

**United States District Court  
District of Nebraska**

**Kent Bernbeck,**

**Plaintiff,**

**v**

**John A. Gale, Nebraska Secretary of  
State, and  
Charlotte TeBrink, Clerk of the Village  
of Denton, a Political Subdivision of the  
State of Nebraska**

**Defendants.**

**No. \_\_\_\_\_**

**Complaint (Declaratory Judgment)  
& Jury Demand**

**Notice of Constitutional Challenge**

Plaintiff alleges:

**Case Overview**

1. Kent Bernbeck, a Nebraska businessman, sues because his First and Fourteenth Amendments rights have been severely burdened by restrictions imposed upon the right of initiative and referendum by Nebraska law. The two (2) distinct subjects of Nebraska law that are unconstitutional and void and constitute severe burdens on Mr. Bernbeck's First and Fourteenth Amendment rights are:

- 1.1 Requirements of *Neb Const* Art III § 2 purporting to govern and restrict the power of initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. The offensive aspects of Article III § 2 include a requirement that registered voters signing petitions must "be so distributed as to include 5% of the registered voters of each of two-fifths of the [93] counties of the state...."
- 1.2 *Neb Rev Stat* § 32-630(3)(g). This Nebraska statute prohibits Mr. Bernbeck from exercising his First Amendment and Fourteenth Amendment rights by

prohibiting payments to petition circulator based on the number of signatures collected, or on a “pay-per-signature” basis.

These restrictions place unreasonable burdens upon Mr. Bernbeck as a citizen who wishes to exercise his rights. They infringe on his well-established constitutional rights to exercise free political speech<sup>1</sup> and to petition the government to redress grievances.<sup>2</sup>

2. Bernbeck contends these Nebraska laws are unconstitutional and void because they violate the First and Fourteenth Amendments to the *Constitution* of the United States. The Defendants are sued because they refused to place on the ballot initiatives he sought to present and violated his well-established<sup>3</sup> constitutional rights. Relief is sought pursuant to 42 *USC* § 1983, and participated in oppressing Bernbeck’s rights while acting under color of state law. Bernbeck seeks a declaration, an injunction, costs and attorneys’ fees<sup>4</sup>.

### **Jurisdiction, Venue, Parties**

3. The District Court’s subject matter jurisdiction lies under 28 *USC* § 1331 as questions of federal law are presented. At issue are ballot box and election rights, free speech rights, and rights relating to petitioning the government. In additions judicial authority lies under 28 *USC* §§ 1343(a)(3) and (4) providing for jurisdiction over suits involving civil rights and the election franchise. Plaintiff seeks to prevent the deprivation of civil rights guaranteed by the Fourteenth Amendment’s due process and equal

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<sup>1</sup> US Const Amend 1; *Citizens United v Federal Election Com’n*, 558 US 310 (2010).

<sup>2</sup> US Const Amend 1; ; *City of Cuyahoga Falls v Buckeye Community Hope Fdn*, 538 US 188, 196 (2003); *Walters v National Ass’n of Radiation Survivors*, 472 US 304 (1985)(“ [T]he “loss of First Amendment freedoms, even temporarily, constitutes irreparable injury” ...).

<sup>3</sup> “In assessing the referendum as a “basic instrument of democratic government,” *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976), we have observed that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice,” *James v. Valtierra*, 402 U.S. 137, 141 (1971). And our well established First Amendment admonition that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” *Texas v. Johnson*, 491 U.S. 397, 414 (1989), dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government. Cf. *Meyer v. Grant*, 486 U.S. 414, 421-422 (1988) (describing thee circulation of an initiative petition as “ ‘core political speech’ ”).”*City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Fdn.*, 538 U.S. 188 (2003).

<sup>4</sup> 42 *USC* § 1983.

protection clauses, and the First Amendment's free speech and right to petition the government clauses, which are incorporated by the Fourteenth Amendment.<sup>5</sup>

4. For purposes of 28 *USC* § 1343, this action is authorized by 42 *USC* § 1983. The Court has authority to grant declaratory and injunction relief under 28 *USC* §§ 2201 & 2202, and injunctive relief under 42 *USC* § 1983.

5. Venue is proper in the District of Nebraska where the claims arose, all the Defendants reside, and a substantial part of the activity giving rise to the claims occurred<sup>6</sup>. The claims asserted are properly joined, as they arise from the same transaction or occurrence, or series of transactions or occurrences, and common questions of fact or law arise in this action.<sup>7</sup>

6. The Plaintiff is Kent Bernbeck. Mr. Bernbeck is a resident of Douglas County, Nebraska, and a citizen of the United States. Bernbeck was the sponsor of the municipal initiative petition in Denton, Nebraska described below. Mr. Bernbeck also seeks to promote and advance a statewide initiative petition and is thwarted by Defendant Gale who enforces, and threatened to enforce, both challenged provisions of state law against Mr. Bernbeck. He has promoted statewide initiatives in the past and seeks to do so know.

7. The Defendants are public officials who hold positions of responsibility and acted under color of state law when they used their positions to refuse to place the Plaintiff's initiative petition on the ballot of the Village of Denton, Nebraska, which proceeded against Mr. Bernbeck and prevailed in a state court proceeding precluding his petition because Bernbeck paid circulators on a pay-per-signature basis to circulate a municipal petition in the Village of Denton, Nebraska, and in several other municipalities. The Defendants are:

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<sup>5</sup> The First Amendment was deemed "incorporated" into the Fourteenth Amendment and applicable to the states, for the first time, in *Gitlow v New York*, 268 U S 652 (1925).

<sup>6</sup> 28 *USC* § 1391(b).

<sup>7</sup> *F R Civ P* 18(a) & 20(a)

7.1 John Gale is the elected and qualified Nebraska Secretary of State. Mr. Gale verified certain matters associated with the Village of Denton petition and, by doing so, acted, or purported to act, under color of state law.

7.2 Charlotte TeBrink is the duly appointed and acting Clerk of the Village of Denton, a political subdivision of Nebraska. She received Mr. Bernbeck's petition and signatures on the petition, but refused to place the initiative petition ballot and caused Bernbeck's actions to be challenged District Court, Lancaster County, Nebraska, in Case No. CI 12-2488. She acted, or purported to act, under color of law.

### **Legal Background**

8. The First Amendment to the *Constitution* of the United States secures to the people of the United States the rights of free speech and to petition for the redress of grievances. *US Const* Amend XIV applies *US Const* Amend I to the State of Nebraska, and the Village of Denton, and guarantees equal protection and due process of law.

9. The Nebraska *Constitution* delineates criteria for use of the power of initiative and referendum. A statutory procedure implements this process and imposes on political subdivisions, like the Village of Denton, and on officials like the Defendants, responsibilities under circumstances and in view of facts like those described below, but these duties and responsibilities violate the clearly established constitutional rights of individuals, including Plaintiff. Nebraska's *Constitution* and the challenged Nebraska statutes place severe and unduly restrictive burdens on the Plaintiff as he attempts to participate in the initiative petition process and use his constitutional rights to do so. These burdens do not withstand strict constitutional scrutiny, and Nebraska's challenged constitutional provision and statutes are void.

### **The Challenged Law & The Facts**

10. *Neb Const* Art III § 2 is challenged as unconstitutional to the extent it imposes upon the sponsors and circulators of initiative petitions, and upon the initiative petition process, an unconstitutional and void distribution requirement which requires that circulators of initiative petitions who meet threshold signor requirements of seven

percent (7%) and ten percent (10%), respectively, depending on the nature of the issue sought to be placed on the ballot, must include, in their petitions, the signatures of registered voters “so distributed as to include five percent (5%) of the registered voters of each of two-fifths of the counties of the state” before their petition shall be filed with the Nebraska Secretary of State who must then “submit the measure thus proposed to the electors....” Relevant portions of *Neb Const Art III § 2* appear, *infra*.

11. *Neb Const Art III § 2* is implemented, in part, by *Neb Const Art III § 4* defining how the total number of signatures required for an initiative or referendum petition to be sufficient to be placed before the people for a vote, is to be determined. Art III § 4 requires that “the whole number of votes cast for governor at the general election next preceding the filing of an initiative or a referendum petition shall be the basis on which the number of signatures to such petition shall be computed.”<sup>8</sup>

12. The laws challenged by Bernbeck here severely burden his identified legal rights. Burdens are imposed on Mr. Bernbeck’s back in these ways:

12.1 The human resources costs of exercising his rights are dramatically increased because it is virtually impossible to attract and employ competent petition circulators without ability to offer them incentive compensation for success in their work.

12.2 The human resources costs, financial resources costs, and time resources costs of exercising his rights are dramatically increased because he must ploy his time and the time of others to sparsely populated counties to collect only a few signatures at a substantially greater human resources, time and financial cost.

12.3 The financial resources costs of exercising his rights are dramatically increased because pay per signature compensation is efficient, and produces prompt results while its alternative is many times more costly and requires much more time because it is less efficient.

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<sup>8</sup> *Neb Const Art III § 4*, sentence 1

12.4 The time resources costs of exercising his rights are dramatically increased because of the training time, recruiting time, supervision time, and sifting in sorting time required to eliminate unqualified signatures collected by petition circulators paid by the hour tend to be less diligent at insuring that collected to signatures are affixed by qualified voters, and because the travel, lodging, and related costs of traversing a Nebraska's length and breadth together signatures in counties of modest populations, is many times greater than spending petition circulating effort, time and resources in the state's more intensely populated regions.

12.5 Scientific survey and review of available data from the 50 states in the US discloses that pay per signature bans reduce the number of initiative and referendum petition efforts made. The data also establishes that the numbers of such efforts that succeed at achieving the ballot, in those states where such bans, or similar restrictions like the geographic distribution requirement described below, are observed by state law.

13. Mr. Bernbeck (1) has suffered and continues to suffer irreparable injuries to his constitutional rights; (2) remedies available at law are inadequate to compensate for those injuries; (3) considering the balance of the hardships to Bernbeck when compared with the compelling state interests of the defendant under a standard of strict scrutiny, injunctive relief is warranted, and (4) the public interest will be served, and not disserved, by a permanent injunction.<sup>9</sup> Permanent injunctive relief, and attorneys' fees are appropriate under 42 USC § 1983 *et seq.*

### **Legal & Factual Background Allegations**

14. *Neb Const* Art III § 2 & § 4 applies to the State and its officials and to municipalities and their officials. *Neb Rev Stat* § 18-2501 provides:

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<sup>9</sup> *eBay, Inc. v MercExchange, LLC*, 547 US 388, 391 (2006) (“ a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief....: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction”).

(1) The powers of initiative and referendum are hereby reserved to the qualified electors of each municipal subdivision in the state. Sections 18- 2501 to 18-2537 shall govern the use of initiative to enact, and the use of referendum to amend or repeal measures affecting the governance of all municipal subdivisions in the state, except those operating under home rule charter and as specified in section 18-2537.

15. The initiative and referendum provisions of the Nebraska *Constitution* and the statutory provisions applying them to municipal elections, are implemented by the *Nebraska Election Act*, *Neb Rev Stat* §§ 32-101 *et seq.* Included within the *Nebraska Election Act* is *Neb Rev Stat* § 32-630, including subparts (3) and (3)(g). This statute, and the portions called out as noted above, provide:

(1) Each person who signs a petition shall, at the time of and in addition to signing, personally affix the date, print his or her last name and first name in full, and affix his or her date of birth and address, including the street and number or a designation of a rural route or voting precinct and the city or village or a post office address. A person signing a petition may use his or her initials in place of his or her first name if such person is registered to vote under such initials. No signer shall use ditto marks as a means of personally affixing the date or address to any petition. A wife shall not use her husband's first name when she signs a petition but shall personally affix her first name and her last name by marriage or her surname. Any signature using ditto marks as a means of personally affixing the date or address of any petition or any signature using a spouse's first name instead of his or her own shall be invalid.

(2) Each circulator of a petition shall personally witness the signatures on the petition and shall sign the circulator's affidavit.

**(3) No person shall:**

(a) Sign any name other than his or her own to any petition;

(b) Knowingly sign his or her name more than once for the same petition effort or measure;

(c) Sign a petition if he or she is not a registered voter and qualified to sign the same except as provided in section 32-1404;

- (d) Falsely swear to any signature upon any such petition;
- (e) Accept money or other thing of value for signing any petition;
- (f) Offer money or other thing of value in exchange for a signature upon any petition; or
- (g) Pay a circulator based on the number of signatures collected.**

16. Kent Bernbeck, a Nebraska citizen, has a vital interest in the right to petition the government of Nebraska, and municipalities within the State of Nebraska, to place before voters by initiative, or referendum, questions of public interest, including efforts to propose new laws, repeal existing laws, or take other actions in the public interest. Bernbeck has participated in previous efforts to protect the rights of initiative and referendum, and citizen involvement. He was a Plaintiff in:

16.1 US Dist Ct, No. 4:10-cv-03001, *Bernbeck et al. v. Gale et al.*.

16.2 Eighth Cir, *Bernbeck et al v Moore*, 126 F3d 1111 (8<sup>th</sup> Cir 1997).

17. Circulation of the initiative petition at issue by or for the Plaintiff constituted core political speech.<sup>10</sup> The requirements of the statutes challenged impose severe burdens on the Plaintiff's First Amendment rights. They prevented Bernbeck from achieving placement of his ballot issue before the electors of Denton. His First Amendment expression was thwarted, his right to exercise the elective franchise was thwarted, he was denied equal protection of the law, and his effort to petition government for an election was declared invalid and thwarted.

18. Prohibition of circulator payment per signature of § 32-630(3) is not justified by sufficiently weighty state interests and is not narrowly tailored to advance compelling state interests as required by law. These requirements impose severe,

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<sup>10</sup> *Buckley v Am. Constitutional Law Found., Inc.*, 525 US 182, 186 (1999) (quoting *Meyer v Grant*, 486 US 414, 422, 425 (1988)). This requires "exacting" and "strict" scrutiny for any limitation on that core political speech. *Meyer*, 486 US at 421; *see also Buckley*, 525 US 182.

unconstitutional<sup>11</sup> burdens on the exercise of Plaintiff' constitutional rights. Such burdensome requirements are

19. The Plaintiff's claims pose actual, justiciable controversies. Unless declaratory relief is granted and injunctions are issued, the Plaintiff will continue to suffer infringement of his Constitutional rights because of the actions of the Defendants. Injunctive relief is essential to prevent enforcement of unconstitutional laws and continuing severe burdens and infringements on the well-established constitutional rights as alleged in paragraph 12. No disruption of any state effort will occur as a result of exercise of federal jurisdiction.<sup>12</sup> Plaintiff has no adequate remedy at law for the Defendants' acts and omissions.

20. The declaratory judgment sought will a) settle significant controversies affecting well-established constitutional rights of the Plaintiff upon which Defendants infringed under color of state law, b) serve useful purposes to clarify permissible relations between the initiative process and the status of those who seek to participate in it and express themselves freely by doing so, and c) create no friction in federal – state relations.<sup>13</sup>

21. In each instance of each law challenged in this Complaint, the burden of the restriction imposed by Nebraska law on the initiative process fails to outweigh any reasonable benefit therefrom, and in each instance the burden imposed is greater than is necessary or reasonable to protect the integrity of the initiative process.<sup>14</sup> As such none of the challenged restrictions withstands strict constitutional scrutiny.<sup>15</sup>

22. Defendants acted, at all relevant times, under the color of state law and in their official capacities as Secretary of State of Nebraska and Village Clerk of the Village

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<sup>11</sup> See, e.g., *Nader v Blackwell*, 545 F3d 459 (6<sup>th</sup> Cir 2008). ; *Krislov v Rednour*, 226 F3d 851, 858-66 (7th Cir 2000); *Nader v Brewer*, 531 F3d 1028 (9th Cir 2008); *Yes on Term Limits v Savage*, 550 F3d 1023 (10th Cir 2008); *Lerman v Bd. of Elections*, 232 F3d 135, 149 (2d Cir 2000);.

<sup>12</sup> *New Orleans Pub. Serv, Inc. v Council of City of New Orleans*, 491US 350, 361 (1989).

<sup>13</sup> *Public Serv Comm'n of Utah v Wycoff*, 344 US 237, 241 (1952); *Bituminous Cas. Corp. v J & L Lumber Co., Inc.*, 373 F3d 807, 813 (6th Cir 2004).

<sup>14</sup> *Timmons v Twin Cities Area New Party*, 520 US 351 (1997).

<sup>15</sup> *Buckley v Am. Const. Law Found., Inc.*, 525 US 182, 194, (1999); *Nader v Brewer*, 531 F3d 1028, 1036 (9th Cir 2008); *Chandler v City of Arvada*, 292 F3d 1236, 1242 (10th Cir 2002); *Lerman v Bd. of Elections*, 232 F3d 135, 149 (2d Cir 2000); *Krislov v Rednour*, 226 F3d 851, 860 (7th Cir 2000).

of Denton. Their conduct infringes on well-established constitutional rights of the Plaintiff and is actionable under 42 USC §1983.<sup>16</sup> These rights include freedom of speech,<sup>17</sup> to vote,<sup>18</sup> to participate, both effectively and in accord with well-established one person / one vote criteria<sup>19</sup> that are violated by the petition signature distribution requirement of Nebraska law, in the election and initiative process,<sup>20</sup> and to petition government.<sup>21</sup>

23. Plaintiff seeks attorneys' fees and costs as permitted by law, in addition to declaratory and injunctive relief.

### **Terms; Laws**

24. Certain terms used in this Complaint are defined by Nebraska law. Those terms are defined below. In addition, the Constitution and statutes of Nebraska relevant to this litigation include these provisions of law:

#### **Neb Const Art III Sec. 2. First power reserved; initiative**

The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed.....

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<sup>16</sup> *White v McKinley*, 519 F3d 806, 814 (8th Cir 2008)

<sup>17</sup> U S Const Amend I; *Norman v Schuetzle*, 585 F3d 1097 (8th Cir 2009)

<sup>18</sup> It is a well established principle of constitutional law that the right to vote is fundamental, as it is preservative of all other rights. *See, e.g., Yick Wo v Hopkins*, 118 US 356, 370, 6 S Ct 1064, 30 L Ed 220 (1886). *Weber v Shelly*, 347 F3d 1101 (9th Cir 2003)

<sup>19</sup> *Wesberry v Sanders*, 376 US 1 (1963); One Person / One Vote was expressly applied to citizen initiated petitions to nominate candidates for office in *Moore v Ogilvie*, 394 US 814 (1969) (“The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system.”). *See, Marijuana Policy Project v Miller*, 578 F Supp2d 1290, 1304-5 (D Nev 2008) for a survey of cases.

<sup>20</sup> *Pickering v Board of Education*, 391 US 563, 571-73 (1968)(retaliation case)

<sup>21</sup> *Sprouse v Babcock*, 870 F2d 450, 452 (8th Cir 1989).

**18-2524. Initiative petition; failure of municipal governing body to pass; effect; regular or special election.**

Whenever an initiative petition bearing signatures equal in number to at least fifteen percent of the qualified electors of a municipal subdivision has been filed with the city clerk and verified pursuant to section 18-2518, it shall be the duty of the municipal subdivision's governing body to consider passage of the measure contained in the petition, including an override of any veto, if necessary.

**18-2503. Circulator, defined.**

Circulator shall mean any person who solicits signatures for an initiative or referendum petition.

**18-2504. City clerk, defined.**

City clerk shall mean the city or village clerk or the municipal official in charge of elections.

**18-2506. Measure, defined.**

Measure shall mean an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass, and which is not excluded from the operation of referendum by the exceptions in section 18-2528.

**18- 2508 Petition.**

Petition shall mean a document authorized for circulation pursuant to section 18-2512, or any copy of such document.

**18-2510. Qualified electors, defined.**

Qualified electors shall mean all persons registered to vote, at the time the prospective petition is filed, in the jurisdiction governed or to be governed by any measure sought to be enacted by initiative, or altered or repealed by referendum.

**32-110. Elector, defined.**

Elector shall mean a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age

and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year.

**32-1404. Initiative and referendum petitions; signers and circulators; requirements.**

A signer of an initiative and referendum petition shall be a registered voter of the State of Nebraska on or before the date on which the petition is required to be filed with the Secretary of State and shall meet the requirements of section 32-630. A person who circulates initiative and referendum petitions shall comply with the requirements of section 32-629 and subsection (2) of section 32-630 and with the prohibitions contained in subdivisions (3)(a), (d), (f), and (g) of section 32-630.

**32-629. Petitions; signers; qualifications; exception; circulators; qualifications.**

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(2) Only an elector of the State of Nebraska shall qualify as a valid circulator of a petition and may circulate petitions under the Election Act.

**32-630. Petitions; signers and circulators; duties; prohibited acts.** (Only primarily pertinent provisions quoted here):

- (3) No person shall:
- (a) Sign any name other than his or her own to any petition;
  - (b) Knowingly sign his or her name more than once for the same petition effort or measure;
  - (c) Sign a petition if he or she is not a registered voter.... Falsely swear to any signature upon any such petition;
  - (e) Accept money or other thing of value for signing any petition;
  - (f) Offer money or other thing of value in exchange for a signature upon any petition; or
  - (g) **Pay a circulator based on the number of signatures collected.**

**First Claim – Pay Per Signature Requirement Void**

25. All allegations above are renewed here.<sup>22</sup>

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<sup>22</sup> On July 27, 2011, the United States District Court for the District of Colorado declared Colorado's pay-per-signature law unconstitutional and void. *The Independence Institute v. Buescher*, 718 FSupp2d 1257 (D Colo 2011).

26. During 2012, Kent Bernbeck caused to be prepared, and presented to a number of municipalities in Nebraska, including the Village of Denton, his initiative petition circulating “an ordinance to require associations receiving municipal funds to disclose and publish in a local newspaper of record, all activity taken to influence the Nebraska Legislature, including support and/or opposition to municipal and statewide ballot measures.” This petition was presented to Defendant, Charlotte TeBrink, Village Clerk of the Village of Denton within relevant time limits and in the required manner to fully comply with procedural requirements. Defendant, Charlotte TeBrink, requested the assistance of Defendant Gale to evaluate the initiative and referendum petitions and ascertain whether they were lawful. The language of the proposed petitions was approved.

27. The petitions were then circulated. Signatures were gathered and were appropriate. On May 7, 2012, the completed petitions were submitted to Defendant TeBrink with an express notation:

**“THIS PETITION IS CIRCULATED BY A PAID CIRCULATOR.”**

Defendant contracted with the Lancaster County Election Commissioner on June 12, 2012, to verify the signatures. Defendant received notice from the Commissioner of sufficient signatures on July 2, 2012.

28. Defendant TeBrink, after consulting with Defendant Gale, refused to allow the petitions to be placed on the ballot. The Village then sued Mr. Bernbeck seeking a declaratory judgment declaring that the petitions were not to be placed on the ballot. This suit was filed in District Court, Lancaster County, Nebraska, as Case No. CI 12-2488, styled *Village of Denton v. Bernbeck*.

29. On September 6, 2012, the matter was decided by the District Court. The District Court awarded judgment to the Plaintiff, Village of Denton, and, “The court declares judgment for the Plaintiff and against the Defendant as follows: The Plaintiff is not required to place the resolution known as the Village Initiative Petition on the ballot at any election.” The Village was awarded costs as allowed by law.

30. In the course of reaching its judgment, the District Court cited, and relied upon, *Neb Rev Stat* § 32-630(3)(g), quoted above, and noted that *Neb Rev Stat* § 18-2517 invokes this legal requirement for municipal initiatives. The Court noted that the constitutionality of this statute was confirmed in *Bernbeck v. Gale*, No. 4:10-cv-3001, 2011 WL 3841602 at \*6 (D Neb). The Court concluded that, “any signatures gathered” by a “paid circulator” contracted by Mr. Bernbeck to circulate petitions in the Village of Denton “were invalid.” The Court found that a paid circulator collected three (3) signatures on the Village initiative petition, all of which were verified and accepted. “These three signatures are rejected by the Court as invalid and, as a result, the Village initiative petition has only thirteen (13) valid signatures. This does not meet the required (and stipulated) threshold of sixteen (16) signatures.” The District Court’s adverse judgment was not appealed.

31. In 4:10-cv-3001, 2011 WL 3841602, the Plaintiff in this case was Plaintiff. While he prevailed on other aspects of his action, this Court held that the Plaintiff did not, in the previous litigation, demonstrate a severe burden on his rights to participate in the initiative and referendum petition process by virtue of the prohibition against the use of paid petitioners. However, Plaintiff knows, and is prepared to prove, that refusal to permit paid petitioners is a significant burden on the right of a party to engage in the initiative and referendum process. This is true because:

31.1 A scientific study, undertaken to ascertain whether a ban on payment of initiative or referendum circulators on a per signature collected basis is invalid, discloses that the average number of ballot measures per biennium decreased by one-third in states that adopted the ban. In addition, the number of instances in which the right was used increased in states where the ban was declared unconstitutional and void during the study period consisting of the time from 1987 through 2010.

31.2 In Plaintiff’s case, Plaintiff’s own experience is that the per signature cost of procuring signatures on initiative and referendum petitions is at least

25% greater when the circulator is paid on an hourly basis than when the circulator is paid on a per signature basis.

31.3 In the Village of Denton, Plaintiff circulated initiative petitions but lacked sufficient time to gather and accumulate enough signatures to qualify the issue, which was of substantial importance to him, for the placement on the ballot. Given the number of signatures involved, payment per signature was the reasonable, prudent method to be used, and it was used, in connection with the effort.

32. *Neb Rev Stat* § 32-630(3) on its face regulates the initiative process. In regulating this process, it is necessary to determine whether the state has gone too far by instituting procedures which effectively limit the speech and petition rights of the Plaintiff. It is essential to consider how severe a burden has been placed by the statute on the underlying speech.<sup>23</sup> When strictly scrutinized, these things are clear:

32.1 The State and the Defendants have no legitimate interest in thwarting the initiative and referendum process.

32.2 There is no threat that paid petition circulators will commit fraud, and there is no evidence of such a risk.

32.3 There is no threat that paid petition circulators will commit forgeries or other offenses forbidden by law, or constituting criminal conduct.

32.4 Use of paid petition circulators increases the likelihood that an initiative or referendum issue can reach the ballot by reducing costs involved in ballot circulation for the initiative or referendum sponsor. In the case of Denton, this difference was sufficiently great that it was definitive of the success or failure of the initiative process.

33. Mr. Bernbeck attempted multiple municipal initiatives simultaneously across the state. This required that he traverse Nebraska from its panhandle to its southeast corner, and from near its South Dakota border to near its Kansas border. He sought to do so for the purpose of placing on the initiative ballot in multiple

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<sup>23</sup> *Timmons v. Twin Cities Area New Party*, 520 US 351 (1997)

municipalities at a single election time, an issue of substantial moment, involving the disclosure to the public of information important to public awareness of the investment of funds for the purpose of influencing public opinion. A material part of this process involved placement of the issue on the ballot before multiple municipalities concurrently. Without paid petition circulators, Bernbeck lacked the time to manage the process through use of undisciplined hourly-paid petition circulators whose commitment to the process was not sufficient to achieve efficiencies in the signature collection process that made it economically feasible to accomplish Bernbeck's constitutionally-protected speech and petition objectives.

34. Bernbeck's experience at suffering a severe burden on his constitutional rights of free speech and use of the petition process are consistent with experiences across the United States. Since 1987, twelve (12) states have adopted prohibitions against the payment of petition circulators per signature collected, but five (5) of the state laws never went into effect, and one (1), in Colorado, was in effect for one (1) year. When these states were compared for the number of statewide initiative or referendum issues presented to their populations per biennium before and after the ban, the result discloses that, in each biennium, prior to the ban, an average of 4.1 initiatives were presented per state, but after the ban, this figure dropped to 2.74, a decline of 33%.<sup>24</sup>

35. The pay per signature requirement violates the provisions of *US Const Amend I*, and the equal protection and due process clauses of *US Const Amend XIV*, and the provisions of *Neb Const Art V § 1*, & *Art V § 19* and *Art III § 2*, guaranteeing the right to speech, petition the government, and enjoy the right of initiative.<sup>25</sup>

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<sup>24</sup> See also ¶ 12, above.

<sup>25</sup> *Meyer v Grant*, 486 US 414 (1988); *Reynolds v Sims*, 377 U S 533(1964); (*Citizens for Tax Reform v Deters*, 518 F3d 375 (6th Cir 2008).

## Second Claim – Unlawful Distribution Requirement

36. All allegations above are renewed here.<sup>26</sup>

37. Mr. Bernbeck has a vibrant and active interest in the initiative and referendum process statewide. He has participated in statewide initiative efforts, and endeavored to undertake and advance such efforts. Bernbeck is a single voter. He lives in a single Nebraska County, Douglas County. The US Census Bureau’s studies indicate that Nebraska’s 2012 estimated population is 1,855,525 persons.<sup>27</sup> The Census Bureau’s estimate of the population for Douglas County, Nebraska, as of 2012 is 531,265 persons. Douglas County is home to approximately 28.53% of the population of Nebraska.

38. Douglas County is adjacent to the County of Sarpy. Its 2012 estimated population is 165,853 persons, or 8.93% of the state population.<sup>28</sup> Douglas County is also contiguous with Dodge County, Nebraska. Its population for 2012 is estimated at 36,427 or 1.963% of the population of the state.<sup>29</sup> Washington County is also contiguous with Douglas County. Its population is 20,252 or 1.1% of the state’s population.<sup>30</sup> Saunders County is also contiguous with Douglas County. Its 2012 population estimate is 20,823, or 1.1% of the state’s population.<sup>31</sup> Nebraska has 93 counties; 41.56% of its population lives in 5 counties – Douglas, Sarpy, Saunders, Dodge, and Washington.

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<sup>26</sup> See, for examples of decisions declaring unconstitutional and void voter distribution requirements for initiative and referendum petitions: *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003) (ballot-initiative requirement that sponsors obtain signatures of six percent of voters in each of at least half the state's counties excessive, where 60% of the population resides in nine of its 44 counties, and violated equal protection); *American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010 (9th Cir. 2006) (“Thirteen Counties Rule”—requiring that, to place initiative on ballot, initiative petition must be signed by 10% or more of the number of voters who voted at the last preceding general election in at least 13 counties in the state—dilutes votes of residents of densely populated counties in violation of equal protection clause); *Libertarian Party of Nebraska v. Beermann*, 598 F. Supp. 57 (D. Neb. 1984) (requirement of 1% of state gubernatorial election voters distributed in at least one-fifth of counties violates one person, one vote). See also, *Gallivan v. Walker*, 2002 UT 89, 54 P.3d 1069 (Utah 2002) (invalidating multi-county signature requirement for placing initiative on ballot as favored voters in less populous rural counties, requiring signatures in 20 of state's 29 counties equal to 10% of votes cast in the county for governor, violating equal protection).

<sup>27</sup> [quickfacts.census.gov/qfd/states/31/31055.html](http://quickfacts.census.gov/qfd/states/31/31055.html)

<sup>28</sup> [quickfacts.census.gov/qfd/states/31/31153.html](http://quickfacts.census.gov/qfd/states/31/31153.html)

<sup>29</sup> [quickfacts.census.gov/qfd/states/31/31053.html](http://quickfacts.census.gov/qfd/states/31/31053.html)

<sup>30</sup> [quickfacts.census.gov/qfd/states/31/31155.html](http://quickfacts.census.gov/qfd/states/31/31155.html)

<sup>31</sup> [quickfacts.census.gov/qfd/states/31/31155.html](http://quickfacts.census.gov/qfd/states/31/31155.html)

39. Sixty-four (64) Nebraska counties have populations under 10,000 persons each.<sup>32</sup> Twelve (12) Nebraska counties have populations of fewer than 1,000 persons each.<sup>33</sup> This means 64 Nebraska Counties combined have less population than the two counties of Douglas and Sarpy. The geographic distribution requirement dilutes the signatures and effectively the votes as petitioners of residents of the state's populace counties. This unconstitutionally infringes<sup>34</sup> on Mr. Bernbeck's rights as a resident of the state's largest county, Douglas.

40. Nebraska has 93 counties. The distance across Nebraska, measured by the traveling distance on Interstate 80, is 454.15 miles from the easternmost exit onto Interstate 80 in Douglas County, where Plaintiff resides, to the westernmost exit, Exit 1, located .48 miles east of the Nebraska-Wyoming border at Pine Bluffs. Measured by travel on US Highway 81 from Chester, Nebraska, on the Kansas border, to South Yankton, on the South Dakota border, the state is 217.5 miles. The driving distance from border to border north to south is estimated at 3 hours 50 minutes, and at Interstate speeds the distance from the Pine Bluff, Wyoming exit to the western edge of Council Bluffs, Iowa is estimated at 6 hours 30 minutes.<sup>35</sup>

41. The forty percent (40%), or two/fifths, requirement in *Neb Const* Art II § 2 requires that an initiative or referendum petition circulator successfully circulate petitions and attach more than five percent (5%) of the registered voters' signatures in at least thirty-eight (38) of ninety-three (93) Nebraska counties and that the circulation process also result in the requisite number of signatures.

42. *Neb Const* Art III § 2's distribution requirement is unconstitutional and invalid. It is a severe burden on Plaintiff's rights to engage in free political speech and to exercise his petition rights because:

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<sup>32</sup> <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

<sup>33</sup> <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. These least population counties are Arthur, Banner, Blaine, Grant, Hayes, Hooker, Keya Paha, Logan, Loup, McPherson, Thomas & Wheeler.

<sup>34</sup> See fn 24, above.

<sup>35</sup> Goggle web search with distances for Goggle derived from Goggle Earth.

- 42.1 It violates the principal of one man one vote established as an essential component of the right to vote because it prevents an initiative petition issue from reaching the voters of Nebraska, notwithstanding the fact that Plaintiff might successfully gather signatures in support of an initiative or referendum issue from as many as fifty percent (50%) of all the voters in the contiguous counties of Douglas, Sarpy, Saunders, Dodge, and Washington, where more than forty percent (40%) of the population of Nebraska resides, thus surpassing, by 200% to 300% the minimum numerical requirements of *Neb Const* Art III § 2 for a valid initiative or referendum petition. This restriction dilutes, cheapens and debilitates a plaintiff's individual voice and vote as a petition circulator<sup>36</sup>.
- 42.2 It deprives him of an equal voice, and it makes his vote less meaningful than the vote of any other Nebraska voter in any other Nebraska county.
- 42.3 The geographic distribution requirement has no rational basis and advances no legitimate public interest of the state, and, more importantly, the requirement does not withstand strict scrutiny but imposes severe burdens on Plaintiff's rights to vote, speak, and petition.<sup>37</sup> These rights are fundamental. "The right to vote is a "precious" and "fundamental" right."<sup>38</sup>
- 42.4 The geographic distribution requirement serves no purpose related to prevention of fraud or misconduct in the election process, and it does not do so when strictly scrutinized.<sup>39</sup>
- 42.5 The geographic distribution requirement serves no purpose as designed to prevent frivolous and unsupported measures on the ballot.<sup>40</sup>

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<sup>36</sup> See fn 25, above.

<sup>37</sup> See *Northeast Ohio Coalition for Homeless v Husted*, 696 F3d 580, 592 (6<sup>th</sup> Cir 2012)( While a rational basis standard applies to state regulations that do not burden the fundamental right to vote, strict scrutiny applies when a state's restriction imposes "severe" burdens.)

<sup>38</sup> *Obama for America v Husted*, 697 F3d 423, 428 (6<sup>th</sup> Cir 2012).

<sup>39</sup> A state's interest in ensuring the integrity of the election process and preventing fraud is compelling. See *Purcell v. Gonzalez*, 549 US 1, 4, (2006). The state has the burden of proving a voting regulation is narrowly tailored to further the state's interest. *Burson v Freeman*, 504 US 191, 199 (1992)(" To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest" ).*Nader v. Brewer*, 531 F3d 1028, 1037 (9th Cir 2008).

### Requests for Relief

43. On the foregoing basis, Plaintiff requests that this Court:
- 43.1 Declare that the provisions of the following Nebraska laws are unconstitutional and void, and permanently enjoin their enforcement:
- Neb Rev Stat* § 32-630(3)(g), unconstitutionally banning payment to circulators of petitions per signature; and
- Neb Const.* Art III Sec 2, to the extent of its petition signature distribution requirement described above.
- 43.2 Award a judgment including permanent injunctive relief against enforcement of the Nebraska laws the Court declares unconstitutional as authorized by 42 USC § 1983; and
- 43.3 Award judgment to Plaintiff for reasonable attorneys' fees as authorized by 42 USC § 1983 *et seq* and for all taxable costs.

July 30, 2013.

Kent Bernbeck, Plaintiff,

By: /s/ David A. Domina

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<sup>40</sup> *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1070 (9th Cir.2003).