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OPINION NO. 2021-04

OFFICE OF THE GOVERNOR; POPULAR INITIATIVE - PETITION WITHDRAWAL; WAIVER OF PERFORMANCE OF MINISTERIAL DUTIES: Article 19, Section 2 of the Nevada Constitution imposes upon the Secretary of State ministerial duties that are owed to the proponents of an initiative petition, including the duty to place an initiative proposal on the ballot after the Nevada Legislature declines to adopt it. Because those duties run to the proponents of the petition, the proponents may waive performance of those duties. Consequently, the proponents may withdraw their petition pursuant to NRS 295.026.

Kevin Benson, General Counsel
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Dear General Counsel Benson:

By letter dated July 20, 2021, you requested an opinion concerning a perceived conflict between NRS 295.026 (as amended in 2021) and Article 19, Section 2 of the Nevada Constitution.¹

¹ NRS 295.026 was amended by Section 84.5 of Assembly Bill No. 321 of the 81st Session of the Nevada Legislature (2021). Assembly Bill No. 321 (AB 321) amended NRS 295.026 to include a deadline by which the proponents of an

You have asked the following question:

“[D]oes Article 19, Section 2 of the Nevada Constitution prevent the proponents of an initiative petition from withdrawing the petition pursuant to NRS 295.026?”

This letter provides a formal opinion in response to your question, made pursuant to NRS 228.150.

NRS 295.026 was enacted in 2017 with the support of the Secretary of State. *See* Act of June 9, 2017, ch. 505, § 30, 2017 Nev. Stat. 3369; *Hearing on A.B. 45 Before the Assembly Committee on Legislative Operations and Elections*, 2017 Leg., 79th Sess. 8-16 (testimony of Secretary of State Barbara K. Cegavske). As originally enacted, NRS 295.026 afforded the proponents of a petition for initiative or referendum an unqualified right to withdraw their petition.² That version stated:

1. A petition for initiative or referendum may be withdrawn if a person authorized pursuant to NRS 295.015 to withdraw the petition submits a notice of withdrawal to the Secretary of State on a form prescribed by the Secretary of State.
2. Once a petition for initiative or referendum is withdrawn pursuant to subsection 1, no further action may be taken on that petition.

initiative petition must submit their request to withdraw their petition. Previously, NRS 295.026 contained no such deadline.

² There are different statutory and constitutional deadlines for filing a petition with the Secretary of State depending on whether the petition proposes (1) a statutory amendment, (2) a constitutional amendment, or (3) the ratification or repeal of an existing statute. The third type of petition is referred to as a “petition for referendum.” *See* Nev. Const. Art. 19, § 1. Although the filing deadlines vary, NRS 295.026 establishes a uniform deadline for withdrawing any petition for initiative or referendum regardless of type.

Act of June 9, 2017, ch. 505, § 30, 2017 Nev. Stat. 3369. The 2021 amendment to NRS 295.026 restricts the proponents' ability to withdraw an initiative petition within 90 days of an election.³

QUESTION

Does Article 19, Section 2 of the Nevada Constitution prevent the proponents of an initiative petition from withdrawing the petition pursuant to NRS 295.026?

SHORT ANSWER

Article 19, Section 2 of the Nevada Constitution does not prevent the proponents of an initiative petition from withdrawing the petition. NRS 295.026 can and should be read harmoniously with the requirements of the Constitution.

NRS 295.026 imposes upon the Secretary of State an enforceable ministerial duty to honor a timely notice of withdrawal that the Secretary has no discretion to disregard. The Nevada Constitution contains no express language affecting this duty, and the Secretary's constitutional duty to submit an existing petition to the voters at the first general election after the Legislature declines to adopt the petition does not conflict with the Secretary's duty to honor a withdrawal under NRS 295.026.

The 2021 amendment to NRS 295.026 does not change this analysis. As amended by Section 84.5 of AB 321, NRS 295.026 allows the proponents of an initiative petition to withdraw their petition "not later than 90 days before the election at which the question of approval or disapproval of the initiative will appear on the ballot." Prior to the 2021 amendment, NRS 295.026 contained no deadline for withdrawing an initiative petition. NRS 295.026 was constitutional when it was enacted in 2017, and it remains constitutional in 2021.

³ As used herein, "proponent" means a person described in NRS 295.015(1).

BACKGROUND

Article 19, Section 2 of the Nevada Constitution governs Nevada's popular initiative. Nev. Const. Art. 19, § 2. This provision allows Nevada's voters to propose and enact law by gathering signatures in support of a proposed statute, statutory amendment, or constitutional amendment.⁴ The process must be initiated by one or more persons who formalize a legislative proposal and circulate it by way of a petition that includes the text of the proposal and a description of its effect. *See* NRS 295.009-.015. Such persons are commonly referred to as the "proponents" of the petition.

To qualify their petition for the ballot, the proponents must gather signatures from 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." Nev. Const. Art. 19, § 2(2). If successful, the proponents must submit the signatures gathered in each county to the clerk of that county for counting and verification. NRS 295.296. When each of the county clerks has tallied and verified the signatures, the clerk must transmit the certified results to the Secretary of State, who reviews them for accuracy. *See* NRS 293.1276-.1279; NAC 293.1825.

Once the Secretary of State determines that the proponents of an initiative petition have gathered enough signatures statewide to qualify their proposal for inclusion on the ballot, the Secretary of State must transmit the petition to the Nevada Legislature. *See* Nev. Const. Art. 19, § 2(3). This affords the members of the Nevada Legislature an opportunity to adopt the proposed

⁴ The process for proposing new statutes and statutory amendments is described in Article 19, Section 2(3), and the process for proposing amendments to the Nevada Constitution is described in Article 19, Section 2(4). *See* Nev. Const. Art. 19, §§ 2(3) and 2(4). The processes are substantially the same. As relevant to this opinion, the processes differ only insofar as proposed constitutional amendments must be approved by the voters at two successive elections as opposed to one election. For purposes of convenience and ease of reference, this opinion cites only to Nev. Const. Art. 19, § 2(3).

statute, statutory amendment, or constitutional amendment as drafted by the proponents of the petition. Article 19, Section 2(3) states that if the Legislature declines to adopt the proposal as written, the Secretary of State shall submit it to a vote of the voters at the next succeeding general election.

Some have argued that the Nevada Constitution forecloses the proponents' ability to withdraw their initiative petition after the Secretary incurs a duty to act on the petition in some manner required by Article 19, Section 2(3). According to this argument, the possible procedural bars to withdrawal include the filing of the petition with the Secretary of State, the Secretary's final certification of the signatures as to authenticity and number, the Secretary's transmission of the petition to the Nevada Legislature, and/or the Nevada Legislature's failure to adopt the legislative proposal set forth in the petition. As discussed below, none of these duties forecloses the proponents' ability to withdraw their petition pursuant to NRS 295.026.

ANALYSIS

Article 19, Section 2 of the Nevada Constitution contains several general directives governing the initiative process. It states that the petition, once circulated by its proponents, "shall be filed with the Secretary of State not less than 30 days prior to any regular session of the Legislature." *Id.* Section 2 then provides a directive stating that the Secretary of State "shall transmit such petition to the Legislature as soon as the Legislature convenes and organizes." *Id.* And, finally, it states that once the Nevada Legislature has reviewed and rejected a proposed statute, statutory amendment, or constitutional amendment proffered by way of the initiative process, "the Secretary of State shall submit. . . [the proposal] to a vote of the voters at the next succeeding general election." *Id.*

None of these general directives expressly forecloses the proponents' ability to withdraw their initiative petition. The Constitution contains no language limiting or foreclosing withdrawal of a petition at any point in the process. There is thus no direct conflict between the plain language of Article 19, Section 2 and that of NRS 295.026. The provisions can, and should, be read and interpreted in harmony.

Legislative intent dictates our conclusion.

Our interpretation of the statute and Constitutional provision at issue here begins with an examination of legislative intent, as revealed in their plain language. Legislative intent is the most important driver of statutory interpretation. A statute or constitutional provision must ultimately be construed according to its purpose. *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972).

In particular, legislative intent—and not word use—controls statutory interpretation. Thus, while Article 19, Section 2 uses the word “shall” to describe the Secretary of State’s duties, “shall” is not presumed to be mandatory if such an interpretation would undermine Legislative intent. *State v. American Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (“In construing statutes [or constitutional provisions], ‘shall’ is presumptively mandatory and ‘may’ is construed as permissive *unless legislative intent demands another construction.*”) (citations omitted) (emphasis added). “The word ‘shall’ in a statute may be construed as ‘may’ where the connection in which it is used or the relation into which it is put with other parts of the same statute indicates that the legislature intended that it should receive such a construction.” *Ballou v. Kemp*, 92 F.2d 556, 559 (D.C. Cir. 1937). *See also U.S. v. St. Regis Paper Co.*, 355 F.2d 688, 695 (2d. Cir. 1966) (holding that court should examine the nature and objectives of a provision when determining whether it is mandatory or directory); *Nunn v. State of California*, 35 Cal.3d 616, 625, 200 Cal.Rptr. 440, 445, 677 P.2d 846, 851 (1984) (“We cautioned. . . that it should not be assumed that every statute that uses the word ‘shall’ is necessarily obligatory).

The plain language of Article 19, Section 2 indicates that initiative petitions are to be subject to an orderly and timely process of submission and acceptance. This provision does not concern itself with the potential withdrawal of a petition from that process. The plain language of NRS 295.026 provides a straightforward mechanism for the proponents of an initiative petition to withdraw it—thus removing it from the procedural processes of Article 19, Section 2. Statutes and constitutional provisions that relate to the same subject matter should be interpreted harmoniously. *Washington v. State*,

117 Nev. 735, 738, 30 P.3d 1134, 1136 (2001) (“Statutes within a scheme. . . must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results.”). Here, Article 19, Section 2 and NRS 295.026 can be read harmoniously to provide a seamless process both for submitting and withdrawing initiative petitions.

In promulgating NRS 295.026, the Legislature is presumed to have acted constitutionally. *List v. Whistler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983) (“All acts passed by the Legislature are presumed to be valid until the contrary is clearly established.”). Even if there is doubt as to a statute’s constitutionality, that doubt should be resolved in favor of upholding the statute. *Caton v. Frank*, 56 Nev. 56, 44 P.2d 521, 523 (1935). This is particularly true where the provisions purported to be in conflict effectuate related policy objectives. See *Benegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 231, 19 P.3d 245, 251 (2001); *Welfare Div. of State Dep’t of Health, Welfare and Rehabilitation v. Washoe Cnty. Welfare Dep’t*, 88 Nev. 635, 638, 503 P.2d 457, 459 (1972). Here, there is no basis to question the presumption of constitutionality. Regarding the initiative process in particular, the Nevada Supreme Court has stated:

Although the Nevada Constitution provides that the power to propose amendments to the Constitution by initiative petition is reserved to “the people,” it also provides that the Legislature may enact laws that provide procedures to facilitate the initiative and referendum process. Additionally, the legislative power includes the broad power to frame and enact laws, unless there is a specific constitutional limitation to the contrary.

Nevadans for Nevada v. Beers, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006).

NRS 295.026 reflects a determination by the Nevada Legislature that the proponents of an initiative petition have a superseding procedural right, within specified limits, to control the ultimate disposition of their initiative petition. As indicated by *Nevadans for Nevada*, the Nevada Legislature

lawfully exercised its power to facilitate the initiative process. *Id.* As a presumptively constitutional exercise of the power to facilitate the operation of the initiative process, NRS 295.026 requires that the Secretary of State honor a notice of withdrawal timely submitted by the proponents of an initiative petition.

The Secretary of State’s Constitutional duties under Article 19, Section 2 are directory, not mandatory.

Whether the Secretary of State’s ministerial duties are mandatory or directory in the context of initiative petitions is a legal question of first impression in Nevada. *See Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) (“Deciding whether a rule is intended to impose a mandatory or directory obligation is a question of statutory interpretation.”)

In general, however, where language is directed to a public officer carrying out public duties, and no sanction is provided for failure to comply, the prescribed duties are considered directory. *See Corbett v. Bradley*, 7 Nev. 106, 1871 WL 3382 (1871) (“If it be clear that no penalty was intended to be imposed for a non-compliance, then, as a matter of course, it is but carrying out the will of the legislature to declare the statute in that respect to be simply directory”). Here, Article 19, Section 2 guides the Secretary of State’s actions under the circumstances specified in its language, but it does not mandate that action or provide consequences for inaction. Because the nature and object of Article 19, Section 2 is directory, “shall” should be interpreted as a directive rather than a mandate.⁵ *See State v. Wichman*, 52 Nev. 17, ___, 279 P. 937, 938 (1929) (“[W]hether a word is to be construed as mandatory or directory depends upon the intention to be gathered from the statute, if such intention can be ascertained.”)

⁵ Language providing time limits and guidelines for accomplishing ministerial tasks are also generally considered directory. *See Village League to Save Incline Assets, Inc. v. State ex rel. Bd. Of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1260 (2008) (“Generally, . . . statutory deadlines that provide tax officials with guidelines for the performance of their duties are directory”).

Determining whether a duty is mandatory or directory under a specific set of circumstances requires asking whether the statute or constitutional provision creates a privately enforceable right. If a statute or constitutional provision creates a privately enforceable right, that right can be waived. *See Broadhead v. Sheriff, Clark County*, 87 Nev. 219, 223, 484 P.2d 1092, 1094 (1972) (holding that right to a speedy trial may be waived). Thus, while seemingly mandatory language appears in many state and federal statutes, these texts do not all create enforceable individual rights and are not all actually mandatory in context. *See Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 757-61 (2005).

Here, Article 19, Section 2 of the Nevada Constitution imposes upon the Secretary of State a duty to perform specified ministerial tasks associated with the initiative process. Even though the provision uses language that appears to be mandatory, (e.g. “shall”), if the Secretary’s duty is owed to the proponents of the initiative petition, they may waive performance of the duty by, for example, withdrawal of their petition pursuant to NRS 295.026. The language of Article 19, Section 2, all available Nevada law, and the circumstances surrounding the initiative petition process support a finding that the Secretary’s duty is owed to the proponents of the petition. As such, the Secretary’s constitutional duties are directory, not mandatory. The proponents of a petition may therefore withdraw it, notwithstanding the Secretary of State’s ostensible duties to file the petition, verify the signatures on the petition, transmit the petition to the Nevada Legislature, and/or include it on the ballot.⁶

⁶ Like the Nevada Constitution, the Colorado Constitution states that “[t]he secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls.” Colo. Const. art. V, § 1(7). Although the Colorado Constitution contains no provision authorizing the proponents to withdraw their initiative petition, the Colorado Legislature has enacted such a provision. This statutory provision authorizes the proponents to withdraw their petition not later than 60 days before the election. § 1-40-134, C.R.S. (2009). The statute reflects a determination by the Colorado Legislature that the word “shall” is directory, not mandatory, as it pertains to the secretary of state’s constitutional duty to place initiative proposals on the ballot. The Nevada Legislature has made a similar determination.

In *We People Nevada ex rel. Angle v. Miller*, the Nevada Supreme Court indirectly spoke to this question—determining that the proponents of an initiative petition had a privately enforceable right to submit their signatures for verification after the statutory deadline for submitting them had passed. 124 Nev. 874, 891, 192 P.3d 1166, 1177 (2008) (noting that “a statutory provision will not be enforced when to do so would infringe upon rights guaranteed by our state constitution”). Such a statutory or constitutional right may generally be waived if the waiver is knowing and voluntary. See *Lowe Enter. Residential Partners, L.P. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 118 Nev. 92, 97-101, 40 P.3d 405, 408-11 (2002) (discussing the enforceability of contractual waivers of the right to a jury trial).

We People Nevada suggests that the Secretary of State’s duties run to the proponents of the initiative petition. It logically follows that authorized proponents may withdraw their petition pursuant to NRS 295.026 and that enforcement of NRS 295.026 does not violate their rights under the Nevada Constitution.⁷

Herbst Gaming, Inc. v. Heller, likewise suggests that the rights of persons with an interest in the application of governing processes and procedures take precedence over the pre-election rights of voters.⁸ 122 Nev. 877, 141 P.3d 1224 (2006). In *Herbst Gaming*, persons opposed to an initiative petition filed suit to prevent the petition from appearing on the ballot at the 2006 election. They filed their suit after the Secretary of State had certified the petition and transmitted it to the Nevada Legislature pursuant to Article 19, Section 2 of the Nevada Constitution. See 122 Nev. at 881. In other words, they filed suit after the Secretary had incurred a duty to act on the petition pursuant to Article 19, Section 2.

⁷ Whether enforcement of NRS 295.026 will potentially violate the rights of the public to vote on an initiative petition is an open question. It is unlikely, however, that a Nevada court would recognize a pre-election right to vote on an initiative petition over the objection of the proponents, as the proponents have a superseding right to control the ultimate disposition of their initiative petition.

⁸ Persons who sign the initiative petition, as opposed to voters generally, appoint the proponents to act as their proxy for matters concerning the initiative petition. See NRS 295.015.

Nonetheless, the court recognized that when the opponents of an initiative petition “allege procedural defects or assert that a measure does not satisfy an explicit constitutional or statutory requirement for initiatives”, they may bring a pre-election lawsuit to prevent the initiative from appearing on the ballot. *Id.* at 892. By this rationale, a procedural defect may be used to deny the electorate an opportunity to vote on an initiative petition after the Secretary of State has incurred a duty to transmit the petition to the Nevada Legislature and/or place the initiative proposal on the ballot. This indicates that voters do not acquire pre-election rights to vote on initiative petitions. In other words, if persons opposed to an initiative petition can effectively cause its withdrawal on procedural grounds even after the petition has cleared numerous procedural hurdles, then the proponents of an initiative petition should logically have a right to withdraw the petition within a reasonable time prior to the election.

The Secretary of State does not violate any duty by honoring a notice of withdrawal.

As applied to an elected official, a directive to perform a specified task may be mandatory only to the extent that an omission to perform that task will violate a duty owed to an individual, a class of individuals, or the public at large. *See, e.g., Coty v. Washoe County*, 108 Nev. 757, 760, 839 P.2d 97, 98-99 (1992) (“[T]he duty of fire and police departments ‘is one owed to the public, but not to individuals.’”) (quoting *Frye v. Clark County*, 97 Nev. 632, 633, 637 P.2d 1215, 1216 (1981)). “This rule is often referred to as the public duty doctrine.” *Id.* These public duties are not mandatory in the sense that they must be carried out at the request of any individual citizen, without regard to circumstances such as available resources and public safety priorities.

The operation of a public, directory duty in Nevada is illustrated in *Thomas*. There, the Nevada Supreme Court acknowledged that the word “shall” imposed upon the Department of Parole and Probation a duty to include criminal history information in the presentence report that it submitted to a sentencing judge pursuant to NRS 176.145. 88 Nev. at 384-85. The Department’s failure to include that information did not, however, preclude the judge from sentencing the defendant. *Id.* The Department owed a duty to

the sentencing judge, not to the public. The sentencing judge thus had the discretion to proceed with sentencing despite the Department's failure to perform its duty. The judge's statutory duty to review a defendant's criminal history prior to sentencing was directory, not mandatory.

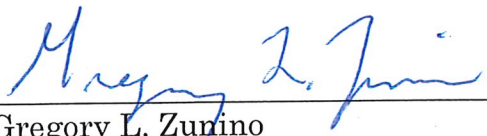
Here, the Secretary of State owes no mandatory duty to the general public or any individual in carrying out the requirements of Article 19, Section 2. The Secretary thus does not violate any duties or impinge on any rights by honoring a notice of withdrawal pursuant to NRS 295.026.

CONCLUSION

Article 19, Section 2 of the Nevada Constitution imposes upon the Secretary of State ministerial duties that are owed to the proponents of an initiative petition. Because those duties run to the proponents of a petition, the proponents may waive performance of those duties. Specifically, the proponents may withdraw their initiative petition before or after its certification and transmission to the Nevada Legislature pursuant to NRS 295.026, provided they submit their withdrawal request not later than 90 days before the election. By law, the Secretary of State must honor any such request notwithstanding general constitutional directives to file the petition, verify the signatures on the petition, transmit the petition to the Nevada Legislature, and/or place it on the ballot. These duties are directory and should not be performed over the proponents' objection.

Sincerely,

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