under the County Population Rule weighs substantially less than one voter's vote in any other Nevada county" and further that, "A system that gives counties of unequal population equal power violates equal protection" or what is commonly known as the "one man, one vote" rule (see Appendix H).

Judge Pro also noted in his opinion that the Ninth Circuit Court had previously found in similar cases that "using legislative districts . . . would alleviate equal protection concerns" and would "ensure relatively broad statewide support including some rural voters." The judge did not voice a clear preference for Assembly, Senate or, perhaps, congressional districts.

Accordingly, the court found the County Population Rule unconstitutional and enjoined the Secretary of State from enforcing it. The ruling left intact Nevada's constitutional requirement that statewide initiative petitions gather the signatures of "10 percent or more of the voters who voted in the entire state at the last preceding general election" (Article 19, Section 2[2]), but the State had no way of determining from where those signatures must be gathered.

#### Signature Requirements in Other States

Research conducted by NCSL indicates that, at present, four states continue to use geographical signature requirements based on counties; another three states have in place signature requirements based on congressional districts (a proposal that the Nevada Legislature heard but failed to pass in 2007); and one state, Montana, requires that signatures be gathered from 10 percent of voters who voted in the last general election from each of 40 legislative districts.

These states' requirements are similar where statutory initiatives are concerned, with the exception that some states require that signatures be gathered from a lower percentage of voters who voted in the last general election and/or from a lower number of counties or districts. Montana, for example, requires signatures from 5 percent of voters be gathered from each of 34 legislative districts (see Appendix I for the complete signature requirement table).

#### **Postsession Update**

Cognizant of the courts' past review of Nevada's attempts to craft a fair, defensible signature gathering plan, the Legislature reached an agreement on signature gathering requirements just prior to the close of the 2009 Session. The details of the plan are contained in two companion measures, Senate Bill 212 (Chapter 460, Statutes of Nevada) and Assembly Joint Resolution No. 1 (File No. 98, Statutes of Nevada).

Senate Bill 212 requires the Legislature to create petition districts from which signatures for a petition for initiative must be gathered. The bill defines "petition district" to mean congressional district until July 1, 2011, at which time the Legislature must have established petition districts for the period after that date.

The Director of the Legislative Counsel Bureau is required to retain a copy of maps of the petition districts and make them available to any interested person for a reasonable fee not to exceed the actual cost of producing the copy. A petition for initiative must be signed by a number of registered voters in each petition district in the State equal to at least 10 percent of the voters who voted in that petition district in the last preceding general election.

Assembly Joint Resolution No. 1 proposes to amend the *Nevada Constitution* to remove provisions requiring that a statewide initiative petition be signed by at least 10 percent of the voters who voted at the last preceding general election in at least 75 percent of the counties in the State. Instead, the resolution declares that an initiative petition shall be proposed by a number of registered voters from each petition district in this State equal to 10 percent of the number of voters who voted at the last general election in the petition district. The measure also stipulates that petition districts must be created by the Legislature.

Finally, the resolution specifies that the number of signatures required on a petition for initiative or referendum will be determined when a copy of the petition is filed with the Secretary of State before circulating the petition for signatures.

If approved in identical form during the 2011 Session of the Legislature, the proposal under A.J.R. 1 will be submitted to the voters for final approval or disapproval at the 2012 General Election.

#### VIII. CONCLUSION

As the title of a 2005 study conducted by the Century Foundation on the implementation of HAVA suggests, creating sound election law and administering that law effectively can rightly be seen as a constant attempt at *Balancing Access and Integrity*. Discussing the congressional debate over what provisions would ultimately be included in HAVA, the report notes that:

Broadly speaking, one side of the pre-HAVA debate tended to emphasize the importance of promoting access to the electoral process through measures that facilitate voter registration and the like. By contrast, the other side tended to emphasize the need for protective measures to prevent voting fraud (pp. 1-2).

In Nevada at least, the debate surrounding access and integrity continues. A brief glance at the legislation considered during the 2009 Legislative Session reveals that proposals to make voting more accessible to Nevadans continue to be considered alongside proposals to ensure that illegitimate votes are not cast and that voters be assured their votes are counted in a timely, transparent, and accurate fashion.

Of course, these concerns are rarely mutually exclusive and, if the success of Nevada's 2008 General Election is any indication, the Legislature will continue to work closely with election administrators in the future in order to ensure that the State continues to meet two fundamental electoral system attributes also described eloquently in *Balancing Access and Integrity*:

First, an electoral system must be able to collect, record, and tally the votes of the electorate with sufficient accuracy to declare a winning candidate whose victory is procedurally legitimate in the eyes of supporters and opponents alike. Second, no well-functioning electoral system would fail to provide or count a ballot cast by a properly registered voter who correctly completed all steps required to receive one (p. 2).

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<sup>&</sup>lt;sup>6</sup> Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform. The Century Foundation Press, New York.

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#### APPENDIX A

Letter Dated September 6, 2007, From Assemblywoman Ellen Koivisto, Chair, Assembly Committee on Elections, Procedures and Ethics, to Senator Randolph J. Townsend, Chairman, Legislative Commission, Requesting a Staff Study Concerning Elections Issues

September 6, 2007

Senator Randolph J. Townsend Chairman, Legislative Commission Nevada Legislative Counsel Bureau 401 S. Carson Street Carson City, Nevada 89701

Dear Senator Townsend:

During the course of the 74<sup>th</sup> Legislative Session the Assembly Committee on Elections, Procedures, Ethics, and Constitutional Amendments investigated a range of topics related to the conduct of elections in Nevada.

Some of the topics addressed included issues relating to voter registration, voter fraud, and voter identification requirements; signature gathering for petitions, the reliability and security of computerized voting machines; absentee and mail-in voting provisions; and a proposal that Nevada join a national movement to elect the President of the United States by popular vote rather than through the Electoral College. The Committee also spent a good deal of time looking into how third-party groups influence elections in Nevada. While the Committee strove to learn everything it could on these diverse subjects and to make well-informed decisions, the reality is that we need more information if we want to be certain that we are providing Nevadans with the best electoral system possible.

To that end, I ask that the Legislative Commission direct the Research Division of the Legislative Counsel Bureau to conduct an Interim Staff Study of Nevada's election system. The study should encompass each of the topics named above, as well as any other issues staff believes are pertinent.

The Research Division should be directed to provide a report of its findings to the Legislative Commission on or before September 1, 2008. The Legislative Commission may direct staff to provide updates on the progress of its study during the 2007 - 2008 Interim. A copy of the report should be provided to members of the Assembly and Senate Election Committees for consideration during the 75<sup>th</sup> Session of the Legislature.

Thank you for your consideration of this request.

Sincerely,

Assemblywoman Ellen Koivisto, Chair

Assembly Committee on Elections, Procedures

and Ethics

#### APPENDIX B

National Conference of State Legislatures—Survey of Voter Registration Deadlines

### **Voter Registration Deadlines**

STATE	REGISTRATION DEADLINES
Alabama	10 days before an election
Alaska	30 days before an election
Arizona	29 days before an election
Arkansas	30 days before an election
California	29 days before an election
Colorado	29 days before an election
Connecticut	14 days before an election
Delaware	20 days prior to a general election and 21 days prior to any primary election
D.C.	30 days before an election
Florida	29 days before an election
Georgia	The fifth Monday before a general primary, general election, or presidential preference primary. The fifth day after the date of the call for all other special primaries and special elections
Hawaii	30 days before an election
Idaho	25 days before an election if mailed; 24 days for in person; or election day at the polls
Illinois	29 days before primary, 28 days before a general election
Indiana	29 days before an election
Iowa	Must be delivered by 5 pm 10 days before a state primary or general election, 11 days before all others or postmarked 15 or more days before an election
Kansas	Delivered 15 days before an election
Kentucky	28 days before an election
Louisiana	30 days before an election
Maine	10 business days before an election or delivered in person up to and including election day

Maryland	Postmarked 25 days before an election or received in the elections office by 9pm no later than 21 days before an election
Massachusetts	20 days before an election
Michigan	30 days before an election
Minnesota	Delivered by 5pm 21 days before an election; also election day registration at polling places
Mississippi	30 days before an election
Missouri	28 days before an election
Montana	30 days before an election
Nebraska	Received by 6pm on the second Friday before the election or postmarked by the third Friday before the election
Nevada	9pm on the fifth Saturday before any primary or general election. 9pm on the third Saturday before any recall or special election unless held on the same day as a primary or general election and then it remains the fifth Saturday
New Hampshire	Must be received by city or town clerk 10 days before an election or registration at the polls on election day
New Jersey	29 days before an election
New Mexico	28 days before an election
New York	25 days before an election
North Carolina	Postmarked 25 days before an election or received 25 days before an election in the elections office or designated voter registration agency by 5pm
North Dakota	North Dakota does not have voter registration
Ohio	Postmarked 30 days before an election or received 25 days before the election
Oklahoma	25 days before an election
Oregon	Postmarked or received 21 days before an election
Pennsylvania	30 days before an election
Rhode Island	30 days before an election
South Carolina	30 days before an election

South Dakota	Postmarked 30 days before an election or delivered 15 days before an election
Tennessee	Postmarked or received 30 days before an election
Texas	30 days before an election
Utah	Postmarked 20 days before an election
Vermont	Postmarked, submitted, or accepted by noon second Saturday before an election
Virginia	Delivered 29 days before an election
Washington	30 days before an election or delivered in-person up to 15 days before an election at a location designated by the county elections officer
West Virginia	30 days before an election
Wisconsin	Postmarked or accepted by the second Wednesday preceding election or completed in the local voter registration office 1 day before the election; or completed at the polling place on election day
Wyoming	30 days before an election or register at the polling place on election day

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#### APPENDIX C

Electionline.org—Election Day Registration Voter Identification Requirements

# electionline.org Briefing



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# Election-Day Registration: A Case Study

Nearly 4,000 people – or one out of every 100 voters – in Montana were able to register or update their registration and vote on the same day during last November's mid-term election, something not permitted in the state since the inception of voter lists.

While the number of election-day registrants caused long lines, poll-worker confusion and headaches in parts of the state – prompting some to call for a quick end to the newly-enacted rules – the results were difficult to ignore: voters who had the opportunity to register and vote on Election Day did so en masse.

In the largely rural state, election officials said they were "over-whelmed" by the turnout. Representatives of groups that encouraged the change, including the League of Women Voters, said the long lines and large crowds were symptoms of a lack of preparation and a failure to adequately anticipate demand. The turnout, they argued, represented "a resounding success."

Montana joined six states around the country allowing the practice of election-day registration (EDR). The process allows those on the fence about participating in an election extra time to make up their minds. If they miss deadlines for registering to vote – a month before an election in some states – they can still have their voices heard and cast a ballot, pro-

vided they live in one of the seven states allowing it.

This, the first in a series of *electionline.org* case studies, examines the implementation, legislative history, practice and outlook for EDR in the states where it is currently permitted and in other parts of the country where it has been or will be considered by lawmakers.

Nationally, EDR has been debated since it was first implemented in three states in the 1970s.

Organizations including Demos, Common Cause and the League of Women Voters have been supportive of efforts to expand EDR beyond Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming, the seven states that now permit it.

According to Demos, states with EDR consistently lead the national average in turnout, counteract "arbitrary" voter registration deadlines and help numerous Americans who report trouble with registration procedures.<sup>1</sup>

Common Cause reports registration issues were the most frequently-cited problem by voters who called hotlines in 2004. The organization recommends EDR as a solution to registration problems by eliminating registration "as a barrier to voting."

But EDR has its skeptics as well.

Paul Gronke, a political science professor at Reed College, has challenged the notion that EDR increases turnout.

"The major barriers to turnout are voter interest and motivation," Gronke wrote on his blog, *Earlyvoting.net*. "Election reforms are fine as far as they go, but if anyone thinks that minor tweaking around the edges, like same-day registration, will do anything but help turnout a few percentage points, they are sadly mistaken."

Fraud should also be a concern, said election turnout expert Curtis Gans of the Center for the Study of the American Electorate. In states with a history of voter fraud, EDR can exacerbate the problem.

Speaking about a proposal to introduce EDR in Massachusetts in 2005, Gans said EDR offers "no protection against last-minute fraudulent registration or votes in the name of people who have died or moved."

"The question is, has there been fraud in Massachusetts? If the answer is yes, then same-day registration is not good for Massachusetts," he said.

And even in states where it was considered to be a good fit, not everyone is supportive.

Two lawmakers in Montana, troubled by long lines and confusion at some county election offices during the November 2006 election sought to roll back the current law. Those rules allow for a 30-day "late registration period," permitting voters to register and vote at an election office up until polls close on Election Day. With election officials tied up helping would-be voters register and cast ballots until well after polls closed, other needs, such as troubleshooting problems at the polls or answering voter inquiries on the phone, had to be delayed or pushed aside.

EDR bills have been introduced again in several states this year, including Michigan, Hawaii and Utah. But the movement to expand the practice beyond largely rural, low-population states has been static. EDR has been defeated repeatedly in a number of states, including Connecticut, Massachusetts and Texas. Maryland officials, who are considering introducing EDR to the state in 2008, recently concluded a comprehensive study on its advantages and challenges.

# Executive Summary

The number of states that allow citizens who delay registering to vote just prior to or on Election Day has recently expanded to seven, with Montana joining the group of primarily Western and rural states in 2006.

Designed to give voters the flexibility to circumvent registration deadlines that occur a month before an election in more than half of the states, election-day registration (EDR) has allowed hundreds of thousands of voters access to the political decision-making process they otherwise would not have or at least permitted more flexibility to delay registering.

Advocates say EDR states consistently lead the national average in turnout, while counteracting registration problems, which are frequently cited by voters as barriers to participation.

But the practice has also raised concerns, particularly over whether allowing voters to cast ballots on the same day they register fails to provide adequate scrutiny of credentials or potentially allows double voting by permitting someone who might have cast an absentee ballot or voted at another polling place the ability to do so again. One critic said voter interest and motivation, not EDR, are crucial to increasing turnout.

electionline.org examined the states that offer EDR – Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming – detailing the differences in practices in each.

Montana rolled out EDR – termed "late registration" – for the first time in the 2006 election with mixed success.

More than 7,500 voters took advantage of the rules, which allow citizens to register and vote at central offices after the 30-day pre-election registration deadline until the close of polls on Election Day. But along with big crowds came problems in some areas, including long lines and confusion at local precincts when veteran staff and poll workers found themselves helping same-day registrants rather than attending to other duties during the vote. As a result, some local clerks and lawmakers in 2007 were seeking to roll back EDR by ending the late registration period a week or more before Election Day. Advocates, however, pointed to high demand as proof the practice was needed in the state.

Minnesota, which has offered polling-place EDR for more than 30 years, has recorded between 10 and 20 percent of voters registering and casting ballots on Election Day. Officials noted that EDR can make ordering ballots more difficult and lines can get long in some areas. Nonetheless, one county clerk said voters in her county rarely waited more than 20 minutes to register and vote, and a pilot implementation of electronic poll books in several precincts in special elections this year — offering links to the statewide voter registration database — could help add more safeguards against fraud.

Efforts to expand EDR have been unsuccessful other than in largely rural and/or sparsely-populated states. Lawmakers in a number of states — Connecticut, Florida, Illinois, Indiana, Massachusetts, New York, North Carolina and Texas among them — have rejected EDR measures in recent years. Similarly, ballot measures that would allow EDR failed in both California and Colorado in 2002 by substantial margins.

# The Montana Experience

In 2006, Montana joined six other states around the country that offer citizens the opportunity to make last-minute decisions about voting. By registering on Election Day, recent arrivals who relocated from another county or state, those roused to action at the last minute by a candidate or ballot issue, or plain old procrastinators could participate in the process despite missing a 30-day cut-off for traditional registration.

Lawmakers enacted a bill (S.B. 302) that allowed a similar version of same-day registration or election-day registration (EDR) found in Idaho, Maine, Minnesota, New Hampshire, Wisconsin and Wyoming but with some unique features.

Montana's version of EDR is slightly more restrictive than what is offered in other states. While voters can register and vote in the period between the 30-day cut-off for regular registration and the time the polls close on Election Day, they must do so at a county elections office. The other six states offering EDR allow voters to register and vote at their precinct or at a central location.

According to election administrators, S.B. 302 was a compromise among a number of different factions; among them the state's League of Women Voters, the AFL-CIO, the AARP, Associated Students of the University of Montana, the Secretary of State's office, political parties and county clerks.<sup>4</sup>

"Same-day registration or pollingplace registration has always been a big issue: whether or not the person

who moves into Montana two weeks before the election should be allowed to vote," said Duane Winslow, director of elections for Yellowstone County. "We were able to compromise in this and allow late registration. So, after the close of registration, if someone who is not registered to vote in the county and has not been issued an absentee ballot in any other county in Montana...we will allow them to register and to be issued a ballot right there in the election administrator's office. They won't be allowed to go to a polling place, but they will be able to [register and vote at a county office] up until Election Day."5

With concerns about the limits of Montana's recently-implemented statewide voter registration system and the potential for double-voting or other forms of fraud, state law-makers embraced a form of election-day registration that does not allow the convenience of polling-place sign up, but nonetheless permits recent arrivals or procrastinators the ability to participate in elections.

The law limits registration to county offices or courthouses where election officials say they can perform necessary checks to make sure a voter has not cast a ballot previously or been issued an absentee ballot in another part of the state.

#### The roll out

The November 2006 election marked the first time Montana voters had the opportunity to register and cast ballots on Election Day, and from media accounts during and after the vote, the response was overwhelming.

With a hard-fought and highprofile race for U.S. Senate – and with partisan control over the body potentially in the hands of Montana voters – turnout was unusually high at polling places throughout the state, with long lines at locations offering EDR.

Democrat Jon Tester edged incumbent Republican Conrad Burns to take the seat back for the party, which assumed control over the Senate with a single seat advantage.

Countywide turnout at polling places in Missoula was "way, way up for an off year" said Vickie Zeier, county clerk and recorder. She went on to predict "a record number of voters" for a mid-term election, with voters waiting in line for close to two hours for the opportunity to register and vote. In all, 644 people took advantage of EDR in the county.<sup>7</sup>

#### Caught 'off guard'

Elaine Gravely, state election director, said the high turnout surprised local election officials, many of whom expected the nearly monthlong late registration period would help thin lines on Election Day.

"Turnout caught us off guard, to be honest," Gravely said. "Because [current law] is requiring that people can register and vote on the same day at the court house, we had almost 4,000 people on Election Day in Montana. And we're a state with a small population. It created real havoc for election administrators in the state. One county had people in line voting at midnight."8

Winslow, who oversees elections in Yellowstone County, home to more than 92,000 registered voters, reported "steady lines" throughout the day. He attributed the rush on Election Day to a number of reasons, but primarily because the county "didn't do a better job of advertising that they didn't have to wait until Election Day to come in to register and vote."

Winslow said lines were "not as bad" in his county as others in the state, particularly those with large populations of college students. On average, voters waited about 20 minutes, with each registration transaction taking approximately five minutes to complete.<sup>9</sup>

Statewide, 3,947 Montana residents cast ballots using the state's new late registration rules. Another 3,535 registered and voted at county offices in the period between the end of the 30-day registration period and Election Day. In all, late registration led to nearly 7,500 residents voting – or nearly 2 percent of those who cast ballots – who would have otherwise been unable to vote under previous rules.<sup>10</sup>

Whether the new law or a high-interest U.S. Senate race contributed to the election's higher-than-usual turnout is a question left for political scientists to debate. What is known, however, is that turnout among registered voters stood at 63 percent, a dramatic 10-point increase over the 2002 midterm vote, and the highest figure in the state in a mid-term since 1994.

...we're a state with a small population.

It created real havoc for election administrators in the state. One county had people in line voting at midnight.

-Elaine Gravely, Montana election director

## An 'embarrassment?' A 'win?' Or both?

Votes were still being counted two days after Election Day, resulting in Jim Farrell, the state Democratic Party chair, declaring the vote "an embarrassment in the eyes of the whole country."<sup>12</sup>

Farrell told reporters that Secretary of State Brad Johnson (R) failed to prepare local officials for the crush of election-day registrants, a charge that Gravely denied.

"We did a lot of training," she said. "What you had was everything from [Help America Vote Act] deadlines suddenly hit at the same time. We had the statewide voter registration database, the new AutoMark [accessible voting] machines, provisional ballots, voter identification and election-day registration. The clerks were just overwhelmed."<sup>13</sup>

The experience of late registration, while trying for voters and some local officials, was nonetheless a success because it expanded the vote to thousands who otherwise wouldn't have had the opportunity to vote, wrote Mike Cooney, a for-

mer Montana secretary of state in an editorial.<sup>14</sup>

"As often happens with elections, Montanans became motivated and engaged in the closing days of the 2006 campaign," Cooney wrote, with former Connecticut Secretary of State Miles Rapoport. "[EDR rules] eliminated arbitrary registration deadlines and opened the door for thousands of citizens to exercise their most basic democratic right. Montana now joins its neighbors, Idaho and Wyoming, and four other states offering EDR – states which consistently rank among the top 10 in voter turnout."<sup>15</sup>

#### Rollback efforts

With the problems at the polls – and perhaps some partisan ill will after a hard-fought but unsuccessful election for Republicans in November – some lawmakers are seeking to eliminate the option of election-day late registration in the state by rolling back the deadline to the Friday before an election or earlier.<sup>16</sup>

Rep. Tom McGillvray, R-Billings, proposed a measure (H.B. 281) that

would allow residents to register as late as four days (or the Friday) preceding an election, eliminating the option to register and vote on Election Day itself.<sup>17</sup>

Rep. Rick Jore, a member of the Constitution Party representing Ronan, filed a bill (H.B. 266) that would end the registration period 14 business days before an election, further curtailing the late-registration rules in the state.<sup>18</sup>

Jore said he was disturbed by reports of long lines and confusion at polling places.

"My concern is that we're diminishing the integrity of the elections process," Jore said at the hearing.<sup>19</sup>

Opponents of the bill said the long lines in November 2006 proved that same-day registration was serving its intended purpose – increasing the number of Montanans participating in the vote.

"I certainly know that there was some difficulty in terms of long lines, but that just showed that all of those folks voted. There was no voter fraud. We're just working out the technicalities," said Terry Kendrick, a representative of Montana Women Vote, a group that encourages women's political participation.<sup>20</sup>

Sara Busey, HAVA representative for the League of Women Voters of Montana, said her group opposes any efforts to curtail EDR.

"The month leading up to election day on Nov. 7 saw 3,535 people register to vote statewide; on Election Day, an additional 3,947 registered and voted," she said. "EDR was a resounding success in

terms of providing access to voting. The push for curtailing EDR is coming from the clerks and recorders who weren't prepared for the rush and had to pull experienced staff off [of supporting] precincts to register folks at the court house. We feel this is a problem easily overcome with proper preparation."<sup>21</sup>

McGillvray's bill passed the Republican-controlled House by a 52-48 margin, with Senate debates underway at press time. Most in Montana expect EDR will become a mainstay in the state's elections, at least if the partisan numbers hold up.

"Realistically, I doubt there will be any change," Winslow said. "As it becomes more partisan, Democrats will want to keep the system as it is. And Democrats have the Senate and governor's office."<sup>22</sup>



### Montana's Late Registration Process

Unlike other states that offer election-day registration, Montana offers a "late-registration period," designed to allow similar flexibility to voters who can cast ballots up until polls close on Election Day even if they miss the state's 30-day pre-election registration deadline.

But it does not permit voters to register and vote on Election Day at local precincts. Because the statewide voter registration database is only online at county registrar offices, the state's late-registration law limits the process of same-day registering and voting to one centralized location in each county.

A voter who has missed the state deadline is given a registration form at an election office. Identification is required in the state to vote, and the list of acceptable verification includes photo and non-photo documents.

After a voter fills out the form, the statewide registry is checked to make sure the record is not a duplicate and the voter has not been issued an absentee ballot. If the application is accepted, the voter casts a regular ballot at the central location.

# Minnesota: An Election-Day Registration Pioneer

With more than 30 years experience registering voters on Election Day, Minnesota is frequently cited as a model of success by proponents of the process, though election-day registration (EDR) is not uniformly supported.<sup>23</sup>

In 1973, Minnesota made sweeping changes to its voter registration process, including allowing EDR. The legislation also mandated that all jurisdictions maintain voter registration, altering rules that had previously allowed jurisdictions with fewer than 10,000 people – representing about one-third of the state – to operate without rolls.<sup>24</sup>

Not only did EDR represent a new wrinkle in Minnesota elections, it also meant that for many, it would be their first experience registering at all.

#### The process

Like nearly all states that require voter registration, Minnesota closes its registration rolls before an election, allowing time to verify new registrants, clean up duplicates and perform other maintenance before the vote. Regular registration closes 21 days prior to Election Day, and voters who sign up before the deadline are termed pre-registered voters.

When voters enter a polling place, they are directed either to a table for those who need to register to vote or a table for those who are pre-registered. A registration judge conducts EDR. The judge is prohibited by law from handling the ballots of sameday registrants.<sup>25</sup>

The judge first checks if the voter is in the correct precinct by examining

a precinct map. Voters must be in the correct precinct to register. If not, they are re-directed.

If in the correct precinct, the voter completes a new voter registration card and provides identification. Acceptable forms include a Minnesota driver's license with a current address; a notice of late registration; a U.S. passport with a utility bill; a U.S. military photo ID card with a utility bill; an oath of a registered voter in a precinct (also known as vouching); or a student ID, registration, or fee statement with a current address.<sup>26</sup>

When the form is completed and the voter's identity has been verified, they are then asked to add their name, address, date of birth and signature to a blank line in the poll book. After this the voter is given a receipt and then directed to the ballot judge.<sup>27</sup>

#### The first 30 years of EDR

When EDR was first authorized, the state provided funds to assist local jurisdictions with implementation. The state initially authorized \$125,000. Local jurisdictions soon discovered it was far from enough. In all, \$800,000 was required for that year. Eventually, the state left jurisdictions to fund EDR themselves as part of regular election expenses.<sup>28</sup>

The election of 1976 was the first presidential vote in which same-day registration was permitted, and there were more EDR registrants than expected, causing some administrative problems at the polls.

The state estimated about 10

percent of voters would register on Election Day. In actuality, more than one in five state voters registered the same day they cast ballots, the highest rate since EDR's inception.

This, coupled with a high turnout (73 percent of eligible voters cast ballots<sup>29</sup>) led to long lines at some polling places, voters registering at the wrong polling place and some same-day registrants being allowed to cast ballots without being properly identified.<sup>30</sup>

However, with experience, more realistic estimates of EDR turnout and updated election procedures, officials and observers say these issues have mostly been addressed.<sup>31</sup>

Over the past 30 years, the number of Election Day registrants has remained fairly steady, with approximately 13 percent of voters registering to vote on Election Day during off-year elections, and nearly 19 percent during Presidential elections.<sup>32</sup>

State and local election officials have also stepped up voter education on EDR, while the statewide voter registration database has allowed for a more complete and up-to-date voter list.<sup>33</sup>

# Local snapshot: Anoka County and EDR in 2006

Anoka County, the fourth-most populous of Minnesota's 87 counties, registered approximately 17,000 voters on Election Day in November 2006. The county had a little more than 183,000 pre-registered voters prior to the general election.<sup>34</sup>

After the election, five county election staffers spent approximately

six weeks entering and updating voter registration records, completing the task in mid-January.<sup>35</sup>

County clerk Rachel Smith said she believes EDR safeguards the integrity of voter rolls.

"It provides us with the most upto-date information on the voter," she said. "It assures that individuals are voting for offices and districts where they live on Election Day and it eliminates the need for provisional ballots because we resolve any voter registration issues that day."<sup>36</sup>

#### Challenges and responses

There are some administrative challenges to using EDR in Minnesota, but officials say they are manageable.

"[EDR] can sometimes make ballot orders slightly more difficult because there is more flexibility on the number of people that can show up to vote. There are [also] some technical issues in working with what is considered legal identification that election judges frequently get confused, but the county does provide 'cheat sheets' and is always available for questions," said Smith, referring to her experience in Anoka County. <sup>37</sup>

Two other major concerns critics have about EDR are the potential for voter fraud, i.e. voters casting more than one ballot, and longer lines at the polls due to the EDR check-in process.

In the past, former Minnesota Secretary of State Mary Kiffmeyer (R), who supported continued use of EDR in the state, expressed one of those concerns. "We have long lines because of same-day. People get frustrated and leave." 38

Gary Poser, the state's election director, acknowledged that while long lines can be a problem, election officials have responded to this issue.

"Longer lines can be expected in precincts where numerous new registrants might be anticipated - near college campuses, near large apartment complexes and in areas with new housing developments," he said. "Precincts in these areas may hire additional election judges to help administer anticipated larger numbers of EDR voters. Accurate news media articles on acceptable proofs of residence can also help voters bring the appropriate documentation to the polling place to keep the process moving."<sup>39</sup>

Smith said it is not a problem she has encountered much in Anoka County, noting the county rarely sees long lines and that at peak times voters probably don't wait more than 15 to 20 minutes to register.<sup>40</sup>

On voter fraud, both Poser and Smith agree there is little evidence of EDR leading to double-voting or other voter fraud and in fact may be less prone to fraud than other means of registering to vote.

"EDR is an in-person registration with an election official (poll worker) where an authorized proof of residence is shown. EDR has less fraud potential than a mail registration," said Poser.<sup>41</sup>

Smith said she knew of one instance of potential voter fraud in

2004 in her county – where a voter cast both an absentee ballot and voted on Election Day in another precinct. The case could not be pursued by the county attorney because of the mental state of the individual and an inability to establish intent, she said.

She said she does not know of recent instances of voter fraud in Anoka County and describes how they check for this when inputting registration information into the state database.

"The statewide [voter registration] system will immediately notify us if a voter voted more than once," she said. 'We also send a non-forwardable postcard to each voter when they register to vote and if the postcard is returned, we will immediately investigate. The majority of the postcards that are returned are due to moves during December and January following an election and therefore are also not fraudulent."<sup>42</sup>

#### What's next

The state is hoping to test electronic poll books in select precincts in upcoming special elections in 2007. An informal request for proposal has been issued for such poll books, which may either have a real-time connection to the statewide voter registration database or may hold data that will be uploaded to the database after the election. For the potential upcoming pilot project, the state will use a parallel approach, using the new electronic poll books along with the printed rosters.<sup>43</sup>

# Election-Day Registration Outside of Montana and Minnesota

Along with Minnesota and Montana, five other states — Idaho, Maine, New Hampshire, Wisconsin and Wyoming — also permit election-day registration (EDR).

Wyoming was the first to allow EDR when in 1945 the practice was allowed at primaries in several rural counties, cities and municipalities that had fewer than 1,000 votes cast in the previous election. EDR was used for the first time in primary elections in Wyoming in 1952, and for the first time in general elections in 1994. In 2003, it was permitted in all elections except "special district elections."

The state has a 30-day cut-off period for voter registration prior to each election; however, if someone misses the 30-day deadline they may go to their county courthouse, register to vote and vote in-person absentee at the same time.<sup>45</sup>

Citizens in Wisconsin may register to vote on Election Day as well by filling out a special voter form (EB-131) at their polling place. Those wishing to register must provide a driver's license number (or state-issued ID or the last four digits of their Social Security number) and have proof of residence indicating they have lived at their current address for at least 10 days prior to the election.<sup>46</sup>

If a registrant does not have a license with them and does not know the number, they are permitted to vote a provisional ballot. They then have until 8 p.m. to return to the polling place with the necessary identification, or they may fax it by 4 p.m. the next day.<sup>47</sup>

Voters have until 5 p.m. on the

day prior to the election to register to vote, but sometimes, even that's not quite enough time.

"Obviously I knew the election was coming up, but I just never got around to registering. I'd like to blame it on the fact that I was in my third-trimester [of pregnancy] at the time, but really, I can't," said Jen Fudge of Wauwatosa who recently moved back to Wisconsin. "But it was great to know that I could register and vote on Election Day. The whole process took me about five minutes to register. It actually took longer to vote."<sup>48</sup>

Voter registration in New Hampshire closes 10 days prior to an election; however, those who do not meet that deadline may register to vote on Election Day. Unlike Wisconsin, which requires that voters be residents for at least 10 days prior to an election, New Hampshire mandates no such minimum residency. Those who are unable to make it to the town or city clerk's office prior to the election need only bring proof of age, citizenship and domicile to the polling place with them on Election Day.<sup>49</sup>

According to its Web site, Maine has one of the most accessible voting processes in the country. Voters who do not complete their voter registration form at least 20 days prior to an election may register to vote in person through and including on Election Day. Voters wishing to register in person must show proof of identity and residency.<sup>50</sup>

Voters who are unable to either register in person or by mail at least 25 days prior to an election may register to vote on Election Day in Idaho. Those wishing to register via EDR in Idaho must provide proof of residence along with a photo ID. Idaho permits college students with a valid student ID and a current student fee statement that contains the student's valid address in the precinct to register as well.<sup>51</sup>

### The North Dakota exception

North Dakota is the only state in the nation without some form of voter registration. It could also be argued that North Dakota was actually the first state to support EDR when, in 1895, the North Dakota Legislative Assembly passed a law requiring voter registration, part of which allowed an unregistered voter to appear at the polls on Election Day and vote after they filled out an affidavit swearing to the fact that they were indeed a resident.<sup>52</sup>

In 1951, North Dakota repealed mandatory voter registration and left registration optional with governing boards of municipalities. Although there have been several legislative attempts to reinstitute voter registration, all have either failed at the state legislature level or been vetoed by the governor.<sup>53</sup>

Today, in order to vote in North Dakota, one needs to be 18, a U.S. citizen and have lived in North Dakota for 30 days preceding the election. To prove that, citizens need a valid ID (driver's license, tribal ID, student ID, etc.), a utility bill dated 30 days prior to Election Day or a change of address verification letter from the U.S. Postal Service. If a potential voter does not have one of those forms of ID, they may still vote if a poll worker is able to vouch for their identity or they complete a voter's affidavit.<sup>54</sup>

# Legislative Outlook

### Connecticut's 'Presidential Ballots'

While stopping short of allowing EDR, the Nutmeg State has a unique system allowing unregistered residents to cast ballots on Election Day, but only for the office of President. While voters are not required to register at the time they cast these ballots, registration can be offered by the clerk.

In place since 1963, the "Presidential Ballot" directs unregistered voters to town clerk offices beginning up to 45 days before an election and ending, until recently, a week before the vote. In 1997, the law was amended to allow presidential balloting until polls close on Election Day.<sup>55</sup>

To receive the ballot, applicants must sign a form attesting they are a U.S. citizen of legal age, have not forfeited their right to vote (by committing certain crimes), are a resident of the town or a former resident who has moved within the past 30 days and they have not nor will not cast any other ballot. Since 2004, applicants also have to provide qualifying photo or non-photo identification. <sup>56</sup>

The 2000 vote, the first Election Day allowing same-day Presidential voting, saw a huge jump in presidential ballots – from about 1,000 in 1996 to more than 30,000 in the 2000 general election.

The crush of same-day presidential voters caused some problems at clerks' offices, including long lines, ballot shortages and concern over fraud – a worry shared by lawmakers who in 2004 opted to require presidential ballot voters to show identification when applying for the ballot.<sup>57</sup>

Election-day registration (EDR) has been limited to largely rural and sparsely-populated states. Maine, Minnesota and Wisconsin have permitted the practice since the 1970s, while New Hampshire, Idaho and Wyoming adopted it statewide beginning in the 1990s.

It took another decade for an additional state to join the small group, when Montana lawmakers adopted a late-registration process in 2005.

Legislative failures have been plentiful in recent years. Bills introduced in 12 states – Connecticut, Florida, Illinois, Indiana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oregon, Texas and Utah – failed in 2005 sessions. A year earlier bills failed in 13 states, among them Alaska, Hawaii, Massachusetts, Missouri, Pennsylvania, Ohio, Tennessee and Vermont.<sup>58</sup>

With bill failures widespread, it would seem the prospects for this year's crop of bills are bleak, especially with repeat efforts in Illinois, Indiana and Texas.<sup>59</sup> Michigan state Sen. Liz Brater, D-Ann Arbor, introduced S.B. 13 in early January to allow polling-place EDR.

Brater said partisan politics would likely keep her bill from succeeding. Democrats have control of the governorship and state House in Michigan, but are a minority in the state Senate.<sup>60</sup>

With a district that includes the University of Michigan, Brater said the introduction of EDR in the state would get more young people voting and increase participation statewide, as evidenced by turnout rates in states

which offer it. And with Michigan's Qualified Voter File able to check against duplicate or fraudulent registrations and double voting, Brater said "people who have considerable expertise in election law have endorsed this concept."

Edward Foley, a law professor at the Moritz School of Law at The Ohio State University, said partisanship and EDR are more nuanced than the simple notion that Democrats support and Republicans oppose EDR.

"Strategic considerations do not fully explain the positions of the two parties in these voting administration debates. Rather, their different positions conform to their overall ideological differences," Foley said. "Democrats, tending generally to value equality and civil rights over the detection and punishment of crimes, would be expected to value guaranteeing equal access to the electoral process over prevention of election fraud. Republicans, conversely, being more law-and-order in general than Democrats, would naturally be inclined to see stopping election fraud as a higher value than removing all obstacles to the casting of a ballot."

#### Efforts to repeal

While not as common as bills to introduce EDR, efforts to repeal it are underway in at least one state. Long lines and confusion at clerk/recorder offices in parts of Montana led two lawmakers – one Republican and the other a member of the conservative Constitution Party

– to introduce legislation to alter the state's late registration period, closing the rolls four to 14 days before Election Day.<sup>62</sup>

That effort was dismissed by some as partisan ill-will after a Democratic upset in the race for the U.S. Senate.

"Election-day registration was not partisan [in the state] before 2006," said Sara Busey of Montana's League of Women Voters. "But it has become somewhat due to the very closeness of the parties in the legislature. A heavy turnout on Election Day at court houses to register and vote occurred in heavily Democratic areas. Some feel that allowed Jon Tester (D) to defeat [then-incumbent] Sen. Conrad Burns (R)."63

While the correlation between party preference and EDR is not always present, searches across the country looking at bills to expand or restrict registration procedures closer to or on Election Day show some patterns.

Republican lawmakers have sought to restrict efforts to introduce EDR or roll back existing rules allowing it; Democrats have sought to increase EDR in states and oppose measures to curtail its use in states that allow it.

#### The people choose – and pick 'No'

Brater said she would consider trying to take the issue of EDR directly to voters in the form of a ballot question to circumvent Republican opposition in the legislature.

Voters in California and Colorado have both had the opportunity to vote on measures that would allow EDR in their states, and in both cases, rejected it by substantial margins.

In California, EDR failed by 20

Demos said the citizens of Colorado and California were "losing out" by defeating the measures. In a press release, the organization blamed "a campaign of misinformation and distortion... [caused] the initiatives' defeats."

percentage points in the 2002 election, despite efforts by Demos, a New York-based organization that supports EDR, and others to convince voters that it would increase turnout. The state Republican Party led the opposition to Proposition 52, press reports indicated, along with then-Secretary of State Bill Jones.<sup>64</sup>

Voters were apparently receptive to arguments put forth by Prop. 52 opponents, which included assertions that permitting EDR would "make it easier for criminals and non-citizens to vote."

"Hidden in the fine print is a change in the law that makes proving fraud almost impossible," stated the official rebuttal to Prop. 52 on state voter guides. "The authors of Prop. 52 are trying to fool you with talk of tough penalties. Tough penalties mean nothing if it's impossible to prove the crime was committed." 65

That same year, Colorado voters rejected EDR by an even greater margin. Amendment 30, as it was called on ballots, garnered just over 37 percent of the vote.<sup>66</sup>

Demos said the citizens of Colorado and California were "losing out" by defeating the measures. In a press release, the organization blamed "a campaign of misinformation and distortion....that caused the initiatives' defeats."<sup>67</sup>

# SNAPSHOT OF THE STATES: Election-Day Registration States

#### **Idaho**

Voter registration deadline (pre-election): 25 days<sup>68</sup> EDR location: Polling place<sup>69</sup>

**Non-EDR voter identification requirements**: Driver's license number or last four digits of Social Security number. A voter who lacks documentation checks a box indicating so on a registration form.<sup>70</sup>

*EDR voter identification requirements*: Driver's license or state identification card issued through the department of transportation; any document which contains a valid address in the precinct together with a picture identification card; or current valid student identification card from a post-secondary educational institution in Idaho accompanied with a current student fee statement that contains the student's valid address in the precinct with a picture identification card.<sup>71</sup>

**2004 registration**: 798,015; EDR registrants: 117,622<sup>72</sup> **2006 registration**: 764,880; EDR registrants: 54,531<sup>73</sup>

#### **Maine**

*Voter registration deadline (pre-election)*: 21 days before election if registering by mail. No deadline for in-person voting.<sup>74</sup>

EDR location: Polling place75

**Non-EDR voter identification requirements**: Driver's license number or last four digits of Social Security number. A voter who lacks both forms checks a box indicating so on the registration form.<sup>76</sup>

EDR voter identification requirements: Same as non-

EDR requirements.<sup>77</sup>

**2004 registration**: 1,023,956; EDR registrants:

Unavailable

**2006 registration**: Unavailable; EDR registrants:

Unavailable

#### **Minnesota**

Voter registration deadline (pre-election): 21 days<sup>78</sup> EDR location: Polling place<sup>79</sup>

**Non-EDR voter identification requirements**: Driver's license number; or last four digits of Social Security number. A voter who lacks documentation checks a box indicating so on the registration form.<sup>80</sup>

EDR voter identification requirements: Driver's license, learner's permit, identification card, or receipt for one, with current address; tribal ID; if Minnesota license, tribal ID or state ID has a former address, a voter can present a current utility bill with address; "Notice of Late Registration" postcard; U.S. passport with utility bill; U.S. military photo ID card with utility bill; voter's prior registration listed on roster at former address in precinct; oath of a registered voter in precinct vouching for residence; student ID, registration, or fee statement with current address, utility bill.<sup>81</sup>

**2004 registration**: 3,569,917; EDR registrants:

492,42182

2006 registration: 3,410,683; EDR registrants:

292,16883

#### **Montana**

*Voter registration deadline (pre-election)*: 30 days. At end of the period, applicants must register and vote at local election offices.<sup>84</sup>

**EDR location**: Local election offices. 85

Non-EDR voter identification requirements: Registrant must provide a driver's license or last four digits of Social Security number. Those with neither a driver's license nor a Social Security number must provide (in person) or enclose (by mail) a copy of one of the following: any photo ID with their name; or a current utility bill, bank statement, paycheck, government check or other government document that shows name and current address.<sup>86</sup>

EDR voter identification requirements: Same as non-EDR requirements.<sup>87</sup>

**2004 registration**: 638,474;<sup>88</sup> EDR registrants: Not applicable.

**2006 registration:** 649,436;89 EDR registrants: 3,94790

#### **New Hampshire**

Voter registration deadline (pre-election): 10 days<sup>91</sup> EDR location: Polling place<sup>92</sup>

*Non-EDR* voter identification requirements: Driver's license number or last four digits of Social Security number.<sup>93</sup>

*EDR voter identification requirements*: Registrant must prove citizenship, age, and domicile. A birth certificate, U.S. passport, naturalization papers if the applicant is a naturalized citizen, a citizenship affidavit and a domicile affidavit are acceptable.<sup>94</sup>

**2004 registration**: 855,861; EDR registrants: 94,431<sup>95</sup> **2006 registration**: 848,317; EDR registrants: 25,924<sup>96</sup>

#### **Wisconsin**

**Voter registration deadline (pre-election)**: 21 days before election if registering by mail. If registering to vote in person at the municipal clerk's office, can register up until 5 p.m. the day before an election.<sup>97</sup>

EDR location: Polling place98

**Non-EDR voter identification requirements**: Driver's license number, other state-issued ID card or last four digits of Social Security number or their state ID card. A voter who lacks acceptable forms checks a box indicating so on the registration form.<sup>99</sup>

EDR voter identification requirements: Wisconsin driver's license or other state-issued ID; employee ID with or without photo; a real estate tax bill or receipt for the current year or the year preceding the date of the election; a current residential lease; a university, college or technical institute fee card with photo; a university, college or technical institute identification card with photo; a utility bill for the period commencing not earlier than 90 days before election day; bank statement; paycheck; a check or other document issued by a unit of government.<sup>100</sup>

**2004 registration**: Unavailable; EDR registrants: Unavailable

**2006 registration**: 3,450,258; EDR registrants: 360,059 (not including Deerfield and Unity)<sup>101</sup>

#### **Wyoming**

*Voter registration deadline (pre-election)*: 30 days. At the end of period, applicants must register and vote at local election offices.<sup>102</sup>

**EDR location**: Polling place<sup>103</sup>

**Non-EDR voter identification requirements**: Driver's license number or last four digits of Social Security number.<sup>104</sup>

*EDR voter identification requirements*: Same as non-EDR requirement.<sup>105</sup>

**2004 registration**: Unavailable; EDR registrants:

Unavailable

2006 registration: Unavailable; EDR registrants:

Unavailable



Methodology

Research was compiled through the use of primary and secondary sources, including interviews with state and local election officials, state election division Web sites, news accounts, data derived from state law, information provided by other non-governmental organizations and an election reform information database created by the National Conference of State Legislatures.

All sources are cited below in the endnotes.

The opinions expressed by election officials, lawmakers and other interested parties in this document do not reflect the views of non-partisan, non-advocacy *electionline.org* or the Election Reform Information Project.

All questions concerning research should be directed to Sean Greene, research director, at sgreene@electionline.org.

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# electionline.org Briefing

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## APPENDIX D

Washington State Legislature House Bill 1528 Relating to Electronic Voter Registration (Sixtieth Legislature, 2007 Regular Session)

### CERTIFICATION OF ENROLLMENT

### HOUSE BILL 1528

60th Legislature 2007 Regular Session

Passed by the House February 28, 2007
Yeas 91 Nays 6

Speaker of the House of Representatives

Passed by the Senate April 9, 2007
Yeas 30 Nays 17

President of the Senate

Approved

Secretary of State
State of Washington

Secretary of State
State of Washington

#### HOUSE BILL 1528

Passed Legislature - 2007 Regular Session

State of Washington

6

7

8

60th Legislature

2007 Regular Session

By Representatives Hunt, Chandler, Green, Kretz, Ormsby, Armstrong, Miloscia, Appleton, Kenney, Goodman and Moeller; by request of Secretary of State

Read first time 01/22/2007. Referred to Committee on State Government & Tribal Affairs.

- AN ACT Relating to electronic voter registration; adding a new section to chapter 29A.08 RCW; and providing an effective date.
- 3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:
- MEW SECTION. Sec. 1. A new section is added to chapter 29A.08 RCW to read as follows:
  - (1) A person who has a valid Washington state driver's license or state identification card may submit a voter registration application electronically on the secretary of state's web site.
- 9 (2) The applicant must attest to the truth of the information 10 provided on the application by affirmatively accepting the information 11 as true.
- 12 (3) The applicant must affirmatively assent to use of his or her 13 driver's license or state identification card signature for voter 14 registration purposes.
- 15 (4) A voter registration application submitted electronically is 16 otherwise considered a registration by mail.
- 17 (5) For each electronic application, the secretary of state must 18 obtain a digital copy of the applicant's driver's license or state 19 identification card signature from the department of licensing.

p. 1

- 1 (6) The secretary of state may employ additional security measures
- 2 to ensure the accuracy and integrity of voter registration applications
- 3 submitted electronically.
- 4 <u>NEW SECTION.</u> **Sec. 2.** This act takes effect January 1, 2008.

--- END ---

## APPENDIX E

National Conference of State Legislatures—Tables on Requirements for Voter Identification

# Requirements for Voter Identification

Updated October 23, 2008

#### First-Time Voters

The federal Help America Vote Act mandates that all states require identification from first-time voters who registered to vote by mail and did not provide verification of their identification with their mail-in voter registration.

### Blanket Voter ID

Twenty-four states have broader voter identification requirements than what HAVA mandates. In these states, all voters are asked to show identification prior to voting. Seven of these states specify that voters must show a *photo* ID; the other seventeen states accept additional forms of identification that do not necessarily include a photo (Table 1). In no state is a voter who cannot produce identification turned away from the polls—all states have some sort of recourse for voters without identification to cast a vote. However, in Georgia and Indiana, voters without ID vote a provisional ballot, and must return to election officials within a few days and show a photo ID in order for their ballots to be counted. For specifics on what forms of identification are acceptable and the options available to voters who cannot present identification, see Table 2.

## Recent Legislative Action

New voter ID laws passed in 2003: Alabama, Colorado, Montana, North Dakota, South Dakota New voter ID laws passed in 2005: Indiana, New Mexico, Washington

Also in 2005: Georgia tightened its existing voter ID law to require photo ID

New voter ID law passed in 2006: Ohio

Also in 2006: Georgia passed SB 84, providing for the issuance of voter ID cards at no cost to registered voters who do not have a driver's license or state-issued ID card. Georgia's voter ID law was enjoined from enforcement in July 2006. This affects the primary, general and any runoff elections in 2006.

Also in 2006: Missouri tightened its existing voter ID law to require *photo* ID, but this provision was struck down by the state supreme court in October 2006

Voter ID law relaxed in 2008: New Mexico now allows a voter to satisfy the ID requirement by stating his name, address as registered and year of birth

## Recent Litigation

*Arizona*: On October 20, 2006, the U.S. Supreme Court vacated an October 6 9<sup>th</sup> Circuit Court of Appeals decision that suspended Arizona's requirements pending further litigation. The ID law was in effect for Arizona's 2006 election, and remains in effect in 2008

*Georgia*: On October 27, 2006, the 11<sup>th</sup> U.S. Circuit Court of Appeals upheld an injunction barring Georgia from enforcing its photo ID law. The injunction was issued a week earlier by a U.S. District Court judge. Georgia's voter ID requirement was reinstated by a federal judge in mid-2007.

*Indiana*: Photo ID law was upheld by 7<sup>th</sup> Circuit U.S. Court of Appeals on January 4, 2007. The U.S. Supreme Court upheld the ruling on appeal in April 2008.

*Michigan*: The Michigan Supreme Court ruled July 18, 2007 that a voter ID law originally passed in 1996 (but never implemented due to a ruling by the state's Attorney General) is constitutional and enforceable.

*Missouri*: On October 16, 2006, the Missouri State Supreme Court struck down the state's photo ID requirement.

*Ohio*: On November 1, 2006, the secretary of state issued an order suspending the requirement that voters present photo ID at the polls for the November 2006 election. The order did not apply to future elections, and voter ID requirements are in effect for 2008.

Table 1	: State Requirements for	v Voter Identification	
	States That Request	Photo ID	
	Florida		
	Georgia		
	Hawaii		dimit to the
	Indiana		
	Louisiana		
	Michigan		
	South Dakot	a a a a a a a a a a a a a a a a a a a	
Sta	tes that Require ID (pho	oto not required)	
	Alabama		
	Alaska		
	Arizona		Men of Table 1
	Arkansas		
	Colorado		
	Connecticut	•	4.11
	Delaware		
	Kentucky		
	Missouri		
	Montana		See that the second of the
	North Dakot	a	
	Ohio		
	South Carolin	na	
	Tennessee		
	Texas		
	Virginia		
	Washington		
4 4		oter Identification Requi	rements
State	Requirement	Acceptable Forms of ID	Voters Without ID
labama	Each elector shall provide identification to	Government-issued	Vote a challenged or provisional ballot or vote

§17-11A-1	an appropriate election official prior to voting.	photo ID	if s/he is identified by two poll workers as an eligible
	oznam parez de veznago	Employee ID card with photo	a voter on the poll list, and both poll workers sign the voting sign-in register by
		Alabama college/university ID with photo	the voter's name.
		Utility bill	
		Bank statement	
		Government check	
		Paycheck	
		ID card issued by any state or the U.S. government	
		U.S. passport	
	1 2	Alabama hunting license	
	The state of the s	Alabama fishing license	
	national distribution of the state of the st	Alabama gun permit	
		FAA-issued pilot's license	
		U.S. military ID	
		Birth certificate (certified copy)	
		Social security card	The state of the s
		Naturalization document	
		Court record of adoption	

		Court record of name change	
		Medicaid or Medicare card	
		Electronic benefits transfer card	
		Government documents showing name and address of voter	
Alaska	Before being allowed to vote, each voter shall	Official voter registration card	An election official may waive the identification
§15.15.225	exhibit to an election official one form of identification.	Driver's license	requirement if the election official knows the identity of the voter. A voter who
		Birth certificate	cannot exhibit a required form of identification shall
	10.1	Passport	be allowed to vote a questioned ballot.
		Hunting or fishing license	
		Current utility bill, bank statement, paycheck, government check or other government document with the voter's name and address	
		Valid Arizona driver's license	An elector who does not provide the required identification shall receive
	Every qualified elector shall present one form of identification that	Valid Arizona non- driver identification	a provisional ballot.  Provisional ballots are counted only if the elector
Arizona		Tribal enrollment card or other form of tribal	provides identification to the county recorder by
§16-579A		identification	5pm on the fifth business day after a general election that includes an election
	address of the elector.	or local government issued identification	for federal office, or by 5pm on the third business day after any other
		Utility bill dated within	1

		90 days of the election	
		Bank or credit union statement dated within 90 days of the election	
		Valid Arizona vehicle registration	
		Indian census card	
		Property tax statement	
		Vehicle insurance card	
		Recorder's Certificate	
Arkansas	Election officials shall request the voter to	Driver's license	If a voter is unable to provide this identification,
§7-5-305(a)(8)	provide identification	Government-issued photo ID	the election official shall indicate on the precinct voter registration list that
		Voter card	the voter did not provide identification.
		Social security card	
		Birth certificate	
		U.S. passport	
	19 d. c.	Employee ID card	
		Student ID card	
		Arkansas hunting license	
		U.S. military ID card	
		Copy of a current utility bill, bank statement, government check, paycheck, or other government document	
		that shows the name and address of the voter	

Any eligible elector desiring to vote shall	Colorado driver's license	An eligible elector who is unable to produce
in section 1-1-104	CO Dept. of Revenue ID card	identification may cast a provisional ballot.
(19.3).	U.S. passport	
	Employee ID card with photo issued by the U.S. government, CO state government, or political subdivision of CO	
	Pilot's license	
	U.S. military ID with photo	
	A copy of a current utility bill, bank statement, government	
	other government document that shows	
	Medicare or Medicaid card	
	Certified copy of birth certificate	
	Certified documentation of naturalization	
Each elector shall present identification	Social Security card Other preprinted form of identification which	Elector shall, on a form prescribed by the Secretary of the State, write the elector's
	shows the elector's name and either the elector's address,	residential address and date of birth, print the elector's name and sign a
	desiring to vote shall show his or her identification as defined in section 1-1-104 (19.5).	desiring to vote shall show his or her identification as defined in section 1-1-104 (19.5).  U.S. passport  Employee ID card with photo issued by the U.S. government, CO state government, or political subdivision of CO  Pilot's license  U.S. military ID with photo  A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the elector  Medicare or Medicaid card  Certified copy of birth certificate  Certified documentation of naturalization  Each elector shall present identification  Other preprinted form of identification which shows the elector's name and either the

the room where an election is being held, shall announce his or her name and address and provide proof of identity  Florida  The clerk or inspector shall require each elector, upon entering and valid picture identification as provided in s. 97.0535(3)(a). If the picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.  The clerk or inspector shall require each elector, upon entering the polling place, to present a current and valid picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.  Tit. 15, §4937  Utility bill  Paycheck  Any government document with voter's name and address  Florida driver's license broid driver's license by the Dept. of Highway Safety and Motor Vehicles  U.S. passport  Utility bill  With them, he on sign an affidavit affirmation that is the person list election district  Utility bill  Any government document with voter's name and address  The person shall his or her own hor with assistance member of the election district  U.S. passport  U.S. passport  U.S. passport  U.S. passport  Employee badge or identification  does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.  Buyer's club identification  Whenever the atmade and filed with them, he on sign an affidavit affirmation that is the person list election district  U.S. passport  Employee badge or identification  Whenever the atmade and filed with them, he on sign an affidavit affirmation that is the person shall his or her own hor with assistance member of the election desired by the Dept. of  Highway Safety and  Motor Vehicles  Super's club  identification  Whenever the atmade and filed with them, he on sign an affidavit affirmation that is the person shall his or with assistance and indentification with the sign and filed vital affirmation that is the person hall his or with				false statement that the elector is the elector whose name appears on the official checklist.
shall require each elector, upon entering and the polling place, to present a current and valid picture identification as provided in s.  97.0535(3)(a). If the picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.  Shall require each elector, upon entering the polling place, to present a current and valid picture identification as provided in s.  97.0535(3)(a). If the picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.  Student identification work his or her own hor or with assistant member of the election was an affidavit to the stated in the fille such affidavit she sworn to and sul before one of the inspectors or cle election who is a made and filed with the provides the voter's signature shall be required.  Student identification work his or her own hor with assistant member of the election in member of the election in member of the election in the stated in the fille such affidavit she sworn to and sul before one of the inspectors or cle election who is a made and filed with the point of the provides the voter's signature shall be required.  Student identification work in the fille such affidavit she sworn to and sul before one of the dentification whence the administer the admin	Tit. 15, §4937	the room where an election is being held, shall announce his or her name and address and provide proof of identity	Utility bill  Paycheck  Any government document with voter's name and address	In the event the voter does not have proof of identity with them, he or she shall sign an affidavit of affirmation that he or she is the person listed on the election district record.
Entertainment identification  Public assistance	§97.0535(3)(a) and	shall require each elector, upon entering the polling place, to present a current and valid picture identification as provided in s. 97.0535(3)(a). If the picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be	Florida ID card issued by the Dept. of Highway Safety and Motor Vehicles  U.S. passport  Employee badge or identification  Buyer's club identification  Debit or credit card  Military identification  Student identification  Retirement center identification  Neighborhood association ID  Entertainment identification	The person shall fill out, in his or her own handwriting or with assistance from a member of the election board, the form and make an affidavit to the facts stated in the filled-in form; such affidavit shall then be sworn to and subscribed before one of the inspectors or clerks of the election who is authorized to administer the oath. Whenever the affidavit is made and filed with the clerk or inspector, the person shall then be admitted to cast his or her vote, but if the person fails or refuses to make out or file such affidavit, then he or she shall not be permitted to vote.

Georgia	Each elector shall present proper	Georgia driver's license, even if expired	If you come to the polls without one of these forms
§21-2-417	identification to a poll worker at or prior to	-	of ID, you can still vote a provisional ballot. You
	completion of a voter's certificate at any	the state of Georgia or the federal government	will have up to two days after the election to
	polling place and prior to such person's	Free votoer ID card	present appropriate photo ID ar your county
	admission to the enclosed space at such polling place.	issued by the state or county  U.S. passport	registrar's office in order for your ballot to be counted.
		Valid employee ID card containing a	
		photograph, issued by any brand, department, agency or entity of the	
		U.S. government,	
		Georgia or any county,	
		municipality, board,	
		authority or other entity of the state.	
		Valid U.S. military identification card	0.40 mm
Hawaii	Every person shall	Pollworkers request	If the voter has no
	provide identification if	<u>*</u>	identification, the voter
§11-136	so requested by a precinct official.	signature. Acceptable types of ID are not specified by law.	will be asked to recite his/her date of birth and residence address to corroborate the
			information provided in the poll book.
		Specific forms of ID are	Voters who are unable or decline to produce proof of identification may vote
Indiana	A voter who desires to vote an official ballot at	not listed. ID must be	ballot is counted only if
§3-5-2-40.5,	an election shall	Indiana or the U.S.	(1) the voter returns to the
3-10-1-7.2 and	provide proof of	government and must	election board by noon on the Monday after the
3-11-8-25	identification	show the name and photo of the individual.	election and: (A) produces proof of identification; or (B) executes an affidavit stating that the voter

			cannot obtain proof of identification, because the voter: (i) is indigent; or (ii) has a religious objection to being photographed; and (2) the voter has not been challenged or required to vote a provisional ballot for any other reason.
Kentucky §117.227	Election officers shall confirm the identity of each voter by personal acquaintance or by a document.	Driver's license Social Security card Credit card	When the officers of an election disagree as to the qualifications of a voter or if his right to vote is disputed by a challenger, the voter shall sign a written oath as to his qualifications before he is permitted to vote.
Louisiana §18:562	Each applicant shall identify himself, in the presence and view of the bystanders, and present identification to the commissioners.	Louisiana driver's license  Louisiana special ID card  Other generally recognized picture identification	If the applicant does not have identification, s/he shall sign an affidavit to that effect before the commissioners, and the applicant shall provide further identification by presenting his current registration certificate, giving his date of birth or providing other information stated in the precinct register that is requested by the commissioners. However, an applicant that is allowed to vote without the picture identification required by this Paragraph is subject to challenge as provided in R.S. 18:565.
Michigan §168.523	Each voter must show a photo ID or sign an affidavit attesting that he or she is not in the possession of photo identification.	Michigan driver's license  Michigan personal identification card  A voter who does not	An individual who does not possess, or did not bring to the polls, photo ID, may sign an affidavit and vote a regular ballot.

		have either of the above	
		may show any of the	
		following, as long as	
		they are current:	
tar the water			
The transfer		Driver's license or	1111 i -
		personal ID card issued	8
		by another state	
		Federal or state	
		government-issued	
		photo ID	
28. V 1 / AM		photo ib	
		U.S. passport	
THE REAL PROPERTY.		O.D. passport	
		Military ID with abota	
2.4		Military ID with photo	
	. 77 - 1,19,14	Ctudout ID:41 1	
		Student ID with photo	
Line of the same	Equilibrium distriction	from a high school or	
To a terrorista in the		accredited institution of	
		higher education	
		Tribal ID with photo	
Missouri (a)	Before receiving a	Identification issued by	If an individual does not
La a transia	ballot, voters shall	the state of Missouri, an	possess any of these forms
§115-427	establish their identify	agency of the state, or a	of identification, s/he may
	and eligibility to vote at	local election authority	still cast a ballot if two
	the polling place by	of the state;	supervising election
	presenting a form of		judges, one from each
	personal identification.	Identification issued by	major political party, attest
			they know the person.
		government or agency	1
		thereof;	
		Identification issued by	
		an institution of higher	
		education, including a	
		univeristy, college,	
		vocational and technical	
		school, located within	
		the state of Missouri;	
		ine state of iviissoull,	
		A convert of a comment	
		A copy of a current	
		utility bill, bank	

		other government document that contains	
		the name and address of	
		the voter;	
tel for all		D : 1 1:	
	100	Driver's license or state	
		identification card	
		issued by another state.	
Montana	Before an elector is	Driver's license	If the identification
	permitted to receive a		presented is insufficient to
§13-13-114	ballot or vote, the	School district or	verify the elector's identity
	elector shall present to	postsecondary	and eligibility to vote or if
	an election judge a	education photo	the elector's name does not
	current photo	identification	appear in the precinct
	identification showing		register, the elector may
	the elector's name. If	Tribal photo	sign the precinct register
		identification	and cast a provisional
	present photo	identification	ballot.
	identification the	Current utility bill,	ounot.
	elector shall present one		
	of several specified	paycheck, notice of	
		confirmation of voter	
		registration,	
	current address.	government check, or	
		other government	
		document that shows	
		the elector's name and	
		current address	
North Dakota	Before delivering a	Driver's license	If an individual offering to
	ballot to an individual,	age for the later than	vote fails or refuses to
§16.1-05-07	the poll clerks shall	State identification card	show an appropriate form
	request the individual to		of identification, the
		Federally issued ID	individual may be allowed
		card: passport or	to vote without being
		card: passport or agency ID card	to vote without being challenged if the
		card: passport or agency ID card	to vote without being challenged if the individual provides to the
		card: passport or agency ID card  Tribal government	to vote without being challenged if the individual provides to the election board the
		card: passport or agency ID card  Tribal government issued ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth
		card: passport or agency ID card  Tribal government issued ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the
		card: passport or agency ID card  Tribal government issued ID card  Student ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the election board or a clerk
		card: passport or agency ID card  Tribal government issued ID card  Student ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the election board or a clerk knows the individual and
		card: passport or agency ID card  Tribal government issued ID card  Student ID card  U.S. military ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the election board or a clerk knows the individual and can personally vouch that
		card: passport or agency ID card  Tribal government issued ID card  Student ID card  U.S. military ID card	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the election board or a clerk knows the individual and can personally vouch that the individual is a
		card: passport or agency ID card  Tribal government issued ID card  Student ID card  U.S. military ID card  Utility bill dated 30	to vote without being challenged if the individual provides to the election board the individual's date of birth and if a member of the election board or a clerk knows the individual and can personally vouch that

		residential address Change of address verification letter from the U.S. Postal Service	challenged voter by executing an affidavit that the challenged individual is a legally qualified elector of the precinct.
Ohio §3503.16(B)(1)(a and 3505.18(A)(1)	All voters must provide to election officials at the polling place on the day of an election proof of the voter's identity. Also applies to voters requesting and voting an absentee ballot.	Current and valid photo identification, defined as a document that shows the individual's name and current address, includes a photograph, includes an expiration date that has not passed, and was issued by the U.S. government or the state of Ohio  Current utility bill  Current bank statement  Current government check, paycheck or other government document	A voter who has but declines to provide identification may cast a provisional ballot upon providing a social security number or the last four digits of a social security number. A voter who has neither identification nor a social security number may execute an affidavit to that effect and vote a provisional ballot. A voter who declines to sign the affidavit may still vote a provisional ballot.
South Carolina	When any person presents himself to	Voter registration certificate	Voters without ID may be premitted to vote a
§7-13-710	driver's license or other form of identification containing a photograph issued by the Department of Motor Vehicles, if he is not licensed to drive, or the written notification of registration.	South Carolina Dept. of Motor Vehicles photo ID card	county. Whether the provisional ballot is counted is at the discretion of the county commisioners at the provisional ballot hearing.
\$12-18-6.1 and 6.2	When a voter is requesting a ballot, the voter shall present a valid form of personal identification.	South Dakota driver's license or nondriver identification card  U.S. passport  Photo ID issued by an	If a voter is not able to present a form of personal identification as required, the voter may complete an affidavit in lieu of the personal identification.  The affidavit shall require

		agency of the U.S. government  Tribal ID card, including a photo	the voter to provide his or her name and address. The voter shall sign the affidavit under penalty of perjury.
		Student ID card, including a photo, issued by a South Dakota school	
Tennessee §2-7-112	A voter must sign an application for a ballot. The voter's signature and information on the signature list is compared with other evidence of identification supplied by the voter.	Voter registration certificate  Tennessee driver's license  Social Security card  Credit card bearing voter's signature  Other document bearing voter's signature	
		Voter registration certificate  OR  Driver's license	A voter who does not present a voter registration certificate when offering to vote, but whose name is on the list of registered voters for the precinct in
Texas	On offering to vote, a voter must present the	Department of Public Safety ID card  A form of ID	which the voter is offering to vote, shall be accepted for voting if the voter executes an affidavit stating that the voter does
Election Code §63.001 et seq.	voter's voter registration certificate to an election officer at the polling place.	containing the person's photo that establishes the person's identity	not have the voter's voter registration certificate in the voter's possession and the voter presents other proof of identification. A
		A birth certificate or other document confirming birth that is admissible in a court of law and establishes the person's identity	voter who does not present a voter registration certificate and cannot present other identification may vote a provisional ballot. A voter who does not present a voter

		U.S. citizenship papers	registration certificate and
		r r r	whose name is not on the
		A U.S. passport	list of registered voters
			may vote a provisional
		Official mail addressed	
		to the person, by	
		name, from a	
		governmental entity	
	parket.	A copy of a current	
		utility bill, bank	
		statement, government	
		check, paycheck, or	
		other government	
1075		document that shows	
	Control of the Contro	the	
		person's name and	
		address	
		Any other form of ID	
		prescribed by the	
		presented by the	
		secretary of state	
Virginia	The officer shall ask the	Virginia voter	If a voter is entitled to vote
	voter to present any one	registration card	except that he is unable to
§24.2-643(B)	of the specified forms		present one of the forms of
	of identification.	Social Security card	identification listed above,
			he shall be allowed to vote
		Virginia driver's license	after signing a statement,
			subject to felony penalties
		Any other identification	for false statements, that
		card issued by a	he is the named registered
		cara issued by a	ne is the number registered
			voter who he claims to be.
		government agency of the Commonwealth,	
		government agency of the Commonwealth,	
		government agency of	
		government agency of the Commonwealth, one of its political	
		government agency of the Commonwealth, one of its political subdivisions, or the	
		government agency of the Commonwealth, one of its political subdivisions, or the United States	
		government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification	
		government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification card containing a	
	Any person desiring to	government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification card containing a photograph	voter who he claims to be.
	Any person desiring to vote at any primary or	government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification card containing a photograph Valid photo	voter who he claims to be.  Any individual who
Washington	vote at any primary or	government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification card containing a photograph Valid photo identification such as a	Any individual who desires to vote in person
Washington	1	government agency of the Commonwealth, one of its political subdivisions, or the United States employee identification card containing a photograph Valid photo identification such as a driver's license or state	voter who he claims to be.  Any individual who

before signing the poll book.	card.	provisional ballot.
	A voter's identification	
	card issued by a county	
	elections officer, or	
	A copy of a current	
	utility bill, bank	
	statement, paycheck, or	
	government check or	
	other government	
	document.	

a) Missouri's photo ID law was struck down by the Missouri State Supreme Court on October 16, 2006. ID is still required to vote, but the list of acceptable forms of ID is much broader and includes some forms without a photo.

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## APPENDIX F

Letters From Clark County Election Observers

TEC 10 V 01 VOIL 1887

## David R Feniger 1304 Normandy Lane Sacramento, CA 95822

November 5, 2008

Clark County Election Department 965 Trade Drive North Las Vegas, NV 89030-7802

RE: Precincts 6450, 6079, located at 7970 Peace Way, Las Vegas, NV 89147

Dear Sir or Madam:

On Election Day, I was an outside observer for precincts 6450 and 6079, both of which were located at 7570 Peace Way in Las Vegas. I was at the location for almost 12 hours that day.

I wanted to commend the team leader Phil for his outstanding service to the voters of Clark County on that day. Phil was prepared and thoroughly understood the law. He was helpful and courteous to voters as he explained the process to them and if they were in the wrong precinct, he provided them with detailed instructions on how they can get to their precincts— even offering to write down directions for the voters. He managed his staff of eight extremely well. They were efficient, well-organized and polite. This is how voting should take place everywhere. Please provide this information to Phil's supervisor, as appropriate.

If you have any questions, I can be reached at 916.985.5702.

Thank you.

David R. Feniger

## DAVID R. FERTIG

ATTORNEY AT LAW

407 PARKWOOD AVENUE, PASADENA, CALIFORNIA 911007-5039

Voice: (626) 793-6484

E-MAIL: DFERTIG@WORKERLAW.NET

November 6, 2008

Mr. Larry Lomax Elections Department 965 Trade Drive, Suite A Las Vegas, Nevada 89030-7802

Dear Mr. Lomax,

First, I wish to convey my thanks for your thoughtful gift of the 2008 Clark County Election Department T-shirt. When I recently mentioned to you my earnest desire for one, in the midst of the hectic Early Vote period, I had no idea you would keep it in mind along with the myriad - and more serious - details and demands placed before you this busy election season. But my request was earnest, indeed.

I had the eye-opening experience (and pleasure) of spending 13 very full days with your Early-Vote staff at 12 different polling locations all over Clark County, and then a full day on the November 4<sup>th</sup> Election Day visiting 10 various polling locations as a poll observer. Having watched the hundreds of election workers toil 12-15 hours each day, yet remain persistently cheerful and diligent, I was deeply impressed.

During that time I also came to feel, in a way, part of the "family" of Election Department workers due to their warmth, enthusiasm and discipline. Their esprit de corps was both exemplary and infectious.

Thus the 2008 Clark County Election Department shirt shall serve me as a reminder of, really, one of the best demonstrations of good management and ethical discipline I have ever encountered.

I've spent twenty years litigating on behalf of workers, including state (California) and federal employees. I know what good and bad management looks like. And I know the quality of management flows from the top down. Thus, Mr. Lomax, you deserve great accolades for inspiring and managing such a fine crew, and the workers deserve great accolades as well, for their good management and sacrifices (I know they didn't do it for the money!) to ensure a fair, humane and accountable election process.

Thus I send my congratulations, thanks, and best wishes to you and your department. If I may ever be of any help to you, please do not hesitate to call upon me.

Sincerely,

David R. Fertig

DF:sd

## JERRY GOREN 12321 HARTSOOK STREET VALLEY VILLAGE, CALIFORNIA 91607

Mr. Larry Lomax 965 trade Drive North Las Vegas, Nevada 89030-7802

Dear Mr. Lomax:

On November 4th, I came to Law Vegas as a poll watcher for the Obama campaign. I was assigned to precinct 6455 operating out of Fire Station #26, located at 4030 S El Capitan Way in Las Vegas. I spent the entire day from 6:15 am until 8:00 pm observing your election workers as they processed over to 300 voters who came to vote. I am writing to inform you that your team performed admirably.

Holly, the team leader, and Dick, the assistant leader, had the site prepared and ready to operate a good 30 minutes before the 7:00 am opening time. They were helpful to the outside observer and me from the start, and continued in this manner throughout the day. Operating as a team, throughout the day, they impressed me with their knowledge of the voting laws. Where questions were raised they did not hesitate to call for advice and guidance from your office. They demonstrated a commitment to solving problems to ensure that every eligible voter had the opportunity to vote.

Where voters were at the wrong precinct, they encouraged going to the correct precinct to ensure timely and complete voting while at the same time making the voter aware of their right to vote using a provisional ballot. In each case they checked the computer records to ensure that the voter was in the proper congressional district. In no case did they deny a voter a provisional ballot if that was the voter's desire. In every one of these cases they carefully and accurately informed the voter of the differences between voting provisionally. Their advice was accurate and delivered in a positive helpful manner. Never once did I witness any effort to improperly influence a voter's decision. I observed them turn people away only where this was necessitated because of the voter's failure to register. In several cases they made significant efforts to figure out how to allow a voter to vote within the confines of what state law allowed. They dealt with problems ranging from accommodating handicapped and hearing-impaired voters, to voters who had language issues and adversarial attitudes. Overall, I thought voters felt attended to and I observed no one leaving the polls unhappy with how they were treated.

The other three members of the staff were welcoming, personable, and in every case appropriately interactive. Where necessary, they enforced the rules politely and correctly. Ernie, who was responsible for checking voters in, was careful and efficient. His final tallies were accurate as a result. He too was knowledgeable about the law and used the team leader and assistant leader to help him when needed. Barbara and Rosemary handled the voting

machines themselves. They were all smiles all day long, helping voters as needed. I witnessed no voter dissatisfaction and a minimum of voter confusion as a result.

My hat is off to you and your staff. If this is the way in which voting went at the other locations, and I have heard nothing to suggest otherwise, you deserve a compliment yourself. You have managed to run an efficient and honest election process during a hotly contested and emotional election. Good job!

Sincerely,

Jerry S. Goren

PS I am sorry that I do not know the last names of these five individuals. I hope you can get a copy of my letter to them or at least inform them that I complimented them to you regarding their work.

# APPENDIX G

National Conference of State Legislatures—National Popular Vote Pro-Con Discussion

# MAKE EVERY VOTE COUNT

A national popular vote would make sure no state is disadvantaged and every vote is equal.

BY JON S. CARDIN

hroughout our country's history, we have been vigilant in expanding democracy, empowering individuals and correcting injustices through the ballot box. We have remedied the disenfranchisement of women, African Americans and many others since the days of the Continental Congress. We have provided for the election of senators directly by individuals rather than by state legislatures. We have made confidential voting easier for the disabled and possible for the blind. We have worked to make the voting process more convenient, confident and transparent without compromising security.

Despite our progress, challenges to our democracy persist. The way we elect our president is flawed. When a candidate can win the popular vote but lose the election, and when he must spend 90 percent of his time in five states to win the election, the process has become un-democratic. A national popular vote (NPV) would fix many of the problems surfacing in the Electoral College, and is perfectly constitutional if done correctly.

The Electoral College is antiquated and anti-democratic. Once it protected smaller states from being ignored. Today, since only a few small and medium states are considered battleground states, candidates simply avoid spending time or money in the majority of small and medium states.

A candidate can win the popular vote but lose the presidency. Al Gore did so in 2000. A shift of 60,000 votes in Ohio in 2004 would have elected John Kerry, even though he lost the national popular vote by millions. Similar small changes in one or two states could have altered the winner of the election without affecting the popular vote many times in recent history.

An agreement among the states and the

Maryland Delegate Jon S. Cardin chairs the subcommittee on election law and was co-sponsor of Maryland's national popular vote law. Daniel Shiff, who recently graduated from The Park School of Baltimore, contributed to this article. District of Columbia to use the popular vote numbers to determine their representatives to the Electoral College could change all this. The national popular vote policy would become binding once a critical mass of states enter to give it an electoral majority (270 votes).

If the electoral votes go to the national popular winner, candidates will be required to campaign in all states to guarantee the electoral votes of all the members of the compact, thereby holding an electoral majority. No state can be ignored, no matter how small, large, red or blue.

Our country's founders gave states exclusive and plenary control over the manner of awarding their electoral votes. A state can choose its electors based on a winner-take-all system, the votes in congressional districts, a vote in the legislature or even the flip of a coin. Legislators are, of course, encouraged and expected to choose a way that best protects their state's interests. With more than 30 states disadvantaged by the current system, it is in our best interests, our voters' best interests, and the best interests of democracy to choose electors by a national popular vote.

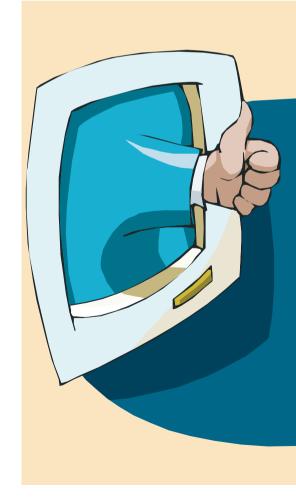
There is no constitutional impairment with this plan. We have more than 100 interstate compacts dealing with trade and security, transportation, law enforcement and environmental issues already in place. The federal government has even less power with respect to how states choose their electors than with these issues. The NPV compact would be completely constitutional, with or without congressional consent, based on established Supreme Court precedent.

Opponents of a national popular vote say it will take away the voice of smaller states. The argument is that because every state is given a two-vote bonus, the small states have fewer people per elector and therefore more of a say. Under the NPV they would lose the effect of that two-elector boost. In theory, this argument is accurate. But in today's world, these two electors are essentially irrelevant. The population of 11 of the smallest states is roughly equal to thafOhio. Those 11 states

have almost twice as many electoral votes as Ohio. One would expect that those states combined received twice as much of the candidates' time and money in 2004. Instead, because they were not battleground states, they received a tiny fraction of what Ohio received. No system (including the coin flip) could possibly disadvantage the small states as much as the current one.

The NPV is picking up momentum. Two states have passed it; 41 have considered it. At least one member of Congress from each state supports the idea. So do former Presidents George H. W. Bush and Jimmy Carter. Richard Nixon and Gerald Ford also supported it.

A nationwide popular election of the president would make every single voter—whether from Pennsylvania, New Hampshire, Texas, North Dakota or anywhere else—equal. It is time for a change in campaign strategy. We need a national campaign—we deserve a national debate—with equal attention to every state.



# DON'T CIRCUMVENT THE CONSTITUTION

Perhaps direct election of the president is a good idea. But trying to work around the Constitution isn't.

#### **BY JOHN SAMPLES**

n Federalist No. 10, James Madison identified our Constitution with "popular government." Power belongs to the people, but popular government does not mean unimpeded majority rule. Instead, the Founders sought to constitute the will of the people through institutions that restrained and refined the exercise of power.

Laws must gain the consent of three different constituencies: districts in the House, states in the Senate, and the nation with the president. The diversity of the states limits the centralizing urges of the national government.

John Samples is director of the Center for Representative Government at The Cato Institute in Washington, D.C.



Amending the Constitution requires supermajorities in Congress and among the states.

The constitutional mode of presidential election represents this idea of popular government. The number of electors for each state reflects two kinds of equality, of states and of citizens. Smaller states thus have slightly more influence over choosing a president than they would under direct election. But they do not have a veto; large states still matter much more to presidential candidates.

The supporters of the National Popular Vote plan (NPV) wish to replace this method with direct election of the president. The Constitution allows such changes through the amendment process set out in Article V. The NPV plan does not propose to amend the Constitution.

Instead, it advocates that states agree to an interstate compact to cast their electoral votes for the winner of the popular vote. Once enough states signed up, a popular vote plurality would turn into a majority of electoral votes.

The NPV plan allows states with a majority of electors to amend the Constitution in practice if not in law. States with a majority of electors thus decide to circumvent the Constitution to enact an institutional innovation favoring the greater number of voters. Why should smaller states consent to such an abuse? A major change in American government should observe constitutional proprieties or it will not appear legitimate to those whose interests are harmed.

The popular vote plan would harm federalism. Once the states no longer matter in elections, they will matter less than they do now in the federal system. Americans will think of themselves less as a nation of states and more as a nation ruled by a plurality.

State legislators should represent the constituents who elected them. A representative who votes for the National Popular Vote plan transfers control over a state's electoral votes to voters outside the state. This advances the interests of Californians, New Yorkers, and citizens of eight other large states that attain more power under direct election than they have now.

But most state legislators are not elected to represent people who live in large states or who form a national plurality. Under NPV, their constituents will often see their electoral votes cast for a candidate opposed by a plurality of that state's voters. That result cannot be good representation.

Almost all states allocate their electoral votes according to a winner-take-all rule. Battleground states are the focus of presidential campaigns while states with a clear majority for one candidate receive less attention. States need not adopt direct election to attract attention from both candidates. They can simply allocate their votes in accordance with the popular vote in the state.

The popular vote plan promises to make all states competitive since the votes needed for a plurality may be found anywhere. While all votes will count equally under NPV, the cost of attracting the marginal voter will not be the same. Campaigns are likely to seek additional votes in states where they are strong already, control state government, and have more efficient party organizations. The current system has the virtue of forcing candidates to campaign outside their strongholds once they have a majority in a state. The NPV plan could foster regionalism in presidential politics and greater polarization.

The NPV plan may increase conflict over close elections. The current system limits struggles over election results to states where outcomes might be changed if the national result is in question. Under direct popular vote, a loser could seek irregularities throughout the nation to overturn a close election.

Our current means of electing our president, like all human things, is imperfect. One president in the last century did not gain a plurality of the popular vote. But popular government counsels consent through complexity rather than direct rule of the greater number.

Perhaps direct election of the president would be better. If most Americans agree, the Constitution may be amended to that end. Uncertain schemes to work around constitutional demands do not serve the cause of popular government.

# APPENDIX H

Marijuana Policy Project v. Miller





578 F.Supp.2d 1290 578 F.Supp.2d 1290

(Cite as: 578 F.Supp.2d 1290)

C

United States District Court, D. Nevada.

MARIJUANA POLICY PROJECT, Committee to Regulate and Control Marijuana, American Civil Liberties Union of Nevada, David McDonough, Oren Rosen, Kermit Waters, and Joseph Zitello, Plaintiffs,

Ross **MILLER**, Secretary of State of the State of Nevada, Defendant,

and

Nevada Resort Association, a Nevada nonprofit corporation, Intervenor.

No. 2:08-CV-00199-PMP-RJJ.

Sept. 29, 2008.

**Background:** Individual voters who had signed initiative petitions, non-profit organization that had sponsored initiatives, and civil liberties group brought § 1983 action against Nevada's Secretary of State, alleging that statute, which would have used county population to determine how many signatures would be required for initiative to get on ballot, violated First and Fourteenth Amendments. Resort association intervened. Plaintiffs, Secretary, and intervenors all moved for summary judgment.

**Holdings:** The District Court, Philip M. Pro, J., held that:

- (1) organization suffered an injury-in-fact as a result of statute's interference with core political speech;
- (2) voters established an injury-in-fact due to vote dilution as a result of statute;
- (3) organization and voters demonstrated causation and redressability, as required to establish standing to bring § 1983 action;
- (4) equal protection claims of organization and voters were ripe;
- (5) statute violated one person, one vote rule inherent in Equal Protection Clause.

Plaintiffs' motion granted and motions of Secretary and intervenors denied.

West Headnotes

## [1] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

<u>170Ak103.1</u> Standing

170Ak103.2 k. In General; Injury or

Interest. Most Cited Cases

Standing depends on whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, and serves to ensure that legal questions presented to the court will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [2] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.2 k. In General; Injury or

Interest. Most Cited Cases

Generally, in a federal action with multiple plaintiffs, once the court determines one plaintiff has standing, it need not decide the standing of others. <u>U.S.C.A.</u> Const. Art. 3, § 2, cl. 1.

## [3] Federal Civil Procedure 170A = 103.2

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.2 k. In General; Injury or

Interest. Most Cited Cases

When evaluating standing, the court looks to the facts as they exist at the time the complaint was filed. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [4] Federal Civil Procedure 170A 103.2

170A II Parties

**170AII** Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.2 k. In General; Injury or 7

(Cite as: 578 F.Supp.2d 1290)

Interest. Most Cited Cases

The party invoking federal jurisdiction has the burden to establish standing. <u>U.S.C.A. Const. Art. 3, § 2, cl.</u> 1

## [5] Declaratory Judgment 118A 299.1

118A Declaratory Judgment

118AIII Proceedings

118AIII(C) Parties

118Ak299 Proper Parties

118Ak299.1 k. In General. Most Cited

#### Cases

In order to show standing, a plaintiff seeking declaratory or injunctive relief must demonstrate it is realistically threatened by a repetition of the violation. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [6] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

## Federal Civil Procedure 170A € 2544

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2542 Evidence

170Ak2544 k. Burden of Proof. Most

## Cited Cases

At the summary judgment stage, plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements, although plaintiffs cannot rely on mere allegations of injury, but must set forth specific facts, by affidavit or other evidence. <u>U.S.C.A. Const. Art. 3, § 2, cl. 1</u>.

## [7] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing

<u>170Ak103.2</u> k. In General; Injury or Interest. <u>Most Cited Cases</u>

# Federal Civil Procedure 170A € 103.3

170A Federal Civil Procedure

170AII Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.3 k. Causation; Redressability. Most Cited Cases

To establish standing under Article III of the Constitution, a plaintiff must show (1) injury in fact; (2) causation; and (3) likelihood that the injury will be redressed by a favorable decision. <u>U.S.C.A. Const. Art. 3, § 2, cl. 1.</u>

## [8] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure

170AII Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

A plaintiff's alleged injury-in-fact must be to a legally protected interest that is both concrete and particularized and actual and imminent, as opposed to conjectural or hypothetical, in order to establish standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [9] Constitutional Law 92 672

92 Constitutional Law

<u>92VI</u> Enforcement of Constitutional Provisions<u>92VI(A)</u> Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)1 In General

92k672 k. Requirement That Complainant Be Injured. Most Cited Cases

It is sufficient to establish an injury-in-fact for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [10] Constitutional Law 92 5799

92 Constitutional Law

(Cite as: 578 F.Supp.2d 1290)

92VI Enforcement of Constitutional Provisions92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)7 First Amendment in General 92k798 Criminal Law

92k799 k. In General. Most Cited

#### Cases

When the potential enforcement of a challenged statute implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing, because self-censorship from fear of prosecution is a harm that can be realized even without actual prosecution. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [11] Constitutional Law 92 1683

92 Constitutional Law

 $\underline{92XVIII}$  Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections
92k1683 k. Petitions in General. Most

Petition circulation is core political speech, and therefore protected under the First Amendment, because it involves interactive communication concerning political change. <u>U.S.C.A. Const.Amend. 1</u>.

#### [12] Constitutional Law 92 703

92 Constitutional Law

<u>92VI</u> Enforcement of Constitutional Provisions <u>92VI(A)</u> Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)3 Particular Questions or Grounds of Attack in General

92k703 k. Elections. Most Cited Cases An organization that circulates an initiative that fails to qualify for the ballot due to a potentially unconstitutional rule clearly has standing to challenge that

rule. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [13] Constitutional Law 92 55

92 Constitutional Law

<u>92VI</u> Enforcement of Constitutional Provisions<u>92VI(A)</u> Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)9 Freedom of Speech, Expression, and Press

92k855 k. In General. Most Cited

#### Cases

In deciding whether plaintiff has standing in action arising from alleged violation of free speech rights under First Amendment, a court must determine whether plaintiff experiences an injury-in-fact by considering: (1) the evidence that in the past plaintiff has engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced. U.S.C.A. Const.Amend. 1.

## [14] Constitutional Law 92 665

92 Constitutional Law

<u>92VI</u> Enforcement of Constitutional Provisions<u>92VI(A)</u> Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)1 In General

92k665 k. In General. Most Cited

#### Cases

The mere existence of a potentially unconstitutional statute does not necessarily create a case or controversy for standing purposes under Article III. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [15] Federal Civil Procedure 170A • 103.4

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

<u>170Ak103.1</u> Standing

170Ak103.4 k. Rights of Third Parties

or Public. Most Cited Cases

A plaintiff with a generalized grievance about government actions does not have a particularized injury and lacks standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

# [16] Associations 41 20(1)

**41** Associations

41k20 Actions by or Against Associations 41k20(1) k. In General. Most Cited Cases

## Civil Rights 78 1333(6)

78 Civil Rights
78 III Federal Remedies in General

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78k1328 Persons Protected and Entitled to

Sue

78k1333 Injury and Causation

78k1333(6) k. Other Particular Cases and Contexts. Most Cited Cases

Organization that had sponsored ballot initiatives suffered an injury-in-fact as a result of interference with organization's core political speech under Nevada statute that made the number of signatures required in a county for an initiative proposing a new statute, amendment to statute, or amendment to state constitution proportionate to the county's population, and thus organization had standing to bring § 1983 action challenging statute even without waiting until an initiative they sponsored failed due to the statute, where organization intended to sponsor initiatives in the future, but were not currently doing so at least in part due to the statute, and organization had full control of whether they sponsored initiatives and did not require an action by a third party. U.S.C.A. Const. Art. 3, § 2, cl. 1.; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; West's NRSA § 295.012(1).

# [17] Civil Rights 78 1333(6)

**78** Civil Rights

78III Federal Remedies in General

78k1328 Persons Protected and Entitled to Sue

78k1333 Injury and Causation

78k1333(6) k. Other Particular Cases

and Contexts. Most Cited Cases

Individual voters who had signed initiatives in the past established an injury-in-fact due to alleged vote dilution related to Nevada statute that made the number of signatures required in a county for an initiative proposing a new statute, amendment to statute, or amendment to state constitution proportionate to the county's population, and thus voters had standing to bring § 1983 action challenging statute, even though two initiatives signed by voter were removed from circulation; injury occurred whether an initiative petition passes or not because a vote was valued less as soon as it was cast, and voter would have been subjected to dilution again as the statute continued to be enforced. U.S.C.A. Const. Art. 3, § 2, cl. 1.; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; West's NRSA § 295.012(1).

## [18] Federal Courts 170B —12.1

**170B** Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk12 Case or Controversy Requirement

170Bk12.1 k. In General. Most Cited

#### Cases

"Mootness" is the doctrine of standing set in a time frame; the requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence.

# [19] Federal Courts 170B 2.1

**170B** Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk12 Case or Controversy Requirement

170Bk12.1 k. In General. Most Cited

#### Cases

A claim is not "moot" if it is capable of repetition, yet evading review; this exception applies if (1) the challenged action is too short in duration to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will again be subject to the same action.

## [20] Federal Civil Procedure 170A = 103.3

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

<u>170Ak103.1</u> Standing

170Ak103.3 k. Causation; Redressabil-

ity. Most Cited Cases

In determining whether plaintiff has standing, causation is established if the plaintiff's injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. <u>U.S.C.A. Const. Art. 3, § 2, cl. 1</u>.

#### [21] Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure

**170AII** Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.3 k. Causation; Redressabil-

ity. Most Cited Cases

In determining whether plaintiff has standing, re-

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dressability upon a favorable decision must be shown to be likely, as opposed to merely speculative. U.S.C.A. Const. Art. 3, § 2, cl. 1.

## [22] Associations 41 20(1)

### **41** Associations

41k20 Actions by or Against Associations 41k20(1) k. In General. Most Cited Cases

An organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 1.

# [23] Associations 41 20(1)

#### **41** Associations

41k20 Actions by or Against Associations 41k20(1) k. In General. Most Cited Cases

# Civil Rights 78 1333(6)

## **78** Civil Rights

78III Federal Remedies in General
78k1328 Persons Protected and Entitled to
Sue

78k1333 Injury and Causation 78k1333(6) k. Other Particular Cases and Contexts. Most Cited Cases

Individual voters and organization that had sponsored initiatives demonstrated causation and redressability, as required to establish standing to bring § 1983 action against Nevada Secretary of State related to state statute that made the number of signatures required in a county for an initiative proposing a new statute, amendment to statute, or amendment to state constitution proportionate to the county's population, where alleged injuries that statute interfered with core political speech and created vote dilution stemmed directly from statute, which was enforced by Secretary, and thus invalidation of statute would redress plaintiffs' injuries. U.S.C.A. Const. Art. 3, § 2, cl. 1.; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; West's NRSA § 295.012(1).

## [24] Federal Courts 170B —12.1

## **170B** Federal Courts

170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited

#### Cases

The constitutional component of the ripeness inquiry is similar in scope and often coincides with standing's injury-in-fact analysis in that plaintiff's injury must be definite and concrete, not hypothetical or abstract, and the plaintiff must face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.

## [25] Federal Courts 170B = 12.1

#### 170B Federal Courts

170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited

#### Cases

For the prudential component of ripeness, the court considers the hardship to the parties if the court declines to address the matter and whether the issues are fit for judicial review.

#### [26] Federal Courts 170B 13.10

## **170B** Federal Courts

170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.10 k. Civil Rights. Most Cited

#### Cases

Equal protection claims of organization that had sponsored initiatives were ripe, in its § 1983 action against Nevada Secretary of State related to state statute that made the number of signatures required in a county for an initiative proposing a new statute, amendment to statute, or amendment to state constitution proportionate to the county's population, although statute did not stop organization from initiating a petition, where organization would suffer hardship in the absence of court action in that they would be forced to expend significant resources in initiating and circulating a petition without knowing whether they must comply with the statute. <u>U.S.C.A.</u> Const.Amend. 14; 42 U.S.C.A. § 1983; West's NRSA § 295.012(1).

(Cite as: 578 F.Supp.2d 1290)

## [27] Federal Courts 170B = 13.10

**170B** Federal Courts

<u>170BI</u> Jurisdiction and Powers in General

170BI(A) In General

<u>170Bk12</u> Case or Controversy Requirement 170Bk13.10 k. Civil Rights. Most Cited

#### Cases

Equal protection claims of individual voters that had signed initiatives were ripe, in their § 1983 action against Nevada Secretary of State related to state statute that would have used county population to determine how many signatures would be required for initiative to get on ballot, although statute did not stop organization from initiating a petition, where voters would allegedly suffer hardship in the absence of court action because vote dilution would occur upon signing of initiative, and voters were allegedly discouraged from signing another petition until the statute was invalidated. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; West's NRSA § 295.012(1).

# [28] Constitutional Law 92 547

92 Constitutional Law

92III Amendment and Revision of Constitutions 92III(C) State Constitutions

92III(C)4 Submission to Popular Vote;

92k543 Petitions

92k547 k. Signatures and Signers.

Most Cited Cases

Initiative

#### Constitutional Law 92 3657

92 Constitutional Law

92XXVI Equal Protection

 $\underline{92XXVI(E)} \ \ Particular \ \ Issues \ \ and \ \ Applications$ 

92XXVI(E)9 Elections, Voting, and Political Rights

92k3656 Equality of Voting Power (One Person, One Vote)

92k3657 k. In General. Most Cited

Cases

## Statutes 361 €= 302

361 Statutes
361IX Initiative

361k302 k. Constitutional and Statutory Provisions. Most Cited Cases

Nevada statute, which made the number of signatures required in a county for an initiative proposing a new statute, amendment to statute, or amendment to state constitution proportionate to the county's population, was not narrowly tailored to serve stated objectives of ensuring statewide support for initiative, to prevent urban areas from dominating initiative process, and ensuring manageable initiative system, and thus violated the one person, one vote rule inherent in Equal Protection Clause by treating each county equally, regardless of population, where statute could have utilized other political divisions to satisfy both Equal interests. and state's U.S.C.A. Protection Const.Amend. 14; West's NRSA § 295.012.

# [29] Civil Rights 78 🖘 1304

78 Civil Rights

78III Federal Remedies in General

78k1304 k. Nature and Elements of Civil Actions. Most Cited Cases

To establish a claim under § 1983, the plaintiff must show state action and a constitutional violation. 42 U.S.C.A. § 1983.

#### [30] Constitutional Law 92 3657

92 Constitutional Law

92XXVI Equal Protection

 $\underline{92XXVI(E)} \ \ Particular \ \ Issues \ \ and \ \ Applications$ 

92XXVI(E)9 Elections, Voting, and Political Rights

92k3656 Equality of Voting Power (One Person, One Vote)

92k3657 k. In General. Most Cited

#### Cases

Strict scrutiny applies to regulations that contravene the principle of one person, one vote by diluting the voting power of some qualified voters within the electoral unit. U.S.C.A. Const.Amend. 14.

## [31] Constitutional Law 92 53037

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)5 Scope of Doctrine in General

92k3031 Limits of Doctrine 92k3037 k. Territorial Uniformity;

Application to Places, Areas, or Regions. <u>Most Cited</u> Cases

A system that gives counties of unequal population equal power violates equal protection. <u>U.S.C.A.</u> Const.Amend. 14.

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#### **ORDER**

#### PHILIP M. PRO, District Judge.

Presently before the Court is Plaintiffs' Motion for Summary Judgment (Doc. \*1295 # 16), filed on May 21, 2008. Defendant Ross Miller ("Miller"), Nevada Secretary of State, filed an Opposition and Countermotion for Summary Judgment (Doc. # 24). Defendant-Intervenor Nevada Resort Association ("Nevada Resort") also filed an Opposition and Countermotion for Summary Judgment (Doc. # 30).

Also before this Court is We the People Nevada's Motion to Intervene (Doc. # 18), filed on June 4, 2008. Defendant Miller filed an Opposition (Doc. # 40). We the People Nevada did not file a reply. The Court held a hearing on these matters on September 17, 2008.

## I. BACKGROUND

The Nevada Constitution permits Nevada citizens to amend the Nevada Constitution or Nevada Revised Statutes through the initiative process. Nev. Const. art. XIX, § 2. Before an initiative may be placed on the ballot, it must be signed by "10 percent or more of the voters who voted in the entire State at the last preceding general election." Id.§ 2(2). This section also states that a petition must be signed by a "number of registered voters equal to 10 percent or more of the number of voters who voted at the last preceding general election in not less than 75 percent of the counties in the State." Id. This provision, known as

the "13 Counties Rule," required that an initiative supporter obtain the requisite signatures from 13 of the 17 Nevada counties. <u>ACLU of Nev. v. Lomax</u>, 471 F.3d 1010, 1013 (9th Cir.2006). However, in 2004, this Court enjoined the Nevada Secretary of State from enforcing the 13 Counties Rule. (Pls.' Mot. Summ. J. ["Pls.' Mot."], Ex. B (Order and Injunction, CV-S-04-1035-JCM-LRL).) In 2006, the United States Court of Appeals for the Ninth Circuit affirmed, holding the 13 Counties Rule was unconstitutional under the Equal Protection Clause of the United States Constitution. <u>Lomax</u>, 471 F.3d at 1021.

In response to this holding, in 2007, the Nevada Legislature adopted Nevada Revised Statute § 295.012. (See Intervenor's Opp'n Pls.' Mot. Summ. J. & Counter Mot. Summ. J. ["Intervenor's Mot."], Ex. C.) Under this statute, or the "County Population Rule," the total number of signatures required for an initiative to be placed on the ballot is equal to the "number of registered voters from each county in the State that is at least equal to 10 percent of the voters who voted in the entire State at the last preceding general election multiplied by the population percentage for that county." Nev. Rev. Stat § 295.012(1). The first step under the County Population Rule is to determine each county's proportion of the total Nevada population, as determined by the most recent U.S. Census. Id. Second, a particular county's population proportion is then multiplied by 10% of the voter turnout from the preceding election to determine how many signatures must be obtained in that county. *Id.* 

The Nevada Secretary of State has provided an Initiative and Referendum Guide that demonstrates the required signatures per county under the County Population Rule. (Intervenor's Mot. at Decl. Todd L. Bice ¶ 6 & Ex. E.) According to the 2000 U.S. Census, the total population for Nevada was 1,998,257. (Def.'s Opp'n to Pls.' Mot. Summ. J. & Counter Mot. Summ. J. ["Def.'s Mot."], Ex. 1; Intervenor's Mot., Ex. E; Pls.' Mot., Ex. E.) Examples of Nevada county populations as of 2000 are as follows: Clark, 1,375,765; Washoe, 339,486; Eureka, 1,651; and Esmeralda, 971. (Def.'s Mot., Ex. 1; Intervenor's Mot., Ex. E; Pls.' Mot., Exs. F, G, H & I.) Thus, the proportions of the Nevada population existing in each of those four counties are 0.6885, 0.1699, 0.00083, and 0.00049, respectively. (Def.'s Mot., Ex. 1; Intervenor's Mot., Ex. E.) Ten percent of the voter turnout

from the 2006 Nevada elections was 58,628 voters. (Def.'s Mot., Ex. \*1296 1; Intervenor's Mot., Ex. E; Pls.' Mot., Ex. D.) Therefore, under the County Population Rule, the number of signatures needed on a ballot initiative petition in each of those five counties is as follows: 40,364 in Clark County; 9,961 in Washoe County; 49 in Eureka County; and 29 in Esmeralda County. (Def.'s Mot., Ex. 1; Intervenor's Mot., Ex. E.)

Plaintiffs are various individuals and organizations contesting the County Population Rule's constitutionality. (Am. Compl. [Doc. # 4] ¶ 4.) Plaintiff David McDonough ("McDonough'") is an individual who has signed initiatives in prior election years. (Pls.' Reply Mem. P. & A. [Doc. # 36] ("Pls.' Reply") at Decl. David McDonough ¶¶ 1, 4.) Further, at some point during this election year, McDonough signed the "Hemp for Biomass" Initiative and the "Prevent Employers from Seizing Tips" Initiative. (Id.  $\P$  5.) However, the proponents of the "Prevent Employers from Seizing Tips" Initiative withdrew it in August 2008. (See Def.'s Reply Supp. Mot. Summ. J. (Doc. # 46) ["Def.'s Reply"], Ex. A; Intervenor's Reply Supp. Counter Mot. Summ. J. (Doc. # 45) ["Intervenor's Reply"], Ex. 2.) McDonough hopes to sign the "Nevada Taxpayers Protection Act" Initiative, although a Nevada state court since has invalidated this initiative. (Pls.' Reply at Decl. David McDonough ¶ 6; Intervenor's Reply, Ex. 1.) McDonough also would like to continue to sign initiative petitions in the future. (Pls.' Reply at Decl. David McDonough ¶ 6.) However, McDonough states that, as a Clark County resident, he feels his vote is worth less than residents of other counties and he no longer will participate in the initiative petition process unless the County Population Rule is invalidated. ( $Id.\P\P$  1, 8-9.)

Similarly, individual Plaintiff Oren Rosen ("Rosen") signed, this year, the "It's Time for Gaming's Fair Share" and "It's Time for Gaming's Fair Share and Eliminate Property Taxes" Initiatives. (Pls.' Reply at Decl. Oren Rosen ¶ 5.) However, on February 27, 2008, a Nevada state court ordered both of these initiative petitions removed from the 2008 ballot for impermissibly delegating legislative power and containing multiple subjects. (Def.'s Mot., Ex. 2.) Rosen also intends to continue signing future Nevada initiative petitions. (Pls.' Reply at Decl. Oren Rosen ¶ 6.) Nevertheless, because of the County Population Rule, Rosen avers he is discouraged about the initiative

process and he will not participate in it until the law is changed. (*Id.* ¶ 9.) The other two individual Plaintiffs are Kermit Waters ("Waters") and Joseph Zitello ("Zitello"). Although Plaintiffs do not provide affidavits or other evidence as to those two individuals, the Complaint alleges Waters signed the withdrawn "It's Time for Gaming's Fair Share" Initiative, and Zitello intends to sign an initiative petition this year. (Am. Compl.¶¶11-12.)

Plaintiff Marijuana Policy Project (the "Project") is a non-profit organization, with over 500 Nevada members, that works to remove criminal penalties for reasonable marijuana use, especially for medical purposes. (Pls.' Reply at Decl. Rob Kampia ¶ 2.) Plaintiff Committee to Regulate and Control Marijuana (the "Committee") is a registered Nevada political action committee. (Id. ¶ 3 & Ex. A.) Since 2002, the Project, through the Nevadans for Responsible Law Enforcement and then through the Committee, has sponsored three Nevada initiatives, which garnered statewide support. ( $Id.\P\P$  4-5.) The Committee is not currently sponsoring an initiative for the 2008 Nevada ballot because, in part, of the County Population Rule. (Id. ¶ 6.) However, if the law is invalidated, the Committee will circulate initiative petitions for future Nevada ballots. (Id.¶¶ 7-8.) Currently, although Nevada Revised Statute § 294A.281 requires organizations\*1297 to register with the Nevada Secretary of State prior to advocating for or against an initiative, neither the Project nor the Committee is registered as a ballot advocacy group with the Nevada Secretary of State. (Intervenor's Mot., Ex. A.)

The final Plaintiff is the American Civil Liberties Union of Nevada ("ACLUN"). A core principle of the ACLUN is to protect the right of all citizens to have their votes count equally, which is a principle the ACLUN previously has challenged in court. (Pls.' Reply at Decl. Gary Peck ¶¶ 5-7.) Further, ACLUN members previously have participated in the Nevada ballot initiative process, and members in Clark County and Washoe County signed initiative petitions intended for the 2008 ballot. (*Id.* ¶ 8.) Currently, the ACLUN is not registered as a ballot advocacy group with the Nevada Secretary of State. (Intervenor's Mot., Ex. A.)

On February 14, 2008, Plaintiffs filed this <u>42 U.S.C.</u> § 1983 action against Defendant Miller, Nevada Secretary of State. Plaintiffs claim the County Population

Rule violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. (Am. Compl.¶¶ 32-44.) Plaintiffs seek an order declaring the County Population Rule unconstitutional and enjoining its enforcement. Plaintiffs and Defendant stipulated to the intervention of Defendant-Intervenor Nevada Resort on July 1, 2008. (Stip. & Agreem. Allow. Interv. by Nev. Resort Ass'n [Doc. # 28].) Plaintiffs now move for summary judgment on their Equal Protection claim, and Miller and Nevada Resort both countermove for summary judgment, also based solely on the Equal Protection claim. Plaintiffs claim the County Population Rule violates the one person, one vote rule under the Equal Protection Clause. Defendants argue Plaintiffs lack standing and their claims are moot and not ripe. Defendants also assert the County Population Rule satisfies one person, one vote.

Finally, We the People Nevada ("WTP") moves to intervene as a Plaintiff. (Mot. to Interv. at 1.) WTP is a registered ballot advocacy group that seeks to intervene to protect and preserve its rights regarding its "Nevada Property Tax Restraint" Initiative petition. (*Id.*, Ex. A.) At the hearing on this matter, the parties represented to the Court that a Nevada state court recently invalidated some of the signatures on the initiative, and the dispute over these signatures is pending in the Nevada Supreme Court.

#### II. LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076, 1079 (9th Cir.2004) (citing Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir.2001)). Further, this Court views all evidence in the light most favorable to the non-moving party. <u>Id.</u>

Initially, the moving party bears the burden of proving there is no genuine issue of material fact. *Id.* 

(citing <u>Celotex Corp. v. Catrett</u>, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). After the moving party has met its burden, the burden then shifts to the non-moving party to produce some evidence that a genuine \*1298 issue of material fact remains for trial. <u>Id.</u> (citing <u>Liberty Lobby</u>, 477 U.S. at 248-49, 106 S.Ct. 2505).

#### III. JUSTICIABILITY

Defendant Miller argues Plaintiffs lack standing because they have alleged nothing more than a hypothetical intent to circulate or sign an initiative petition, or have signed a withdrawn petition. Miller also argues signing a currently-circulating petition months after the filing of the Amended Complaint does not confer standing because standing is determined at the time the complaint is filed. Similarly, Miller argues Plaintiffs' claims are not ripe because Plaintiffs only intend to sign or circulate a petition at some point in the future. Miller also claims Plaintiffs will experience no hardship if they have to wait to bring a claim until they attempt to place an initiative petition on the ballot.

Defendant-Intervenor Nevada Resort claims the individual Plaintiffs lack standing because the County Population Rule is a requirement for ballot proponents, not signers. Nevada Resort also argues the individual Plaintiffs' claims have become moot because the two initiatives they had claimed to sign were invalidated by a Nevada state court. Nevada Resort claims Plaintiff ACLUN fails to allege any actual or imminent harm to it or its members because its members do not allege any specific plans to sign or work on a future initiative petition, it has not proposed any initiatives for the 2008 ballot, and has not registered as a ballot advocacy group. Finally, Nevada Resort claims the Project and the Committee lack standing because they cannot credibly claim they intend to propose Nevada ballot initiatives or that the County Population Rule will be enforced against them if they have not registered as a Nevada ballot advocacy group.

Plaintiffs respond that the individual Plaintiffs have signed initiative petitions in the past, have signed petitions now in circulation, and intend to sign petitions in the future. Plaintiffs argue the individuals have standing because they have been injured as their signatures on initiative petitions have and will con-

tinue to be valued less than voters in less-populated counties. As such, Plaintiffs claim, the County Population Rule interferes with their ability to petition the government and has caused them to be disinclined to continue participating in the initiative process. Plaintiffs also deny their case is moot but, even if the claims based on initiative petitions removed from circulation have become moot, Plaintiffs argue McDonough has standing now because he has signed two initiatives currently in circulation.

Further, Plaintiffs claim the ACLUN has standing because its members have a right to have their petition signatures count equally, many members participate in the Nevada initiative process, and it has demonstrated a commitment to fair elections by filing several cases on behalf of its members. Finally, Plaintiffs argue the Project and the Committee have standing because they have sponsored and intend to sponsor initiative petitions in Nevada, and the County Population Rule interferes with their ability to promote legislative change through initiatives. Plaintiffs also claim the Committee has not registered as a ballot advocacy group because it is not advocating a petition this year, although it demonstrates its intent to continue participating in the process by maintaining its political action committee registration.

Plaintiffs argue their claims are ripe because hardship will result if a decision is postponed. Specifically, Plaintiffs claim they will not have adequate opportunity for complete judicial review before the November 2008 election if a decision is delayed until signatures are tallied and an initiative fails to qualify, and they are entitled\*1299 to know the rules governing a process before entering it. Plaintiffs also claim hardship exists because the threat that Defendant Miller will enforce the statute is evident as the State, through its Initiative Guide, made it clear it will enforce the County Population Rule. Finally, Plaintiffs claim the facts are sufficiently developed to allow for judicial review because this is a purely legal question and no additional facts would be helpful.

#### A. Standing

[1][2][3][4][5][6] The case or controversy requirement of Article III, § 2 of the United States Constitution underpins the standing doctrine. <u>Lomax</u>, 471 F.3d at 1015-16. Standing depends on "whether a party has a sufficient stake in an otherwise justiciable

controversy to obtain judicial resolution of that controversy, and serves to ensure that legal questions presented to the court will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Norton, 266 F.3d 969, 975 (9th Cir.2001) (quotations, alterations, and internal citation omitted). Generally, in a federal action with multiple plaintiffs, once the court determines one plaintiff has standing, it need not decide the standing of others. Council of Ins. Agents & Brokers v. Molasky-Arman, 522 F.3d 925, 932-33 (9th Cir.2008). When evaluating standing, the court looks to the facts "as they exist at the time the complaint was filed." Lomax, 471 F.3d at 1015. The party invoking federal jurisdiction has the burden to establish standing. <u>Lujan v. Defenders of Wildlife</u>, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Further, when a plaintiff seeks declaratory or injunctive relief, the plaintiff must demonstrate it is "realistically threatened by a repetition of the violation." Gest v. Bradbury, 443 F.3d 1177, 1181 (9th Cir.2006) (quotation omitted). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." Truth v. Kent Sch. Dist., 524 F.3d 957, 965 (9th Cir.2008) (alteration in original) (quotation omitted). However, at the summary judgment stage, the plaintiff cannot rely on mere allegations of injury and must set forth specific facts, by affidavit or other evidence. Defenders of Wildlife, 504 U.S. at 561, 112 S.Ct. 2130.

[7] To establish standing under Article III of the Constitution, a plaintiff must show "(1) injury in fact; (2) causation; and (3) likelihood that the injury will be redressed by a favorable decision." *Lomax*, 471 F.3d at 1015.

#### 1. Injury-in-Fact

[8] A plaintiff's alleged injury-in-fact must be "to a legally protected interest that is both 'concrete and particularized' and 'actual and imminent,' as opposed to 'conjectural' or 'hypothetical.' " LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152-53 (9th Cir.2000) (quoting San Diego Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir.1996)). " '[S]ome day' intentions-without any description of concrete plans, or indeed even any specification of when the some day will be-do not support a finding of the 'actual or im-

minent' injury that our cases require." Defenders of Wildlife, 504 U.S. at 564, 112 S.Ct. 2130. For instance, in Thomas v. Anchorage Equal Rights Comm'n, FN1 prosecution of a rental housing statute was not imminent as it depended on unforeseeable events such as whether plaintiffs would rent their property, whether an unmarried couple would attempt to rent and be denied, and \*1300 whether that couple would file a complaint that actually was prosecuted. 220 F.3d 1134, 1141 (9th Cir.2000) (en banc); see also Cole v. Oroville Union Sch. Dist., 228 F.3d 1092, 1100 (9th Cir.2000) (holding students and parents contesting a high school policy against sectarian speeches at graduation lacked standing because of "the highly speculative assumption" that a student seeking to give such a speech would be chosen as valedictorian or salutatorian and elected to deliver a speech).

> FN1. The Ninth Circuit in *Thomas* analyzed injury under a ripeness inquiry but noted the analysis is the same as it would be for standing. 220 F.3d at 1138-39.

[9][10] Nevertheless, "[i]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." LSO, Ltd., 205 F.3d at 1154-55 (quotation omitted). When the potential enforcement of the challenged statute implicates First Amendment rights, "the inquiry tilts dramatically toward a finding of standing." <u>Id. at 1155.</u> In fact, "self-censorship" from fear of prosecution is "a harm that can be realized even without actual prosecution." *Id.* For example, in ACLU of Nevada v. Heller, the ACLU had standing to bring a First Amendment challenge to a statute requiring disclosure of the financial sponsor of election publications discussing candidates or initiatives because the ACLU and its members previously had been prosecuted and wished to engage in this 378 F.3d 979, 983-84 (9th speech in the future. Cir.2004); see also Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1005-07 (9th Cir.2003) (holding political action committee had standing to challenge a law placing limitations on the timing of political advertising because plaintiff had to modify its speech or face civil penalties).

[11][12] Petition circulation "is core political speech,

because it involves interactive communication concerning political change." Buckley v. Am. Constitutional Law Found. Inc., 525 U.S. 182, 186, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (quotations omitted). An organization that circulates an initiative that fails to qualify for the ballot due to the potentially unconstitutional rule clearly has standing to challenge that rule. Lomax, 471 F.3d at 1015. However, that is not the only way a plaintiff may have standing to challenge such a rule. For instance, the district court in Idaho Coalition United for Bears v. Cenarrusa found standing where the individual plaintiffs previously had circulated ballots and intended to do so in the future, although they had none circulating, because, as they were well-known for their initiative work and had full control over whether they would engage in the initiative process, their statements of future intent were neither hypothetical nor speculative. No. Civ.00-0668-S-BLW, 2001 WL 34050705, at \*1-2 (D.Idaho 2001) (unpublished). The Ninth Circuit affirmed the district court's ruling on the merits, although the Court did not address standing. Idaho Coalition United for Bears v. Cenarrusa, 342 F.3d 1073 (9th Cir.2003).

Similarly, the Tenth Circuit held plaintiffs had standing to bring a First Amendment facial challenge to a Utah constitutional provision requiring wildlife initiatives receive two-thirds of the votes at the election, whereas other initiatives needed only a majority. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1085 (10th Cir.2006) (en banc). The court noted most cases involving a chilling effect on speech occur when a plaintiff faces criminal prosecution for certain forms of speech or conduct. Id. at 1088. However, in *Walker*, the issue was whether the state constitutional provision represented a "credible threat" of "real consequences" to plaintiffs. *Id*.

\*1301 [13] The court provided three factors to consider to determine if plaintiffs suffered an injury-infact:

(1) the evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be en-

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forced.

<u>Id. at 1089.</u> The court held the plaintiff organizations had standing because they were "among the direct targets of the state constitutional change, ... there [were] no doubts about whether the challenged provision will be enforced against them, and ... they ha[d] submitted satisfactory evidence of the chilling effect on their speech." <u>Id. at 1097.</u>

[14][15] The mere existence of a potentially unconstitutional statute does not necessarily create a "case or controversy" under satisfy Article III. Thomas, 220 F.3d at 1139. Likewise, a plaintiff with a generalized grievance about government actions does not have a particularized injury and lacks standing. LSO, Ltd., 205 F.3d at 1153. Nonetheless, a plaintiff still might have standing to challenge a government action when that action is not directed toward the plaintiff. Id. at 1154. For example, in LSO, Ltd., the Ninth Circuit held a plaintiff had standing to contest a state's regulatory actions against liquor licensees because the regulatory actions affected the plaintiff's ability to host an erotic art convention at the liquor licensee's facilities. *Id.* This was not a generalized grievance because the state's actions allegedly interfered with plaintiff's First Amendment rights. Id. In making this holding, the LSO, Ltd. Court analogized to Bantam Books, Inc. v. Sullivan, in which the United States Supreme Court similarly held that a state action directly affecting book distributors still could be challenged by publishers who suffered a "palpable injury" when the state action impaired circulation of their books. Id. at 1153 (citing 372 U.S. 58, 59-63, 64 n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)).

[16] No issue of material fact remains that Plaintiffs the Project and the Committee have established an injury-in-fact because they have circulated initiative petitions in the past, state they intend to do so in the future, and they are not currently doing so at least in part due to the County Population Rule. The Project and Committee also have full control of whether they will do so in the future. FN2 Unlike the situations in Thomas and Cole, whether the Project or Committee will circulate an initiative petition does not require a hypothetical action by a third party. Instead, the Project and Committee's intent to circulate future initiatives is not speculative as they, through affidavit of their Executive Director, state an intent to do so in

the future and Defendants do not contest this intention.

<u>FN2.</u> Defendants noted at the hearing that no discovery has occurred. However, Defendants did not move under <u>Federal Rule of Civil Procedure 56(f)</u> to defer a ruling pending discovery and did not file a <u>Rule 56(f)</u> affidavit in support.

The County Population Rule interferes with the Project and Committee's core political speech because it makes it more difficult to advocate for political change. Plaintiffs stated the Rule has deterred their participation and they should be able to know the requirements for gathering signatures before starting the initiative process. Whether the County Population Rule is constitutional will affect strategy and allocation of resources in gathering signatures. Consequently, the Project and Committee do not have to wait until an \*1302 initiative petition is invalidated by the County Population Rule before they can challenge the injury the County Population Rule is causing to their ability to engage in core political speech. Analogizing to the Tenth Circuit's test, the standing of the Project and the Committee is strengthened further because the Executive Director of the two organizations alleges the Project, through the Committee, previously circulated petitions and the Committee intends to do so in the future, although it will not until the Rule is invalidated. Thus, the Project and Committee have established injury-in-fact.

[17][18][19] Further, although the Court need decide the standing of only one Plaintiff, no genuine issue of material fact remains that individual Plaintiff Rosen and the ACLUN members have established injury-infact because the alleged constitutional violation, vote dilution, occurs immediately upon signing a petition. Specifically, the injury to a voter occurs whether an initiative petition passes or not because a vote is valued less as soon as it is cast. Plaintiff Rosen stated by affidavit that he had signed two 2008 initiative petitions by the time the Complaint was filed. Defendants do not contest that Rosen signed these petitions. Although those both were removed from circulation, his claims are not moot because the "capable of repetition, yet evading review" exception applies. FN3 Because the initiative process is inherently short and the Secretary of State does not claim he will not continue enforcing the County Population Rule, Rosen would

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be subjected to it again as soon as he signs another petition, which by affidavit he avers he intends to do. Additionally, Rosen and McDonough stated by affidavit that, because of the alleged vote dilution, they are discouraged from signing initiatives until the County Population Rule is invalidated. This self-censorship further strengthens Rosen's standing. The ACLUN members also have established standing because, as asserted by the ACLUN's Executive Director, they previously have participated in the Nevada ballot initiative process and members in Clark and Washoe Counties signed initiative petitions intended for the 2008 ballot. Thus, the ACLUN members establish injury by the same alleged vote dilution as Rosen experienced.

FN3. Mootness is the "doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."

Vasquez v. Los Angeles County, 487 F.3d 1246, 1253 n. 6 (9th Cir.2007) (quotation omitted). However, a claim is not moot if it is "capable of repetition, yet evading review."

Lomax, 471 F.3d at 1017. This exception applies if "(1) the challenged action is too short in duration to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will again be subject to the same action."

Id.

Finally, the Court rejects Nevada Resort's argument that the individual Plaintiffs do not have standing because the County Population Rule applies only to petition circulators, not signers. In fact, the individual signers, like the plaintiffs in *LSO*, *Ltd.* and *Bantam Books*, are directly affected by the state action. Although the statute does not stop a voter from signing an initiative petition, if Plaintiffs are correct that the County Population Rule violates the Equal Protection Clause, the enforcement affects the individuals' voting rights. Thus, the individual Plaintiffs' claims are not generalized grievances.

#### 2. Causation and Redressability

[20][21][22][23] Causation is established if the plaintiff's injury is "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before

\*1303 the court." Pritikin v. Dep't of Energy, 254 F.3d 791, 797 (9th Cir.2001) (alterations in original) (quotation omitted). As for redressability, "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 797 (quotations omitted). Here, causation exists because the alleged injuries derive directly from the County Population Rule, which is enforced by Defendant Miller, as the Nevada Secretary of State. Redressability also exists because, as the alleged injury is a result of enforcement of the County Population Rule, invalidation of the Rule would redress Plaintiffs' injuries. Accordingly, because at least the Project, the Committee, individual Plaintiff Rosen, and the ACLUN FN4 establish the three elements of standing, Plaintiffs have standing to bring this suit.

FN4. The ACLUN also needs to establish organizational standing to sue on behalf of its members. An organization "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Nat. Res. Def. Council v. EPA, 526 F.3d 591, 601-02 (9th Cir.2008) (quotation omitted).

Here, the ACLUN members have standing based on their alleged vote dilution. Those voting interests are germane to the ACLUN's purposes because, as stated by its Executive Director, one of the ACLUN's core principles is to protect the rights of all citizens to have their votes count equally. Finally, neither the claim nor relief requires the participation of the ACLUN's members because those interests are adequately represented by the ACLUN and the ACLUN requests only injunctive and declaratory relief. Thus, no genuine issue of material fact exists as to the ACLUN's organizational standing.

## **B.** Ripeness

[24][25] "[R]ipeness is peculiarly a question of timing designed to prevent the courts, through avoidance of premature adjudication, from entangling them-

selves in abstract disagreements." Thomas, 220 F.3d at 1138 (citation and quotations omitted). The ripeness doctrine contains both a constitutional component derived from Article III limitations on judicial power and a prudential component. Id. The constitutional component of the ripeness inquiry is similar in scope and often coincides with standing's injury-infact analysis. <u>Id.</u> The plaintiff's injury must be "definite and concrete, not hypothetical or abstract," and the plaintiff must face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Id. at 1139 (quotations omitted). Injury that is "too imaginary or speculative" will not support a finding of ripeness. *Id.* (quotations omitted). For the prudential component of ripeness, the Court considers the hardship to the parties if the Court declines to address the matter and whether the issues are fit for judicial review. *Id.* at 1141.

[26] Plaintiffs' equal protection claims are ripe. Plaintiffs have established injury, and, therefore, Plaintiffs meet the constitutional component of ripeness. The hardship to the Project and the Committee if the Court declines to address the matter is that they will be forced to expend significant resources in initiating and circulating a petition without knowing whether they must comply with the County Population Rule. Although the County Population Rule does not stop them from initiating a petition, it affects the Project and the Committee's ability and strategy to gather signatures in Nevada. If the Project and the Committee wait to challenge the County Population Rule until an initiative petition is invalidated by the Rule and the \*1304 challenge is successful, they will expend resources to comply with an invalid Rule.

[27] Additionally, for the individual Plaintiffs and ACLUN members, they experience hardship in that the alleged vote dilution occurs upon signing, which some individual Plaintiffs have done this year. Further, both McDonough and Rosen allege they are discouraged from signing another petition until the Rule is invalidated. Thus, they suffer another hardship in the sense that the Rule deters them from participating in the ballot initiative process.

The issues also are fit for judicial review because no additional facts would help the Court make a decision. The dispute over the County Population Rule is a purely legal issue as to whether the statute on its face violates the Equal Protection Clause. Therefore,

Plaintiffs' equal protection claim is ripe.

#### IV. EQUAL PROTECTION

[28] Plaintiffs argue the County Population Rule violates the one person, one vote rule of the Equal Protection Clause because the Rule, like the previous 13 Counties Rule invalidated by the Ninth Circuit, favors residents of sparsely-populated counties over those in densely-populated counties, thereby diluting votes in urban areas. Plaintiffs claim that because Nevada granted equal power to counties of unequal population, as opposed to equally populated geographic units, such as legislative districts, the County Population Rule is unconstitutional under the Fourteenth Amendment of the Constitution.

Defendant Miller argues the County Population Rule does not violate the one person, one vote rule because it allocates an initiative's required number of signatures in accordance with each county's population in proportion to Nevada's population as a whole. Miller also argues the Ninth Circuit, when invalidating the 13 Counties Rule, held unconstitutional only those rules requiring fixed percentages of signatures for a fixed number of counties, not proportional rules. Miller contends the County Population Rule furthers a compelling state interest in maximizing participation in the initiative process that does not unduly burden Plaintiffs, while Plaintiffs' legislative district suggestion would require gathering signatures in over 20 assembly or 12 senate districts in Clark County alone. Finally, Miller argues a signature requirement based on state assembly districts would disenfranchise voters of rural counties because votes could be collected without any support from registered voters in 12 of the 17 Nevada counties.

Defendant-Intervenor Nevada Resort similarly argues the County Population Rule is constitutional because voters in different counties exert the same level of influence in proportion to their county's share of the Nevada population. Nevada Resort also argues no case law makes the use of counties per se impermissible and the use of assembly districts was only a suggestion by the Ninth Circuit, not a requirement. Nevada Resort also claims the County Population Rule functions nearly identical to a system based on assembly districts because of the weight given to each county based on population. For example, if assembly districts were used, each assembly district

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would need 1,396 signatures to meet the 10% signature requirement of the Nevada Constitution (calculated by dividing 10% of the past election voter turnout, 58,628, by 42 assembly districts). (See Intervenor's Mot. at Exs. D, E, F; Def.'s Mot., Ex. 3.) In Clark County, which has 29 assembly districts, a petition would need 40,484 signatures (1,396 multiplied by 29). (See id., Exs. D, F; Def.'s Mot., Ex. 3.) As the County Population rule requires 40,364 votes in Clark \*1305 County, there is a difference of only 120 signatures between the two systems. Finally, Nevada Resort argues that a rule based on Nevada assembly or senate districts would increase significantly the burden on initiative proponents collecting signatures and those verifying signatures because of the difficulty of distinguishing between voters in different districts when the border of those districts is often indistinguishable, as, for example, there are 29 assembly districts in Clark County alone.

[29] To establish a claim under 42 U.S.C. § 1983, the plaintiff must show state action and a constitutional Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir.2003). Here, only the constitutional violation is at issue. Under the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The United States Supreme Court has interpreted this to require all participants in an election have an equal vote, regardless of where their home is in a geographical unit. Gray v. Sanders, 372 U.S. 368, 379, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). The only weighting of votes allowed under the Constitution is allocating U.S. Senators regardless of population and the use of the electoral college in choosing the President. FN5 Id. at 380, 83 S.Ct. 801. As such, "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In other words, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing-one person, one vote." Sanders, 372 U.S. at 381, 83 S.Ct. 801.

FN5. The Supreme Court noted analogies to the electoral college are inapposite to state voting arrangements because the electoral college was adopted with specific historical concerns during the adoption of the U.S. Constitution, while no such constitutional validation exists for statewide voting. *Id.* at 378, 83 S.Ct. 801.

The Supreme Court applied the one person, one vote concept to a county vote counting system in Gray v. Sanders and to a state legislature apportionment scheme in <u>Reynolds v. Sims.</u>In <u>Sanders</u>, the Supreme Court invalidated a Georgia "county unit system" for counting votes in primaries for the state legislature and U.S. Senate. Id. at 370, 381, 83 S.Ct. 801. Under the original doubling system, a candidate receiving the highest number of votes in a county carried that county, thereby receiving two votes for each representative that county had in the state assembly. *Id.* at 371, 83 S.Ct. 801. An amended "bracket" system allocated voting units based on each county's bracket of population. FN6 Id. at 372, 83 S.Ct. 801. The Court held both violated equal protection, noting that even if the "bracket" system units were allocated strictly proportional to population, the winning candidate receives a full unit after winning a majority of the popular vote, thereby making the votes for other candidates\*1306 worth nothing. Id. at 381 & n. 12, 83 S.Ct. 801.

FN6. For example, a county with a population up to 15,000 had 2 units; one with a population between 15,000 and 20,000 had 3 units; one with a population between 20,000 and 30,000 had 4 units; one with a population between 30,000 to 45,000 had 5 units; one with a population of 45,000 to 60,000 had 6 units; and each additional 30,000 persons above 60,000 gave a county two additional units. *Id.* at 372, 83 S.Ct. 801.

In *Reynolds*, the Court invalidated an Alabama state legislature apportionment scheme that had not been updated to reflect population changes, as well as two plans to change that scheme in which each county received one seat and the other seats were distributed proportionally to the counties based on population. 377 U.S. at 543-45, 84 S.Ct. 1362. Specifically, a proposed Alabama constitutional amendment divided the remaining seats by an "equal proportions" method

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(as used in apportioning seats of the U.S. House of Representatives), and an enacted statute divided the remaining seats based on a "formula requiring increasingly more population for a county to be ac-Id. The Court held all corded additional seats." three plans violated equal protection because the houses of a state legislature must be apportioned on a population basis. *Id.* at 569, 84 S.Ct. 1362. though the Court noted the proposed amendment was the closest plan to reaching the constitutional standard, it concluded "the deviations from a strict population basis [were] too egregious to permit [the Court] to find that [the Alabama House] ... was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained." *Id.* (concluding that "[w]hile mathematical nicety is not a constitutional requisite," population variances of close to 5 to 1 violated equal protection).

vote concept to signature collection on nominating petitions in *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969). The Court concluded nominating petitions are integral to a state's election system, and, therefore, a state's procedures for nominating petitions must pass muster under the Constitution. Moore, 394 U.S. at 818, 89 S.Ct. 1493. In *Moore*, the Supreme Court held unconstitutional an Illinois statute that required signatures of 200 qualified voters from each of a minimum of 50 counties before an independent candidate could be placed on the ballot for President and Vice President of the United States. Id. at 815, 89 S.Ct. 1493. The Court held this law violated equal protection because it discriminates against populous counties in favor of rural counties:

The Supreme Court expanded the one person, one

It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

Id. at 818-19, 89 S.Ct. 1493.

The Ninth Circuit adopted the one person, one vote reasoning of *Moore* to ballot initiatives in *Idaho Coa*lition United for Bears v. Cenarrussa and applied it to Nevada law in ACLU of Nevada v. Lomax. In Idaho Coalition, the Ninth Circuit applied strict scrutiny and held unconstitutional an Idaho statute requiring a ballot petition sponsor to obtain signatures from at least six percent of the qualified voters in at least half of the 44 counties in Idaho. 342 F.3d 1073, 1075-77, 1079 (9th Cir.2003). Because Idaho's counties varied greatly in population, the Idaho statute allocated equal power to counties of unequal population. <u>Id. at 1078.</u> Specifically, in the smallest Idaho county, a person's vote would count when only 61 others sign the petition, whereas, in the largest county, it would take 18,054 signatures before a person's vote would count. Id. The Ninth \*1307 Circuit held this violated equal protection because a system to place initiatives on the ballot "may not be based on treating unequal counties equally and making the electoral determination dependent on the support of numbers of counties rather than numbers of people." *Id*.

Applying strict scrutiny, the Ninth Circuit rejected Idaho's arguments as unpersuasive, or, at a minimum, not narrowly tailored to further Idaho's interests. Id. First, Idaho argued it had a greater interest in protecting against localized legislation than Illinois did in requiring statewide support for placing a new political party's presidential elector on the ballot in *Moore*.

Id. at 1077-78. The Ninth Circuit disagreed and held that, even if the state's interest was compelling, the current statute was not narrowly tailored to promote such an interest because Idaho could achieve the same end by, for example, "basing any such requirement on existing state legislative districts." <u>Id.</u> at 1078. Second, Idaho argued it was interested in preventing long and confusing lists of initiatives on the ballot, preventing fraud, informing the voters, ensuring integrity in the ballot process, and promoting grassroots direct legislation. Id. at 1079. The Court concluded that, even if these were all valid purposes, each could be advanced by a system that treats voters equally across geographic areas, such as increasing the number of statewide signatures re-*Id.* Finally, addressing Idaho's interest in creating a check on the majority's will, the Ninth Circuit stated Idaho still could do this by nondiscriminatory means that do not "weigh the votes (or 578 F.Supp.2d 1290 578 F.Supp.2d 1290

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signatures) of some voters more heavily than those of others." *Id.* 

In Lomax, the Ninth Circuit invalidated the Nevada 13 Counties Rule, which required a petition have signatures from 13 of the 17 Nevada counties. 471 F.3d at 1013, 1021. Applying *Idaho Coalition*, the Court held the 13 Counties Rule violated equal protection as it diluted the votes of residents in densely populated counties. Id. at 1019. Although a higher percentage was required in the Nevada rule than in the Idaho rule and the Court suggested in *Idaho Coa-*<u>lition</u> that increased percentages might alleviate equal protection concerns, the Court stated such an increase was suggested "in lieu of, rather than in conjunction with, a county-based requirement." *Id.* at 1020 (emphasis omitted). In fact, "[a] general statewide increase of the fixed percentage requirement does not resolve the constitutional infirmities resulting from a system that dilutes the power of some votes by providing more sparsely populated counties with the same total power as densely populated counties." *Id.* Finally, applying strict scrutiny, the Ninth Circuit expressed skepticism that the state has a compelling interest in ensuring statewide support for ballot initiatives; however, even assuming that interest was valid, the 13 Counties Rule was not narrowly tailored, as Nevada could base a rule on legislative districts. *Id.* at 1021.FN7

> FN7. Other courts have applied similar analyses. See, e.g., Blomquist v. Thomson, 739 F.2d 525, 527-28 (10th Cir.1984) (holding unconstitutional Wyoming's rule requiring a minimum of 8,000 signatures, the majority of which cannot reside in the same county, because the state did not justify the burdens on constitutional rights); Communist Party of Ill. v. State Bd. of Elections, 518 F.2d 517, 518, 521-22 (7th Cir.1975) (holding that Illinois statute requiring political parties seeking ballot recognition to obtain 25,000 signatures, not more than 13,000 from any one county, violated equal protection because it discriminates against voters in populous counties and was not narrowly tailored); Mont. Pub. Interest Research Group v. Johnson, 361 F.Supp.2d 1222. 1224-25. (D.Mont.2005) (finding unconstitutional Montana's statute that required an initiative

petition receive signatures from 5% of voters in half of Montana's unequally populated counties because, applying strict scrutiny and Idaho Coalition, it resulted in unequal treatment of voters and was not narrowly tailored to Montana's objectives); Gallivan v. Walker, 54 P.3d 1069, 1076, 1096 (Utah 2002) (invalidating Utah initiative petition requirement to obtain signatures from 10% of voters during last election in at least 20 of Utah's 29 counties because it violates equal protection). But see Libertarian Party v. Bond, 764 F.2d 538, 539, 544 (8th Cir.1985) (upholding Missouri statute for placing a new political party's candidate on the ballot by requiring signatures of 1% in each or 2% in one-half of Missouri's congressional districts), cited in Idaho Coalition, 342 F.3d at 1079 (distinguishing Idaho's statute because the Missouri statute related to divisions of equal population); Petition of Berg, 552 Pa. 126, 713 A.2d 1106, 1109 (1998) (upholding Pennsylvania statute requiring 100 signatures from 10 of the state's 67 counties because, among other reasons, a "scant minority of voters in rural areas could [not] 'veto' the wishes of the majority"), cited in Idaho Coalition, 342 F.3d at 1079 (distinguishing Berg because Pennsylvania's counties were more evenly populated).

\*1308 [30] Although not all voting regulations receive strict scrutiny review, strict scrutiny applies to "regulations that contravene the principle of 'one person, one vote' by diluting the voting power of some qualified voters within the electoral unit." Green v. City of Tucson, 340 F.3d 891, 896, 899-900 (9th Cir.2003). Further, Idaho Coalition and Lomax applied strict scrutiny to determine whether ballot initiative petition requirements diluted the vote of certain voters based on where they live in the state. Therefore, under strict scrutiny, Nevada has the burden of showing the County Population Rule is "narrowly tailored to achieve a compelling state interest." Nader v. Brewer, 531 F.3d 1028, 1035, 1037 (9th Cir.2008).

Here, Miller and Nevada Resort put forth two justifications for the County Population Rule. FN8 First, Defendants claim the Rule is necessary to ensure statewide support for a ballot initiative and to prevent

urban areas from dominating the initiative process. The Courts in Moore, Idaho Coalition, and Lomax suggest this is not a compelling interest because, as stated in *Moore*, "[i]t is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support...." 394 U.S. at 818, 89 S.Ct. 1493. However, the Ninth Circuit in Idaho Coalition concluded only that this interest is not greater than the interest of ensuring statewide support for a new political party placing presidential electors on the ballot advanced in Moore. The Ninth Circuit did not necessarily hold that it is not a compelling interest. Both Idaho Coalition and Lomax instead focus more on the narrowly tailored aspect of strict scrutiny. Thus, although the Ninth Circuit has suggested this interest is not compelling, it has not held it could never be compelling. Nevertheless, instead of explaining why statewide support for initiatives is a compelling state interest, Defendant Miller argues only that other initiative petition schemes might allow signatures to be collected in relatively few counties. Thus, Miller has not met his burden of proving statewide support is a compelling state inter-

<u>FN8.</u> Plaintiffs do not contest that either of these interests are compelling. Rather, Plaintiffs focus on whether the County Population Rule is narrowly tailored.

[31] Even if statewide support is a compelling government interest, the County Population Rule is not narrowly tailored to serve that objective. As in Lomax, one voter's vote in Clark County under the County Population Rule weighs substantially less than one voter's vote in any other Nevada county. In Idaho Coalition, it took only 61 others to sign for a person's vote to count in the smallest county, whereas it took 18,054 others to sign for a vote to count in the largest county. Similarly, here, it would take 40,363 other voters to sign a petition before a Clark County\*1309 voter's vote would "count," whereas it would only take 28 other voters to sign in Esmeralda County. Because a petition supporter must obtain signatures from every county, each county is treated equally. Therefore, the Rule is based on numbers of counties not numbers of people. As the *Idaho Coali*tion and Lomax Courts held, a system that gives counties of unequal population equal power violates equal protection.

Further, the Ninth Circuit provided at least one possibility, using state legislative districts, that would alleviate equal protection concerns. Miller argues such a scheme would allow an initiative petition to get on the ballot with support from only a small number of counties. However, because the Ninth Circuit stated a ballot rule cannot be made "on the support of numbers of counties rather than numbers of people," statewide support cannot be addressed in terms of gaining support from enough counties. Idaho Coalition, 342 F.3d at 1078. Moreover, although signatures could be gathered from less than all counties, even if this happens, the initiative proponent still would need some of the signatures from rural counties. In other words, even though an initiative supporter theoretically could obtain signatures from less than all of the Nevada counties, the urban voters could not dominate the process. Thus, because an alternative system based on legislative districts would not violate equal protection and would ensure relatively broad statewide support including some rural voters, Defendants do not meet their burden of proving the County Population Rule is narrowly tailored to further Nevada's interest in statewide support for initiatives.

Defendant-Intervenor Nevada Resort's second justification for the County Population Rule is to ensure a manageable initiative system for initiative petitioners and the State. Specifically, Nevada Resort argues that using state legislative districts would make the process exceedingly difficult because signature collectors and verifiers would need to distinguish between voters in different districts that randomly cross urban areas. Miller also notes the large number of assembly or senate districts in Nevada, especially in Clark County. This manageability concern is a more compelling reason why using state legislative districts, as opposed to counties, is not a reasonably functional system. In fact, as the right to circulate initiatives is a right provided by the Nevada Constitution, Nevada has a compelling interest in making sure that right realistically can be supported by the government and realized by Nevada voters.

However, even if the manageability concerns are compelling, the State still must show the County Population is narrowly tailored to that interest. Although state legislative districts might make managing the initiative process more difficult, it is not clear that they would and neither Miller nor Nevada Resort

demonstrate it is unduly burdensome to use these divisions. Further, other divisions could satisfy both equal protection and the State's interests. For example, Nevada has significantly fewer state senate districts than assembly districts, thereby lessening manageability concerns. Additionally, using United States congressional districts would not have the same manageability concerns. Because Defendants do not meet their burden of showing the County Population Rule is narrowly tailored to serve its interests and the Rule violates one person, one vote, no genuine issue of material fact exists that the County Population Rule violates the Equal Protection Clause. The Court therefore will grant Plaintiffs' Motion for Summary Judgment and deny Defendant Miller's and Defendant-Intervenor Nevada Resort's Motions for Summary Judgment. Further, the Court declares \*1310 the County Population Rule in Nevada Revised Statute § 295.012 unconstitutional and enjoins Defendant Miller from enforcing the County Population Rule.

### V. MOTION TO INTERVENE

WTP moves to intervene as a Plaintiff under Federal Rule of Civil Procedure 24(a) as a matter of right, or, in the alternative, to intervene permissively under Rule 24(b). However, because the Court is granting Plaintiffs' Summary Judgment motion, WTP's motion to intervene is hereby denied as moot.

#### VI. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (Doc. # 16) is hereby GRANTED. Judgment is hereby entered in favor of Plaintiffs and against Defendant Miller.

IT IS FURTHER ORDERED that Defendant Miller's Countermotion for Summary Judgment (Doc. # 24) is hereby DENIED.

IT IS FURTHER ORDERED that Defendant-Intervenor Nevada Resort's Countermotion for Summary Judgment (Doc. # 30) is hereby DENIED.

IT IS FURTHER ORDERED that the County Population Rule, <u>Nevada Revised Statute § 295.012</u>, is hereby declared unconstitutional under the Fourteenth Amendment of the United States Constitution.

IT IS FURTHER ORDERED that Defendant Miller is hereby enjoined from enforcing Nevada Revised Statute § 295.012.

IT IS FURTHER ORDERED that WTP's Motion to Intervene (Doc. # 18) is hereby DENIED as moot.

D.Nev.,2008. Marijuana Policy Project v. Miller 578 F.Supp.2d 1290

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# APPENDIX I

National Conference of State Legislature	s—Signature Requirements	for Initiative Proposals
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# NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

# **Signature Requirements for Initiative Proposals**Updated August 2008

		Statutory Initiatives			Constitutional Initiatives		
	Signature Formula	2008 Actual Requirement	Geographic Distribution	Signature Formula	2008 Actual Requirement	Geographic Distribution	
Alaska	10% of total votes cast in last general election	23,831	Signatures from 7% of those who voted in the previous general election in at least ¾ of the state's 40 house districts		N/A		
Arizona	10% of votes cast for governor in last election	153,365	None	15% of votes cast for governor in last election	230,047	None	
Arkansas	8% of votes cast for governor in last election	61,974	Signatures equal to 4% of votes cast for governor in each of at least 15 of the state's 75 counties	10% of votes cast for governor in last election	77,468	Signatures equal to 5% of votes cast for governor in each of at least 15 of the state's 75 counties	
California	5% of votes cast for governor at last election	433,971	None	8% of votes cast for governor at last election	694,354	None	
Colorado	5% of votes cast for sec. state at last election	76,047	None	5% of votes cast for sec. state at last election	76,047	None	
Florida		N/A		8% of total votes cast statewide in last presidential election	611,009	8% in at least 13 of the state's 23 congressional districts	

Source: National Conference of State Legislatures November 2006

	Statutory Initiatives			Constitutional Initiatives		
	Signature Formula	2008 Actual Requirement	Geographic Distribution	Signature Formula	2008 Actual Requirement	Geographic Distribution
Idaho	6% of qualified electors at previous election	45,893	None (a)		N/A	
Illinois		N/A		8% of total votes cast for governor in last election	279,039	None
Maine	10% of votes cast for governor in last election	55,087	None		N/A	
Massachusetts	To place before the legislature: 3% of votes cast for governor in last election To place on the ballot if the legislature fails to pass: 0.5% of votes cast for governor in last election	66,593 + 11,099	No more than 25% of signatures may be from one county	3% of votes cast for governor in last election	66,593	No more than 25% of signatures may be from one county
Michigan	8% of votes cast for governor in last election	304,101	None	10% of votes cast for governor in last election	380,126	None
Mississippi		N/A		12% of votes cast for governor in last election	91,673	At least 18,355 signatures from each of the 5 congressional districts
Missouri	See geographic distribution no total signature requirement	86,989 - 94,762 <sup>d</sup>	5% of votes cast for governor in last election from 6 of the 9 congressional districts	See geographic distribution no total signature requirement	139,181 - 151,619 <sup>d</sup>	8% of votes cast for governor in last election from 6 of the 9 congressional districts

	Statutory Initiatives			Constitutional Initiatives		
	Signature	Signature 2008 Actual Geographic		Signature	2008 Actual	Geographic
	Formula	Requirement	Distribution	Formula	Requirement	Distribution
Montana	5% of qualified electors in state at large	22,308	5% of qualified voters in each of 34 legislative districts	10% of qualified electors in state at large	44,615	10% of qualified voters in each of 40 legislative districts
Nebraska <sup>c</sup>	7% of registered voters at the filing deadline	79,605	5% of registered voters in 38 of the 93 counties	10% of registered voters at the filing deadline	113,721	5% of registered voters in 38 of the 93 counties
Nevada	10% of total votes cast in last general election	58,627	See (b)	10% of total votes cast in last general election	58,627	See (b)
North Dakota	2% of resident population of the state at the last decennial census	12,844	None	4% of resident population of the state at the last decennial census	25,688	None
Ohio	To place before the legislature: 3% of votes cast for governor in last election To place on the ballot if the legislature fails to pass: 3% of votes cast for governor in the last election.	120,683 + 120,683	1.5% of total votes cast for governor in each of 44 of the state's 88 counties	10% of votes cast for governor in last election	402,275	5% of total votes cast for governor in each of 44 of the state's 88 counties
Oklahoma	8% of votes highest vote cast in last state election	74,117	None	15% of votes cast for office receiving highest number of votes in last state election	138,970	None
Oregon	6% of votes cast for governor in last election	82,769	None	8% of votes cast for governor in last election	110,358	None

	Statutory Initiatives			Constitutional Initiatives		
	Signature Formula	2008 Actual Requirement	Geographic Distribution	Signature Formula	2008 Actual Requirement	Geographic Distribution
South Dakota	5% of votes cast for governor in last election	16,776	None	10% of votes cast for governor in last election	33,551	None
Utah	Direct - 10% of votes cast for governor in last election  Indirect – To place before the legislature: 5% of votes cast for governor in last election To place on the ballot if the legislature fails to pass: 5% of votes cast for governor in last election	Direct – 91,996  Indirect – 45,998 + 45,998	Direct - 10% of votes cast for governor in at least 26 of 29 state senate districts  Indirect – 5% of votes cast for governor in at least 26 of 29 state senate districts		N/A	
Washington	8% of votes cast for governor in last election	224,880	None		N/A	
Wyoming	15% of total votes cast in last general election	29,433	15% of residents in at least 2/3 of the state's 23 counties		N/A	

<sup>(</sup>a) Idaho's geographic distribution requirement was held unconstitutional by US District Court in December 2001, and that decision was upheld by 9<sup>th</sup> Circuit Court of Appeals in September 2003. It required that signatures include 6% of the registered voters in each of 22 counties.

<sup>(</sup>b) Nevada's geographic distribution requirement was held unconstitutional in August 2004. It required that signatures come from 10% of the total votes cast in the last general election in at least 13 of the state's 17 counties. Two new provisions were passed in the 2007 legislative session: One requires that petitions comply with a geographic distribution requirement that is still county-based, but is flexible in that each county's total required signatures is calculated by a formula based on population. This provision is currently in effect for the 2008 election. A second measure that was passed is a constitutional amendment and therefore will require voter approval in two consecutive general elections. This provision replaces the county-based geographic distribution requirement with a requirement that each petition contain the signatures of 10% of voters in each Congressional district.

<sup>(</sup>c) 2008 requirement not yet determined. Total listed here was effective for 2006 initiatives.

(d) The total number of signatures required varies depending on the combination of districts presented in petitions. **Source:** National Conference of State Legislatures, October 2007