DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Ronald Drake, D.C. Against Slots, and D.C. Watch, **Challengers,** **v.** **Citizens Committee for the D.C. Video Lottery Terminal Initiative of 2004,** **Proponents.**	**Administrative Hearing** **No. 04-020** **Re: Challenge to Initiative Measure No. 68**

MEMORANDUM OPINION AND ORDER

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter "the Board") on July 21, 2004, in response to two challenges filed on July 19, 2004, to a petition submitted by Pedro Alfonso, Margaret Gentry, and Vicky Wilcher ("the Proponents") in support of Initiative Measure No. 68, the "Video Lottery Terminal Initiative of 2004" ("Initiative Measure No. 68"). The first challenge was filed by Ron Drake, Esq., and the second by two civic organizations, D.C. Watch and D.C. Against Slots.

The presiding Board Members were Chairman Wilma A. Lewis, Dr. Lenora Cole and Charles R. Lowery, Jr. Mr. Drake appeared *pro se*, as did Rev. Alpha Brown, Esq., Carol Colbeth, Esq. and Regina James on behalf of D.C. Against Slots, and Dorothy Brizill and Gary Imhoff on behalf of D.C. Watch. The Proponents were represented by John Ray, Esq. and Elise Dang, Esq. of the law firm of Manatt, Phelps & Phillips, LLP.

This Memorandum Opinion, which constitutes the Board's findings of fact and conclusions of law, memorializes the oral ruling of the Board rendered on August 3, 2004.

I. INTRODUCTION

The Board of Elections and Ethics has the important responsibility of ensuring the integrity of our electoral processes. In the context of the initiative petition process, this requires, among other things, a careful examination of the facts and circumstances surrounding the circulation of petitions, with due consideration for safeguarding both the rights of individuals to have their signatures count—which is "core political speech"—as well as the integrity of the process.

In response to the challenges to Initiative Measure No. 68, the Board reviewed the process by which the petition signatures were gathered. Based on the sworn testimony of witnesses and the Board's review of relevant documentary and other evidence, the Board concluded that a significant component of the circulation process was fatally flawed. These flaws were most apparent and concentrated in the portion of the signature gathering operation run by Stars and Stripes, Inc.—a Florida-based professional petition circulation company which operated primarily out of the Red Roof Inn, a hotel located at 500 H Street, NW.

The flaws in the process, which bore on the validity of the signatures collected, were significant when considered individually, and monumental when considered collectively. They served to turn the law of the District of Columbia designed to ensure the integrity of the circulation process on its head. These flaws included: 1) the use of so-called "assistants" who were non-residents of the District of Columbia, but who actually performed the petition circulating responsibilities statutorily prescribed for D.C. residents; 2) the falsification of the circulator's affidavit by D.C. residents at the urging of some of the non-residents brought into the District of Columbia to "assist" with the petition drive; 3) forged signatures of both signatories and circulators; 4) official training

of circulators by non-residents who were uninformed about the District's election laws and Initiative Measure No. 68 itself, and who promoted a sales pitch that mischaracterized the substance of the initiative; 5) false advertising of the initiative to induce signing that was conveyed both orally in communications between circulators and potential signers, and visually through the wearing of T-shirts that conveyed the false information; 6) the haphazard and uncoordinated recruitment of D.C. residents by non-resident circulators to act as purported witnesses to their signature gathering efforts—a practice that undoubtedly contributed to the unreliability of the circulator's affidavits and the Board's inability to subpoena several witnesses; and 7) an overall lack of oversight of the activities in the field by managers who appeared far removed from the details of the collection effort. The Board concluded that the evidence of irregularities that polluted the Red Roof Inn operation—which were most apparent and concentrated in the Stars and Stripes operation—remained essentially unrebutted by the Proponents, and compelled the rejection of the signatures collected by that organization.

Notwithstanding allegations of a scheme or plot to violate the District's election laws, the Board found no evidence in the context of these proceedings that the Proponents set out to intentionally flout the District's election laws, or that they encouraged Stars and Stripes to do so.[1] The absence of such evidence, however, made the problems no less real, the compromise of the integrity of the initiative process no less significant, and the impact on the petition circulation process no less fatal.

Although there was no evidence of a plot or scheme by the Proponents, the evidence did, in fact, show that the Proponents undertook to qualify Initiative Measure

[1] The Board reserves the right to consider whether penalties should be assessed against the Citizens Committee for the D.C. Video Lottery Terminal Initiative. In that context, the issue of intent will be fully considered.

No. 68 for the November General Election ballot by accomplishing in six days what the District's initiative statute allows 180 days to do—the gathering of 17,599 valid signatures, constituting five percent of the District's registered voters both at the city-wide level and in at least five of the District's eight wards. It scarcely needs to be stated that the feat that the Proponents were seeking to accomplish was an extraordinarily challenging one. Indeed, even senior representatives of the professional petition circulation companies retained to conduct the effort acknowledged that they had never before been faced with such a challenge. As the U.S. Supreme Court has remarked: "[t]he securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking ... It is time-consuming and it is tiresome[.]" *Meyer v. Grant*, 486 U.S. 414, 423-4 (1988) (citations omitted). With virtually no time to accomplish what is normally a time-consuming task of no small magnitude, including the pressures inherent in such an undertaking, together with the lax oversight that characterized the process here, the environment was ripe for of the kinds of violations which the Board found, and now addresses.

II. BACKGROUND

On April 22, 2004, the Proponents submitted a proposed initiative measure, then-entitled the "Jobs, Education, and Healthcare Lottery Expansion Initiative of 2004," to the Board. On May 27 and 28, 2004, respectively, the Office of the District of Columbia Attorney General and the Office of the General Counsel for the District of Columbia Council submitted comments to the Board stating that the original version of Initiative Measure No. 68 was not a proper subject for initiative, primarily on the grounds that it included provisions that would constitute an improper appropriation of funds. *See* D.C. Official CODE § 1-204.101. Specifically, both entities cited as problematic the section of

the original measure which provided that all revenues flowing from the proposed Video Lottery Terminal ("VLT") facility would be deposited into the District of Columbia Lottery and Charitable Games Fund. In addition, the original measure created two funds—the "District of Columbia Public Schools Fund," and the "District of Columbia Senior Citizens Prescription Drug Benefits Fund"—and recommended to the District of Columbia Council that the revenues from the Video Lottery Terminals be distributed equally between the District's General Fund and the two newly created funds. Although a recommendation to the City Council regarding the allocation of revenues—rather than a directive in that regard—was viewed as permissible under the applicable law, the creation of specific funds by means of an initiative was not. See *Hessey v. District of Columbia Board of Elections and Ethics, et al.*, 601 A.2d 3 (D.C. App. 1991). Based on a review of the original version of Initiative Measure No. 68 by the Board's General Counsel, together with the written comments received by the Board, the Board's General Counsel informed the Proponents that it was likely that the measure as submitted would be found to violate the laws governing the initiative process in the District of Columbia.

On May 28, 2004, the Proponents submitted a revised version of Initiative Measure No. 68, which omitted, *inter alia*, the problematic language in the body of the original measure that directed where revenues from the VLTs would be deposited, and that established the two funds. Although leaving in the text of the initiative a strong recommendation that funds from the VLTs be used, in part, to support education and healthcare for seniors, the Proponents deleted the reference to Jobs, Education and Healthcare in the title of the initiative, and re-designated the proposed measure as the "Lottery Expansion Initiative of 2004." Shortly thereafter, the Proponents also changed their Committee's name from "Citizens for Jobs, Education and Healthcare Initiative

Committee" to "Citizens Committee for the D.C. Video Lottery Terminal Initiative," and filed the appropriate documentation to effectuate that change with the D.C. Office of Campaign Finance ("OCF").

On June 9, 2004, the Board accepted the revised version of Initiative Measure No. 68 as a proper subject for initiative, and drafted the formulations for the short title and summary statement that would appear on the supporting petition forms. *See* D.C. CODE § 1-1001.16(c)(1)-(2). As drafted by the Board, Initiative Measure No. 68's short title and summary statement were as follows:

INITIATIVE MEASURE No. 68

SHORT TITLE

"THE DISTRICT OF COLUMBIA VIDEO LOTTERY TERMINAL INITIATIVE OF 2004"

SUMMARY STATEMENT

This initiative, if passed, will:

- expand the lottery by allowing "Video Lottery Terminals" ("VLTs") in the District of Columbia;
- provide a fee of 25% of the net revenue from each VLT to the District;
- establish the initial VLT facility at Montana Avenue/New York Avenue/Bladensburg Road, NE;
- permit one licensee to operate VLTs for the first ten years;
- establish application requirements for additional licensees after the first ten years;
- make nonbinding recommendations to the City Council that the fee paid to the District be used, in part, to improve public schools and to help senior citizens obtain prescription drugs.

On June 21, 2004, Mses. Brizill and James, and David Argo filed a complaint with the Superior Court of the District of Columbia seeking an order directing the Board

to reject Initiative Measure No. 68. One of the claims asserted by the plaintiffs was that the Board's June 9, 2004 short title and summary statement formulations were misleading, biased, and inaccurate. The Court affirmed the Board's decision to accept Initiative Measure No. 68, and in so doing, rejected virtually all of the plaintiffs' claims. However, the Court accepted the plaintiffs' argument that there was language in the Board's summary statement formulation that "created prejudice in favor of the measure." (Order of D.C. Superior Court Judge James Boasberg in *Argo, et al v. D.C. Board Of Elections and Ethics*, June 29, 2004). Accordingly, the Court ordered the Board to remove the final bullet point in the summary statement which indicated that Initiative Measure No. 68 would make nonbinding recommendations to the Council of the District of Columbia that the fees paid to the District be used, in part, to improve public schools and to help senior citizens obtain prescription drugs. In addition to the Court's finding in that regard, the Court also instructed the Board to reformulate the first bullet point of the summary statement to note that VLTs are very similar to slot machines, and thus to read as follows: "expand the lottery by allowing 'Video Lottery Terminals' ("VLTs"), which are very similar to slot machines, in the District of Columbia." Finally, the parties stipulated that the phrase "District of Columbia" would be removed from the short title.

On the afternoon of July 1, 2004, two days after the resolution of the legal challenge to Initiative Measure No. 68, the Board convened a Special Meeting to issue an original petition form to the Proponents for the purpose of gathering the proper number of valid signatures to achieve ballot access. *See* D.C. CODE § 1-1001.16(g). Prior to the issuance of the petition form, the Board's General Counsel informed the Proponents of the guidelines for circulators and of the significance of the circulator's affidavit. (Transcript ("Tr.") of July 1, 2004 Special Board Meeting, pp 10-14). He noted that the

prohibition on false statements would include verbal statements, documents, and paraphernalia concerning Initiative Measure No. 68. (July 1 Tr. at 14).

Under the applicable law, the Proposer of an initiative has one hundred eighty (180) days within which to file a petition with the requisite number of valid signatures. The deadline for submitting a petition to gain ballot access in the November General Election, however, was July 6, 2004. The Proponents opted to seek ballot access for the November General Election.

On July 6, 2004, the Proponents submitted a petition to the Board comprised of 3,869 petition sheets with 56,044 signatures ("the Petition"). The Board posted the Petition for public review and inspection on July 9, 2004, for the statutorily prescribed 10-day challenge period. *See* D.C. Official Code § 1-1001.16(o)(1).

On July 19, 2004, Mr. Drake filed a challenge to the Petition ("Drake challenge"), which focused on alleged deficiencies in the petition circulation process. On that same day, the Board also received a joint challenge from D.C. Watch and D.C. Against Slots ("Brizill/James challenge"), which raised similar issues. Prehearing conferences were held on July 20 and 21, 2004, for the Drake and Brizill/James challenges, respectively.

On July 21, 2004, the Board consolidated the Drake and Brizill/James challenges, and commenced a hearing to resolve the challenges. *See* D.C. CODE §§ 1-1001.16(o)(1), 1-1001.08(o)(2). The hearing, which lasted nine days, was conducted between July 21 and August 2, 2004.

In connection with the hearing, the Board issued subpoenas and requests for appearances to a total of 130 individuals. This number included the three officers of the

Citizens Committee for the Video Lottery Terminal Initiative,[2] 102 circulators, eleven signatories, eight representatives of Progressive Campaigns, Inc. ("PCI") and its sub-contracting affiliates, three individuals identified as supporters of Initiative Measure No. 68, two managers at the hotels where non-resident circulators stayed while in D.C., and one purported signatory. The Board ultimately heard testimony from 38 witnesses: Proponents Pedro Alfonso and Vickey Wilcher; circulators Stephen Atkins, Danielle Campbell, Damon Catchings, Tenisha Colbert, Janzell Coley, Augusteen Cowan, Melissa Darnell, Bobbie Diggs, Evelyn Gerst, Vernon Humbles, Tanica Hunter, Margol Inabinet, Antoine Jeffries, Eugene Kinlow, David Neverson, Norman Neverson, Perry Queen, Andre Rempson, Albrette Ransom, Bernice Rink, Gwendolyn Squirewell, and Sheila Washington; purported circulator Forrest Jackson; PCI representatives and affiliates Angelo Paparella, Rob Grocholski, Clinton Hyatt, John Michael, Carl Towe, and Ross Williams; signatory Sheryl Sturges; purported signatory Robert Price; complainant John Capozzi; and interested citizens Evanna Powell and Martha Ward. In addition to witness testimony, the Board reviewed and considered individual petition sheets as well as documentary and other evidence submitted by the parties either voluntarily or in response to Board-issued subpoenas.

Closing arguments were held on August 2, 2004, and the Board issued an oral ruling on the challenges on August 3, 2004.

III. THE APPLICABLE LAW

Voters in the District of Columbia were granted the right of initiative by the "Initiative, Referendum and Recall Charter Amendments Act of 1977." *See* D.C. Law 2-46, *codified at* D.C. Official Code § 1-204 *et seq.* Under this law, registered voters in the

[2] The three Proponents are officers of the Citizens Committee for the Video Lottery Terminal Initiative.

District are allowed to propose laws and present them to the District's electorate for approval. However, a proposed initiative measure may not be presented to voters for approval unless it is found to be a proper subject for initiative in accordance with the applicable law, and it is demonstrated to have the broad-based popular support that meeting a substantial signature threshold, as prescribed by statute,[3] is intended to indicate.

A successful petition means that a new rule of action or conduct which has binding legal force may be established in the District. The significance of this event underscores the importance of an initiative petition and the Board's independent duty to assure its sufficiency. *Dankman v. D.C. BOEE*, 443 A2d. 507, 512 (D.C. App. 1981). A key component of the Board's ability to satisfy its responsibility in this regard is the role played by the circulator and the attendant affidavit requirements.

Pursuant to District law, an initiative petition circulator must complete and sign a circulator's affidavit of certification for each petition sheet he or she circulates. This affidavit, which is "made under penalty of perjury," must contain the following information and representations:

(1) The printed name of the circulator;
(2) The residence address of the circulator, giving the street number;
(3) That the circulator of the petition sheet was in the presence of each person when the appended signature was written;
(4) That according to the best information available to the circulator, each signature is the genuine signature of the person it purports to be;
(5) That the circulator of the initiative or referendum petition sheet is a resident of the District of Columbia and at least 18 years of age; and
(6) The dates between which the signatures to the petition were obtained.

D.C. Official Code § 1-1001.16(h).

[3] The Proposer of an Initiative is required to secure the valid signatures of five percent of registered voters in the District both at the city-wide level and in at least five of the District's eight wards. *See* D.C. Official Code § 1-1001.16(i).

The Board's regulations further provide that a circulator must represent by signing the affidavit that he or she: "was advised by the proposer of the initiative of the law set forth in [D.C. Official Code § 1-1001.14. Corrupt Election Practices]; has not made any false statements to the Board of Elections and Ethics regarding the initiative or referendum; and has not made any false statements regarding the initiative or referendum to anyone whose signature is appended to the petition." D.C. Mun. Regs. tit. 3, § 1003.6 (g)-(i) (1998).

The requirements for the circulator's affidavit serve several important purposes: they make clear exactly which individuals may circulate initiative petition sheets in the District of Columbia; they enable the Board to identify and locate particular circulators, if necessary; they provide guidance as to how, and highlight the importance of when, initiative petition sheets are to be circulated; and they provide insight into those factors that bear on the integrity of the process. In short, the affidavit requirements reflect the province of the Board to "regulate elections [so that] they are ... fair and honest," *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999) (citations omitted), and the need of the Board and the District to "ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the [District]." *Id.* at 190, n.10. D.C. CODE § 1-1001.16(k)(1)(D) and (E) reflects the importance of the affidavit requirements by providing:

> Upon submission of an initiative petition by the proposer to the Board, the Board shall refuse to accept the petition upon any of the following grounds: . . . (D) The petition sheets do not have attached to them the statements of the circulators as provided in subsection (h) of this section; or (E) The petition was circulated by persons who were not residents of

the District of Columbia and at least 18 years of age at the time of circulation.

The statutory and regulatory requirements for initiative petition circulators clearly contemplate that the D.C. resident circulator is deemed to be the party responsible and accountable for the circulator process as it pertains to the particular petition sheet(s) to which he or she is attesting. The circulator must be sufficiently engaged in the process of gathering signatures so as to be able to ensure the integrity of that process. Accordingly, while a circulator may utilize assistants—including non-residents—in circulating the petition, the circulator must be "in the presence of" each signer at the time of signing such that he or she is aware of, and can attest to, the circumstances surrounding the signing, including for example, the nature of any representations that are made to potential signers regarding the subject of the petition.[4] The law does not require that the circulator must be the person who first approaches the signer, the person holding the clipboard with the petition sheet, the person who gives the clipboard to the signer, or even the person who always responds to the signer's questions. However, the circulator must be sufficiently engaged in the process and in such close proximity to the signer so as to be able to be fully responsible, fully accountable, and well versed in the circumstances of the signature gathering effort.

The extent to which a false circulator affidavit impugns the integrity of the process so as to warrant the invalidation of signatures associated therewith has been recognized by the courts of this jurisdiction. In *Citizens Against Legalized Gambling v.*

[4] This interpretation comports with the regulatory requirement that the circulator must swear or affirm under penalty of perjury that he or she "has not made any false statements regarding the initiative or referendum to anyone whose signature is appended to the petition." D.C. Mun. Regs. tit. 3, § 1003.6(i) (1998). This requirement would be rendered a nullity if a non-resident assistant, unencumbered by the affidavit requirement, could be *assisting* in the signature gathering effort outside of the presence of the D.C. resident circulator and making misrepresentations to the signers of which the D.C. circulator is unaware.

District of Columbia Bd. of Elections and Ethics, 501 F.Supp. 786 (D.D.C. 1980), which involved an initiative petition, the court noted:

> Where petitions have been invalidated because of the failure of the person circulating the petition to comply with the laws, the reasoning generally seems to be that the omission raises doubts as to the validity of the signatures themselves. See, e. g., *In re Lebowitz*, 221 N.Y.S.2d 703 (1961) (statement of witness to signatures false, casting doubt on authenticity of signatures); *Clawson v. Wilgus*, 107 Ohio App. 460, 160 N.E.2d 294 (1957) (person attesting to petition did so falsely; no way to determine actual circulator).

Id. at 790.[5] The Court's observation in *Legalized Gambling* must, of course, be read in light of the subsequent enactment of D.C. CODE § 1-1001.16(k)(1), which sets forth grounds upon which the Board "shall" refuse to accept a petition.

More recently, the District of Columbia Court of Appeals addressed the importance of the circulator affidavit in the context of a nominating petition. The Court, in *Williams v. District of Columbia Board of Elections and Ethics*, 804 A.2d 316 (D.C. App. 2002), stated:

> Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.

Id. at 319 (citing *Brousseau v. Fitzgerald*, 675 P. 2d 713, 715 (Ariz. 1984)).

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[5] The court in *Citizens Against Legalized Gambling* concluded that circumstances which would warrant the invalidation of the initiative petition at issue were not present. By contrast in *In Re Lebowitz*, the court invalidated nominating petition sheets that bore affidavits which had been signed by persons who had not been in the presence of the signatories as required by law. The court there noted that, although there appeared to be no intent on the part of the candidate who was the subject of the petition to engage in fraud, he should not derive any benefit therefrom. In *Clawson v. Wilgus*, the court invalidated a nominating petition sheet after finding that the named affiant, who had signed the circulator's affidavit in error, had not been in the presence of the signatories. The court in *Clawson* found that, although the affidavit at issue had been signed in error, the applicable law explicitly required affiants to be in the presence of each petition signatory.

The Proponents correctly argued that the requirements for a circulator of a nominating petition do not mirror those of an initiative circulator. The requirements for nominating petition circulators are more stringent, and the affidavit requirements in that context have been found to create a presumption of signature validity.[6] Nonetheless, fraud in the certification of the circulator's affidavit similarly destroys important safeguards in the initiative petition process pertaining to the way the signatures are obtained. Thus the Court's observations in *Williams* are instructive in this context as well.

The requirements for the circulator of a nominating petition are found in D.C. CODE §1-1001.08(b)(3). In that context, the circulator must be a registered voter who has "(A) Personally circulated the petition; (B) Personally witnessed each person sign the petition; and (C) Inquired from each signer whether he or she is a registered voter.

The requirements for the circulator of an initiative petition are covered by D.C. CODE §1-1001.16(h) which provides, inter alia: "(3) That the circulator of the petition sheet was in the presence of each person when the appended signature was written; and (4) That according to the best information available to the circulator, each signature is the genuine signature of the person it purports to be." Further, although signers of initiative petitions must be registered voters, unlike nominating petitions, there is no specific requirement that the circulator inquire whether the signer is a registered voter.

Thus, it can reasonably be argued that there is a higher standard for circulators of nominating petitions than initiative petitions. As the Court in *Williams* noted, "with respect to nominating petitions, the circulator performs functionally the same role the

[6] D.C. CODE § 1-1001.08(o)(1) "The Board is authorized to accept any nominating petition for a candidate ... as bona fide with respect to the qualifications of the signatures thereto."

Board itself fills in verifying signatures on an initiative or referendum petition." *Williams* at 319. Moreover, "[t]he Board is authorized to accept any nominating petition. . .as bona fide with respect to the qualifications of the signatures. . ." if unchallenged, pursuant to D.C. CODE §1-1001.08(o)(1). In short, where the Board, in the case of an initiative petition, would go through every petition sheet line by line to ascertain if the signer is a registered voter and perform a random statistical sampling of the signatures to determine if the signatures are valid,[7] this is all accomplished, and presumed valid, when the nominating petition circulator attests that they have "inquired from each signer whether he or she is a registered voter" and that they "personally witnessed each person sign."

Notwithstanding the foregoing, the Court in *Williams* held that the circulator's affidavit and the ability to cross-exam the circulator to determine the veracity of the affidavit bears not only on the genuineness of the signatures, ***but also on whether the signatures were properly obtained***—a determination that the Board does not—and can not—make in its review of the petition sheets and its random sample procedure. This same safeguard is necessarily embodied in the role of the circulator, the attestation evidenced in the affidavit, and the ability to cross-examine the circulator in the context of initiative petitions.

In *Williams*, the Board was faced with the issue of whether to accept petition sheets circulated by three individuals with the surname "Bishop." When each of the Bishop circulators asserted their Fifth Amendment privilege, the Board was unable to determine whether any of the signatures on the petition sheets from the Bishops were in fact genuine and properly obtained without undue influence or fraud. Thus, the critical

[7] The random sample procedure is conducted to determine, with the required confidence level of ninety-five percent (95%), whether or not a sufficient number of valid signatures of registered voters are contained in the petition.

role of the circulators in vouching for the integrity of the manner in which signatures are gathered is identical for both initiative and nominating petitions. The Board must rely on the circulator's affidavit to identify, locate and cross-exam, the circulator regarding the circumstances surrounding the collection of signatures. This ability of the Board to determine if signatures were properly obtained is vital to the integrity of the entire ballot qualification process for both the nominating an initiative petitions.

Another aspect of the importance of the affidavit requirement in the initiative context was described in *Buckley v. American Constitutional Law Foundation Inc.*, 525 U.S. 182 (1999). In that case, the Supreme Court explicitly held that affidavit requirements in the initiative petition process have an important place in ballot access because they promote the state's interest in reaching law violators among petition circulators: "This address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency." *Id.* at 196. The significance of the address attestation is not only important for purposes of reaching law violators, but it serves as the primary evidence the Board has that the circulator is a resident of the District of Columbia as required by law.

In response to the Supreme Court decision in *Buckley*, the Council of the District of Columbia removed the requirement that initiative petition circulators be registered voters in the District of Columbia. The law now requires that circulators must be District of Columbia residents who are at least eighteen (18) years of age. Therefore, unlike the previous voter registration requirement, which the Board could verify on its own, the Board must now rely primarily on the affidavit of the circulator, an issue which was also recognized in *Buckley*:

> ACLF did not challenge Colorado's right to require that all circulators be residents, a requirement that, the Tenth Circuit said, "more precisely achieved" the State's subpoena service objective. 120 F. 3d, at 1100. Nor was any eligible-to-vote qualification in contest in this lawsuit. Colorado maintains that it is more difficult to determine who is a state resident than it is to determine who is a registered voter. See Tr. of Oral Arg. 10, 14. The force of that argument is diminished, however, by the affidavit attesting to residence that each circulator must submit with each petition section

Buckley at 197. Accordingly, the Board concludes that the Court's articulation in *Williams* of the consequences of fraud in the certification process is instructive in the initiative petition process as well.

IV. THE CHALLENGES

As discussed above, the Board received two challenges to the Petition: the Drake challenge and the Brizill/James challenge. The Drake challenge alleged that all of the Petition sheets should be invalidated on the basis that each suffered from at least one of eleven specified circulator affidavit defects. The Brizill/James challenge alleged that petition sheets attributed to certain named circulators should be invalidated on circulator-related grounds. Finally, both challenges alleged a pervasive pattern and practice of fraud, forgery and falsification of the Petition that warranted the rejection of the entire Petition.

Although the alleged violations of law were grouped in the Drake challenge according to the type of alleged defect contained in the circulator's affidavit and in the Brizill/James challenge by the circulator, the challengers agreed that there was considerable overlap in the substance of the allegations. Accordingly, the challengers further agreed that the hearing would proceed most efficiently, while capturing the essence of all of the allegations, by addressing the first seven categories of defects described in the Drake challenge and then turning to the allegations as framed by the

Brizill/James challenge.[8] This resulted in an approach to the consolidated challenge that focused first, on a review of identified petition sheets for defects in the circulator's affidavit, followed by the consideration of testimonial, documentary and other evidence concerning the circulation process.

A. Petition Sheets And Signatures Conceded By The Proponents

At the beginning of the hearing on July 21, 2004, the Proponents conceded 89 petition sheets.[9] These concessions reduced the number of petition sheets to 3780. On July 29, 2004, toward the end of the proceedings, the Proponents conceded an additional 378 petition sheets.[10] The Proponents also conceded 34 signatures on petition sheets circulated by Mr. Augusteen Cowan.

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[8] Mr. Drake: Madam Chair, if I may make a representation. I think Ms. Brizill, Mr. McGhie and I had conferred and, at this point, we were going to switch from my complaint to the Brizill complaint from seven, when we completed seven. At that point, we would switch over then to the other complaints. I would simply follow along to see if everything that I had challenged was dealt with. (July 25 Tr. at 221).

[9] These petition sheets were numbered: 601, 602, 603, 627, 864, 865, 866, 868, 983, 1005, 1071, 1167, 1170, 1449, 1466, 1553, 1555, 1637, 1804, 1819, 1893, 2035, 2047, 2145, 2159, 2239, 2305, 2403, 2407, 2408, 2410, 2411, 2412, 2414, 2415, 2416, 2417, 2418, 2422, 2423, 2425, 2426, 2427, 2428, 2429, 2431, 2432, 2492, 2493, 2507, 2594, 2704, 2822, 2889, 2892, 3012, 3191, 3192, 3290, 3296, 3320, 3465, 3733, 3734, 3735, 3738, 3739, 3740, 3741, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3752, 3766, 3767, 3779, 3785, 3786, 3820, 3821, 3822, 3824, 3826, and 3865.

[10] These petition sheets were numbered: 023, 059, 060, 061, 077, 078, 108, 109, 110, 116, 117, 146, 330, 354, 383, 384, 386, 466, 548, 573, 574, 575, 634, 639, 867, 871, 918, 920, 921, 922, 923, 947, 948, 949, 950, 963, 965, 966, 970, 979, 1081, 1082, 1089, 1098, 1146, 1147, 1148, 1165, 1169, 1182, 1208, 1213, 1220, 1265, 1308, 1403, 1447, 1471, 1660, 1672, 1683, 1725, 1726, 1740, 1753, 1754, 1783, 1812, 1816, 1817, 1832, 1871, 1887, 1939, 1989, 1990, 2001, 2014, 2020, 2052, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2071, 2078, 2098, 2115, 2133, 2168, 2177, 2185, 2210, 2227, 2231, 2243, 2251, 2264, 2273, 2301, 2311, 2320, 2324, 2325, 2339, 2363, 2370, 2389, 2397, 2487, 2511, 2522, 2523, 2543, 2549, 2552, 2554, 2556, 2558, 2565, 2577, 2578, 2595, 2629, 2635, 2654, 2687, 2709, 2728, 2732, 2745, 2746, 2749, 2757, 2765, 2808, 2812, 2820, 2840, 2853, 2857, 2861, 2866, 2876, 2882, 2884, 2885, 2923, 2931, 2936, 2937, 2961, 2972, 2973, 2974, 2982, 2999, 3022, 3023, 3029, 3030, 3039, 3042, 3043, 3046, 3048, 3060, 3063, 3069, 3070, 3072, 3081, 3090, 3094, 3099, 3104, 3113, 3130, 3131, 3132, 3147, 3153, 3166, 3173, 3177, 3178, 3190, 3195, 3200, 3221, 3225, 3243, 3267, 3268, 3272, 3273, 3277, 3283, 3284, 3285, 3286, 3297, 3299, 3303, 3304, 3313, 3314, 3317, 3327, 3328, 3335, 3339, 3340, 3345, 3348, 3352, 3358, 3359, 3361, 3362, 3366, 3371, 3372, 3375, 3376, 3381, 3383, 3384, 3386, 3389, 3393, 3398, 3400, 3401, 3403, 3404, 3405, 3407, 3409, 3410, 3411, 3412, 3414, 3416, 3417, 3421, 3423, 3427, 3428, 3429, 3430, 3434, 3436, 3438, 3442, 3444, 3445, 3446, 3449, 3450, 3454, 3460, 3461, 3466, 3468, 3469, 3470, 3471, 3476, 3477, 3478, 3482, 3483, 3484, 3488, 3489, 3491, 3493, 3495, 3496, 3497, 3498, 3500, 3503, 3504, 3508, 3509, 3510, 3511, 3512, 3516, 3517, 3521, 3523, 3525, 3526, 3527, 3529, 3530, 3532, 3535, 3541, 3543, 3545, 3546, 3548, 3550, 3551, 3553, 3554, 3556, 3558, 3564, 3567, 3569, 3570, 3572, 3573, 3575, 3577,

B. Alleged Affidavit Defects

Illegible Names and/or Signatures of Circulators on Circulator's Affidavit of Certification

Mr. Drake asserted that twenty-four (24) petition sheets should be rejected by the Board because the circulator's affidavits contained illegible names and/or signatures.[11] D.C. CODE § 1-1001.16(h) generally provides that "[e]ach petition sheet for an initiative or referendum measure shall contain an affidavit, made under penalty of perjury, [. . .] signed by the circulator of that petition sheet which contains . . . [t]he printed name of the circulator[.]"

The circulator's signature and printed name on an affidavit are critical in that they allow the Board to identify the petition sheet's circulator and contact that individual, if necessary, so that the Board, in performing its role to ensure the integrity of the process, can evaluate the circumstances surrounding the way in which signatures on the petition sheet were collected. In the event that a circulator's signature is illegible and the printed or typed name of the signer does not appear on the petition, the Board would be unable to identify and/or contact the circulator for that petition sheet, and the statutory requirement and important role of the circulator would be rendered a nullity. Accordingly, challenges to circulator affidavits based upon illegible names and or signatures are appropriate.

Based on the Board's review of relevant documentation, including the individual petition sheets, identification documents provided by the Proponents, and voter roll

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3579, 3581, 3586, 3587, 3588, 3589, 3591, 3593, 3597, 3599, 3602, 3603, 3605, 3606, 3607, 3608, 3610, 3612, 3614, 3615, 3616, 3619, 3621, 3622, 3623, 3624, 3625, 3634, 3639, 3644, 3647, 3648, 3649, 3653, 3657, 3660, 3686, 3687, 3689, 3691, 3700, 3709, 3717, 3722, 3725, 3726, 3727, 3731, 3732, 3778, 3814, 3832, 3867, and 3869.

[11] These petition sheets were numbered: 054, 370, 411, 839, 1171, 1242, 1390, 1950, 2055, 2176, 2210, 2717, 2813, 2962, 3066, 3077, 3180, 3497, 3513, 3524, 3528, 3568, 3821, and 3822.

information,[12] the Board rejected ten (10) challenged sheets because of illegibility of names/signatures on the circulator's affidavit.[13] The names/signatures on the remaining fourteen (14) challenged sheets were deemed to be sufficiently legible to identify the circulator.

Two Circulators' Names and/or Addresses on Circulator's Affidavit of Certification

Mr. Drake asserted that twelve (12) petition sheets should be rejected by the Board because of multiple names and/or addresses on the circulator's affidavit.[14] The Board upheld the challenge with respect to five (5) of the twelve challenged sheets, finding in each of these instances that there were two different printed names and/or signatures on the circulator's affidavits.[15] The presence of the two names and/or signatures on the petition sheet at issue creates doubt as to the actual circulator, and casts a shadow on the validity of the circulator's affidavits at issue. The challenges to the remaining seven (7) sheets were denied on the basis of documentation provided to the Board which supported the challenged names/signatures. (July 25 Tr. at 62).

Names, Addresses, and/or Signatures Altered on Circulator's Affidavit of Certification

Mr. Drake asserted that fifty-four (54) petition sheets should be rejected by the Board on the ground that they contained alterations in both names and/or addresses on the

[12] The Board attempted to identify the circulator by checking the voter roll by the address on the petition sheet to determine if there was a registered voter at the address whose information matched that on the petition sheets.

[13] The rejected sheets were numbered: 370, 1171, 1390, 2176, 3066, 3513, 3524, 3528, 3568, and 3822.

[14] These sheets were numbered: 955, 956, 1878, 2128, 2182, 2329, 2331, 2529 2803, 3049, 3290, and 3514.

[15] These sheets were numbered: 1878, 2331, 2529, 2803, and 3049.

circulator's affidavit.[16] The Proponents conceded forty (40) petition sheets in this category prior to the commencement of the hearing.[17]

The Board upheld the challenge with respect to twelve (12) of the fourteen (14) remaining challenged sheets, finding that each of these sheets contained alterations to the names, addresses, and/or signatures contained in the circulator's affidavits.[18] The most typical case involved an individual's name and address being crossed out and replaced with another individual's name and address. The alterations to the rejected petition sheets adversely affect the Board's ability to rely on the validity of the circulator's affidavits contained therein. The challenges to the remaining two (2) petition sheets were denied because, with respect to petition sheet 2021, the Board noted the signatures were identical to other petition sheets circulated; and with respect to petition sheet 048, the Board did not believe that there was a significant alteration of the document.

Beginning and/or Ending Dates of Circulation Missing on Circulator's Affidavit of Certification

Section 1003.6(f) of the Board's regulations provides that a circulator's affidavit must contain "[t]he dates between which the signatures to the petition were obtained[.]" The purpose of this provision is to ensure that initiative petition sheets are not circulated outside of the statutorily-prescribed 180-day circulation period. See D.C. CODE § 1-1001.16(j)(1) (providing that a proposer of an initiative measure shall have 180 calendar

[16] The challenged sheets were numbered: 877, 1555, 2892, 2239, 2949, 627, 1167, 3865, 983, 1637, 2035, 3012, 1893, 2304, 2305, 2594, 2021, 868, 864, 865, 866, 1553, 3549, 1821, 1071, 3704, 2557, 1501, 1819, 048, 1804, 3766, 6767, 601, 602, 2341, 3053, 2047, 1449, 1466, 1467, 2145, 2159, 2507, 2822, 2889, 3191, 3192, 3296, 3320, 3465, 603, 1170, and 311.

[17] The conceded sheets were numbered: 1555, 2892, 2239, 627, 1167, 3865, 983, 1637, 2035, 3012, 1893, 2305, 2594, 868, 864, 865, 866, 1553, 1071, 1819, 1804, 3766, 6767, 601, 602, 2047, 1449, 1466, 2145, 2159, 2507, 2822, 2889, 3191, 3192, 3296, 3320, 3465, 603, and 1170.

[18] These sheets were numbered: 877, 1467, 1501, 1821, 2304, 2341, 2557, 2949, 3053, 3110, 3549, and 3704.

days . . . to file [the] petition with the Board). Mr. Drake challenged sixty-eight (68) petition sheets pursuant to this provision.[19] The Proponents conceded fifty-eight (58) sheets in this category prior to the commencement of the hearing.[20]

The Board examined each of the petition sheets at issue. In instances where the beginning and/or ending date for a petition sheet was missing, the Board considered whether there were other indicia on the petition sheet which indicated that the sheet was circulated within the proper time frame. Where signatory dates on the petition sheets indicated that the circulation occurred within the proper time frame, the Board denied the challenge. Where there was no indication that the petition sheet circulation occurred within the time frame allotted, the Board upheld the challenge. The Board upheld the challenge with respect to three (3) of the remaining challenged sheets.[21]

Date of Signature of Circulator Missing and/or Incomplete on Circulator's Affidavit of Certification

As discussed in the preceding section, the date requirement for initiative petition circulator's affidavits is to insure that signatures were collected within the proper time frame. Mr. Drake challenged twenty-three (23) petition sheets pursuant to this provision.[22] The Proponents conceded one (1) petition sheet in this category.[23]

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[19] These sheets were numbered: 3736, 3739, 3740, 3741, 3824, 3738, 3290, 2408, 2410, 2411, 2412, 2413, 2421, 2492, 3290, 2403, 2424, 2704, 3733, 3734, 3735, 3736, 3779, 2819, 3822, 3821, 2517, 1005, 2423, 2425, 2426, 2427, 2428, 2431, 3820, 3858, 3785, 3786, 3749, 054, 2422, 2429, 3826, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3750, 3751, 3752, 2418, 2493, 2414, 2415, 2416, 2417, 2432, 3743, 3744, 3745, 3746, 3747, 3748, and 2419.

[20] These sheets were numbered: 3739, 3740, 3741, 3824, 3738, 3290, 2408, 2410, 2411, 2403, 2424, 2704, 3733, 3734, 3735, 3736, 3779, 2819, 3822, 3821, 1005, 2423, 2425, 2426, 2427, 2428, 2431, 3820, 3858, 3785, 3786, 3749, 2422, 2429, 3826, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3750, 3752, 2418, 2493, 2414, 2415, 2416, 2417, 2432, 3743, 3744, 3745, 3746, 3747, and 3748.

[21] These sheets were numbered: 2419, 2819, and 3736.

[22] These sheets were numbered: 2408, 2410, 2411, 2412, 2413, 2420, 2421, 2492, 2424, 2600, 3553, 2419, 3779, 1005, 3811, 3812, 3813, 3814, 3815, 3816, 3750, 3751, and 3752.

The Board reviewed each challenged petition sheet to determine whether there were indicia that the signatures were valid with respect to the date. In instances where the year, for example, was omitted, the Board took notice of the fact that the year had to be 2004, as there is no question that the Petition form was distributed to the Proponents in this year. Because there were indicia that the sheets were circulated within the appropriate time frame, the challenges to each of the remaining twenty-three (23) sheets, were denied by the Board.

Names, Signatures, and/or Addresses Missing and/or Incomplete on Circulator's Affidavit of Certification

As noted above, D.C. CODE § 1-1001.16(h) provides that "[e]ach petition sheet for an initiative or referendum measure shall contain an affidavit, made under penalty of perjury, [. . .] and signed by the circulator of that petition sheet which contains . . . [t]he printed name of the circulator; [and] [t]he residence address of the circulator, giving the street number[.]"

Mr. Drake challenged thirteen (13) petition sheets on this basis.[24] The only petition sheet that was not conceded and/or rejected by another category was sheet 513. The Drake challenge alleged that the surname of the petition circulator was missing.

The Board concluded that the petition sheet in question was circulated by Damon Catchings who had previously testified before the Board. The Board found that the address and signature on the petition sheet in question matched those found on other petition sheets circulated by Mr. Catchings. Accordingly, the Board denied the

[23] This sheet was numbered: 2492.
[24] These sheets were numbered: 513, 2424, 2600, 3553, 2407, 3809, 3810, 3811, 3812, 3813, 3814, 3815, and 3816.

challenge, finding that the information on petition sheet 513 was sufficient to allow the Board to identify the circulator.

Signatures Signed by Mark Unsupported by Affidavit on Circulator's Affidavit of Certification

Section 1007.5 of the Board's regulations provides that "[r]egistered voters who are unable to sign their names may make their marks in the space provided for signatures. These marks shall not be counted as valid signatures, however, unless the person(s) witnessing the marks has attached an affidavit to the petition, wherein it is stated that the contents of the petition were explained to the signatory and that the affiant witnessed their marks." 3 D.C. Mun. Regs. tit. 3, § 1007.5 (1998).

Mr. Drake challenged eighty (80) sheets on this basis, all of which have the same mark.[25] He alleged that, in the absence of a supporting affidavit prescribed in Section 1007.5 of the Board's regulations, the petition sheets should be rejected.

The Board found that each of the petition sheets challenged on the basis that a supporting affidavit was required was circulated by Mr. Augusteen Cowan. After reviewing documents which contained Mr. Cowan's signatures—his voter registration records, his driver's license, and the contract he signed with PCI to participate in the petition circulation process—the Board determined that the challenged petition sheets did, in fact, bear his true signature as opposed to a mark and thus, did not require a supporting affidavit. Accordingly, the Board denied each of these challenges.

[25] These sheets were numbered: 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 1256, 1257, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1584, 1585, 1586, 1587, 1588, 1674, 1675, 1676, 1684, 1685, 1686, 1687, 1688, 1689, 1833, 2016, 2017, 2018, 2082, 2201, 2284, 2388, 2633, 2780, 3313, 3314, 3575, 3655, and 3656.

C. Petition Circulation Allegations

The challengers alleged that there were a series of individual irregularities in the circulation process which, when taken together, resulted in a pervasive pattern of fraud, forgeries and other improprieties that permeated the entire petition circulation process and that warranted the wholesale rejection of the signatures associated therewith. In addressing the challengers' claims in this regard, the Board considered the individual alleged violations as well as their collective impact based on the testimony of the various witnesses and the Board's review of associated documentary and other evidence. The Board's analysis follows.

"In The Presence Of" Requirement

At the core of the challengers' allegations was the contention that a significant number of petition sheets were actually circulated by non-residents in violation of District law. Specifically, the challengers asserted that the individuals who were brought to the District, to "assist" with the Initiative Measure No. 68 petition circulation drive, actually circulated petition sheets themselves, outside of the presence of the D.C. resident circulators whose signatures appeared on the circulator affidavits purportedly attesting to the circumstances surrounding the signature gathering process.

An analysis of this allegation requires an understanding and review of the organizational structure and process that was used to accomplish the petition drive effort. The testimony revealed that the Proponents entered into an agreement with PCI, a professional California petition circulation company, in late spring or early summer of 2004. Under the agreement, PCI was retained to manage the petition drive on behalf of

the Proponents.[26] PCI, as the prime contractor, then engaged several subcontractors to assist in the performance of the contract. Those subcontractors were Stars and Stripes, Inc. ("Stars and Stripes"), owned and managed by Carl Towe and based in Florida; Initiatives Plus, owned and managed by John Michael and based in Maine; and John Burkett Petition Management. Stars and Stripes subcontracted, in turn, with the Activist Group, which is owned and managed by Ross Williams and based in California; Charles Snow; Grant Sawyer; and Chad Towe. Each of the PCI subcontractors brought a group of managers and/or other workers from outside of the District of Columbia to assist with the petition drive. Stars and Stripes appeared to be the predominant subcontractor, with the largest number of managers assigned to the project. (July 28, Tr. at 309-10).

The testimony also revealed that there were two distinct operations through which the signature gathering effort was accomplished. One operation was conducted from the law firm of Manatt, Phelps and Phillips, LLP, located at 1501 M Street, N.W ("the 1501 M Street operation"). The other operation was conducted from a group of hotels, including the Red Roof Inn, the Days Inn and the Residence Inn, but most predominantly from the Red Roof Inn, located at 500 H Street, N.W. ("the Red Roof Inn operation").

As described through the testimony of Carl Towe and Ross Williams, the petition circulation companies engaged by the Proponents adopted a three-tiered approach in conducting the petition drive. Category 1 circulators were D.C. residents who circulated their petition sheets on their own. At the 1501 M Street operation, Category 1 circulators, who appeared to predominate, were paid $6.50 per signature. At the Red Roof Inn

[26] Although in writing, the agreement between PCI and the Proponents was never signed because the agreement was to be renegotiated if collection started after May 24. (July 28, Tr. at 99).

operation, Category 1 circulators were paid $3.00 per signature. (July 26, Tr. at 42-60; July 27 Tr. at 77-80).

Category 2 circulators were D.C. residents who performed a dual role – they circulated their own petition sheets, for which they received $3.00 per signature, and they witnessed the non-resident "assistants" who were helping them in the circulation process, for which they received $.50 per signature procured by the assistant. The non-resident assistant received $3.00 per signature. Id.

Category 3 circulators were D.C. residents whose responsibility was to observe the non-resident assistant gathering signatures for the petition. For this, the D.C. resident was paid $.50 per signature procured by the assistant. As before, the non-resident assistant received $3.00 per signature. Id.

The evidence revealed that there was a serious breakdown in the operation of Categories 2 and 3 that resulted in clear violations of District law. While the applicable law, as discussed above, requires the D.C. resident circulator to be the responsible and accountable party in the signature gathering effort, the law was turned on its head in that non-resident assistants assumed the predominant role. This reversal of roles was encouraged by a system in which the non-resident assistants were viewed by PCI and its affiliates as the "experts" or "professionals" in the field; the individuals to whom the managers looked; the "coaches"; the "primary" individuals.[27] The Category 3 payment structure of $3.00 for the non-resident "assistant" and $.50 for the D.C. resident

[27] See, e.g., July 27 Tr. at 297-98: .Ms. Stroud: Q. I'm sorry. Let me ask you, did I hear you correctly just say that your circulators, the people that you brought in were supervising the circulators?

Mr. Michael: A. Well, they're in the field with a circulator. So in a default sense, I don't see how it could be any other way, if you think about it. I mean, they're out there with them. So who's really training them in the field? And ultimately, the responsibility--the essence of the responsibility has to be there. I don't see how it could be any other way.

purported circulator (but mere "witness") further reinforced this role reversal phenomenon. In addition, non-resident assistants were permitted to recruit their own D.C. residents to work with them without any apparent supervision of that process. John Michael of Initiatives Plus testified, for example, that the non-residents whom he managed and brought to the District of Columbia went out and found their own D.C. residents to work with, and he did not know how many people they recruited. (July 27 Tr. at 293-94). John Michael further testified that it was up to the non-resident to train the D.C. resident how to circulate. (Id. at 295). The non-resident had custody and control of the petition sheets, and there was no requirement that the D.C. resident accompany the non-resident assistant when the petition sheets were submitted to the managers. (Id. at 352). Thus, as John Michael acknowledged, he would not know whether the D.C. resident actually signed the petition sheet. (July 27 Tr. at 353).

As the testimony revealed, the unbridled level of control and discretion that the non-resident "assistants" exercised over the petition circulation process gave them an air of authority and placed them in a position that allowed them to manipulate the process and circumvent the laws of the District of Columbia.

Individual Witnesses

The Board heard testimony from eight circulators, each of whom initially asserted their Fifth Amendment right not to testify regarding the signature gathering process, and who later testified under a grant of immunity. These individuals were Danielle Campbell, Tenisha Colbert, Melissa Darnell, Bobbie Diggs, Evelyn Gerst, Margol Inabinet, Antoine Jeffries, and Andre Rempson. Six of these individuals testified that, on the instruction and/or knowledge of individuals associated with the petition circulation companies, they completed the circulator's affidavit of certification for petition sheets

which had been circulated by other individuals while out of their presence.[28] Of these six circulators, the five who personally circulated petition sheets further testified that they could not distinguish the petition sheets which they had actually circulated from those which they had not. [29]

The Proponents submitted a total of 55 petition sheets attributed to **Ms. Danielle Campbell** which were rejected by the Board. Ms. Campbell testified that, in addition to circulating petitions herself, she signed affidavits circulated by at least three non-residents who circulated petition sheets outside of her presence. (July 26, Tr. at 329). She identified two of them as Curtis Fuentes of San Diego, California and Ray Kingsford of Oakland, California.[30] Ms. Campbell testified that she was told that she needed to sign the affidavits for these individuals so that they could get credit for their signatures collected to cover their lodging expenses at the Red Roof Inn. (July 26, Tr. at 288-89).[31] She further testified that she was informed that she would be paid extra money for signing the circulator's affidavits for petition sheets that she did not circulate.

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[28] These individuals were Danielle Campbell, Tenisha Colbert, Melissa Darnell, Evelyn Gerst, Antoine Jeffries, and Andre Rempson. They all worked under the auspices of Stars and Stripes.

Although Tenisha Colbert testified that she and her friend Amber, who she stated was a D.C. resident with Maryland identification, went out together and stayed within fifteen (15) feet of each other (July 28 Tr. at 21). She further testified that upon returning to the Red Roof Inn to turn in their sheets, Amber was not allowed to sign because she did not have proper identification. Ms. Colbert then suggested to Mike Jones that she could sign for Amber because "everybody else was doing it." (Id. at 29). Therefore, Ms. Colbert became a witness for Amber after the fact. Even though Ms. Colbert testified that they continued to circulate together, there was no evidence that she was informed of the responsibilities associated with being a witness. Unlike Ms. Inabinet and Mr. Diggs who the Board found had essentially complied with the "in the presence" requirement, there was no evidence that Ms. Colbert was ever aware of the circumstances surrounding the collection of Amber's signatures.

[29] Evelyn Gerst did not circulate any petition sheets.

[30] Both of these individuals were affiliates of Ross Williams, a subcontractor of Stars and Stripes, who operated out of the Red Roof Inn.

[31] The evidence indicated that the non-residents were required to meet a quota of signatures in order to have their lodging expenses paid (July 26 Tr. at 288). That quota was variously described as 50 or 100 signatures. (Id. at 336; July 28 Tr. at 321).

Accordingly, although she did not circulate petitions for two days during the Fourth of July weekend, she nevertheless signed petition sheets that were circulated on those particular days and given to her by the non-resident assistants. (July 26, Tr. at 289-90). Ms. Campbell also stated that she and Shemeika Mack completed circulator's affidavits for petition sheets—which they did not circulate—for Curtis and Dwight, who was Ray Kingsford's roommate at the Red Roof Inn. (July 26 Tr. at 284-317).

The Proponents submitted a total of 33 petition sheets attributed to **Ms. Melissa Darnell** which were rejected by the Board. Ms. Darnell testified that, in addition to personally circulating petitions, she signed affidavits on petition sheets circulated by non-residents named Therence James, Sr., whom she knew as "T.J.," and two other persons—her brother and an individual whom she knew only as "Bryan." (July 26 Tr. at 370).[32] Ms. Darnell further testified that when she questioned this practice, she was told by T.J. that he was a Director of Coordinators. (July 26 Tr. at 355). This representation obviously created an appearance of authority designed to induce her signature. Ms. Darnell also stated that another circulator, Antoinette Pitter, completed circulator's affidavits for petition sheets which she did not circulate. (July 28, Tr. at 224-247).

The Proponents submitted a total of 37 petition sheets attributed to **Ms. Evelyn Gerst** which were rejected by the Board. Ms. Gerst testified that she never circulated any petition sheets, but rather completed circulator's affidavits on blank petition sheets at the request of Daryl Bonner, a non-resident circulator who was staying at the Red Roof Inn where Ms. Gerst is employed as a housekeeper. (July 26, Tr. at 208-09). Ms. Gerst testified that Mr. Bonner approached her about signing affidavits while she was cleaning

[32] T.J. operated out of the Red Roof Inn.

his room. Ms. Gerst further testified that Mr. Bonner paid her approximately $140 for completing the affidavits on the petition sheets which he circulated. (July 26, Tr. at 218).

The Proponents submitted a total of 36 petition sheets attributed to **Mr. Antoine Jeffries** which were rejected by the Board. Mr. Jeffries testified that, in addition to personally circulating approximately five (5) petition sheets and gathering roughly ninety-eight signatures, he signed affidavits on petition sheets circulated by non-residents, including the women identified in testimony given by Tenisha Colbert as "Rita" and "Dana." (July 28 Tr. at 61-62). Specifically, Mr. Jeffries testified that on the evenings of July 4, and July 5 or 6, 2004, he completed circulator's affidavits on the petition sheets circulated by Rita and Dana at the Red Roof Inn.

The Proponents submitted a total of 52 petition sheets attributed to **Mr. Andre Rempson** which were rejected by the Board. Mr. Rempson testified that, in addition to personally circulating petitions, he signed affidavits on petition sheets circulated by Mike Jones and other non-residents. (July 26 Tr. at 406-08). Mr. Rempson also testified that, on those occasions when he and Mr. Jones went out together, he was not with Mr. Jones as Mr. Jones was procuring signatures for his petition sheets. Mr. Rempson completed the circulator's affidavits on Mr. Jones' petition sheets nonetheless. (July 26 Tr. at 405).

The testimony of these individuals remained unrebutted by the Proponents. The Proponents had ample opportunity to cross-examine each of these witnesses and/or to otherwise provide contrary evidence. However, in those instances where the Proponents chose to cross-examine the witnesses, nothing was elicited from cross-examination testimony that challenged the credibility of the witnesses' direct testimony. Nor was any other evidence proffered by the Proponents in this regard. Accordingly, the testimony of these individuals was credited by the Board.

Additional Circulators Implicated by Unrebutted Testimony

As noted above, two of the circulators whose petition sheets were rejected—Danielle Campbell and Melissa Darnell—described not only their own activities in connection with the petition circulation process, but also the conduct of other circulators who engaged in similar proscribed conduct. These individuals are **Shamika Mack** and **Antoinette Pitter**. The Proponents submitted 27 petition sheets attributed to Ms. Mack, and 17 petition sheets attributed to Ms. Pitter.[33]

Additionally, the Board heard testimony from John Capozzi in reference to purported circulator **Angelo Farrell**. The Proponents submitted 16 sheets attributed to Mr. Farrell. Mr. Capozzi filed a complaint with the Board on July 9, 2004, wherein he indicated that he observed individuals outside of the Safeway supermarket on Kentucky Avenue in Southeast D.C. who were admittedly non-residents circulating petition sheets. (Board Ex. 3) During the hearing, Mr. Capozzi testified that Mr. Farrell, an individual with whom he had previous contact, conveyed to him that he was asked to witness the signatures collected by these non-resident circulators. (July 24 Tr. at 224-25). Mr. Capozzi further testified that Mr. Farrell, a security guard at the Safeway, told him that he could not actually witness the non-residents' signatures because he was required to remain inside the Safeway. (Id. at 224). Finally, Mr. Capozzi testified that Mr. Farrell gave him a copy of the Declaration of Circulator that the non-resident circulators asked him to sign. (Board Exhibit 4; July 24 Tr. at 225-26). This declaration indicates that the signer circulated and witnessed a particular petition sheet.

[33] In its August 3, 2004 oral ruling, the Board erroneously included Scott Smith in this category. Based on a review of the transcript, the Board is correcting the error herein.

The Proponents did not in any way contradict the sworn testimony proffered by Ms. Campbell, Ms. Darnell and Mr. Capozzi.[34] Accordingly, because the Board determined that the testimony of these witnesses was credible,[35] the Board rejected the petition sheets associated with Mses. Mack and Pitter, and Mr. Farrell.

Circulators Who Exercised Their Fifth Amendment Right

Two additional circulators who came before the Board, Tanica Hunter and Gwendolyn D. Squirewell, exercised their Fifth Amendment right against self-incrimination in connection with any testimony regarding the affidavits that they signed concerning the circulation process.[36] Therefore, in the face of challenges to the veracity of these circulators' affidavits, no testimony was provided to the Board to validate the affidavits and the circumstances surrounding the gathering of signatures attributed to them. In the absence of such testimony, and in view of their assertion of their Fifth Amendment rights regarding their conduct, the Board rejected their circulator's affidavits and, consequently, the petition sheets attributed to them. See *Williams v. District of Columbia Board of Elections and Ethics*, 804 A.2d 316 (D.C. App. 2002).

In the instant case, the Board was faced squarely with the issue of whether the affiants of the petition sheets had in fact circulated the petitions which they had signed as circulators. The circumstances surrounding the collection of the signatures were placed

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[34] The Proponents' attempt to discredit Mr. Capozzi's testimony based on the timing of his complaint was not persuasive. (July 24 Tr. at 236-55).

[35] While hearsay evidence is inadmissible in a court proceeding unless the evidence falls under an enumerated exception, the courts have found that hearsay evidence is admissible in administrative proceedings. *Lim v. District of Columbia Taxicab Comm'n*, 564 A.2d 720, 724 (D.C. 1989). (Hearsay evidence is admissible in administrative proceedings unless it is irrelevant, immaterial, or unduly repetitious); *Simmons v. Police & Firefighters' Retirement & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984) (citing *Johnson v. United States*, 628 F.2d 187, 190-91 (1980)) (If hearsay evidence is found to be reliable and credible, it may constitute substantial evidence).

[36] In its August 3, 2004 oral ruling, the Board erroneously included Janzell Coley within this category. Based on a review of the transcript, the Board is correcting the error herein.

in doubt as a result of subpoenaed circulators who signed petition sheets that they did not circulate; who were unable to determine which petition sheets they actually circulated; and who implicated other circulators that engaged in similar conduct. These actions contradicted the information set out in the affidavits. "If a party or witness whose affidavit is submitted is available, and the matters contained in the affidavit are relevant to the case, the party or witness should be required to appear and testify under oath or affirmation. The opportunity to cross-examine is an element of fundamental fairness and hence the requirement of all adjudicatory hearings." BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.7 (3d ed. 1991); D.C. CODE § 2-509(b). Testimony that is not subject to cross-examination generally cannot be considered reliable, probative or substantial evidence, *Selk v. District of Columbia Department of Employment Services*, 497 A2d 1056 (1985). Accordingly, the Board rejected the petition sheets of the two individuals who exercised their Fifth Amendment right.

Alleged Forgery of Circulator's Affidavits

The Board heard testimony on the record from two challenged circulators who indicated that their names were forged on petition sheets attributed to them and submitted by the Proponents. These individuals are Stephen Atkins and Forrest L. Jackson. The Proponents submitted twenty petition sheets attributed to Mr. Atkins, and forty sheets attributed to Mr. Jackson. Mr. Atkins testified that, of the twenty petition sheets attributed to him, he circulated only two of them—petition sheets 1497 and 2256. (July 23, Tr. 115-16). The remaining eighteen sheets were rejected by the Board. Similarly,

Mr. Jackson testified that he did not circulate any of the forty petition sheets attributed to him; thus, all forty sheets were rejected. (July 23, Tr. 129-38).[37]

Alleged Forgery of Petition Sheets

Robert Price testified that his signature was forged on a petition sheet for Initiative Measure No. 68. According to Mr. Price, he was first alerted to the fact that his name was on a petition sheet by a news reporter. (July 23 Tr. at 201). Mr. Price testified that he was approached by circulators at the Giant supermarket on the corner of Seventh and O Street, where he told them that he was against the measure. (Id. at 202). Mr. Price was able to confirm that his signature was forged upon reviewing the petition sheet with his purported signature appended. (Id. at 202). The petition sheet listed Andre Rempson as the circulator. When asked to identify the circulator that approached him at the Giant Supermarket, he did not indicate that the circulator was confined to a wheelchair as is Mr. Rempson.

As to other instances of alleged forgery, Danielle Campbell testified that she was informed by Curtis Fuentes of a "signing party" in Room 318 of the Red Roof Inn. (July 26 Tr. at 304). At this event, circulators allegedly copied names and addresses from the phone book to petition sheets. (July 26 Tr. at 305). Melissa Darnell testified that Therence James, Sr., a non-resident circulator, told her someone was copying names and addresses from a phone book to petition sheets, while cautioning her not to engage in that conduct. (Id. at 376). Andre Rempson testified that, while at the Red Roof Inn on the

[37] Mr. Jackson testified that, while working at the Capitol Hill Safeway as a courtesy clerk retrieving shopping carts, a gentleman approached him about signing the petition and requested that he show identification in order to sign. Mr. Jackson gave him his non-driver's identification and voter registration card. Mr. Jackson was then distracted by the store loud speaker, over which he was being called back into the store. After responding to the call, Mr. Jackson returned to the parking lot for his identification but the gentleman was gone. His identification was left at the customer service counter the next day. Although there was conflicting evidence regarding the particular document that Mr. Jackson signed at the Capitol Hill Safeway, Mr. Jackson was unequivocal—and his testimony was unrebutted—that he did not sign the forty (40) petition sheets as a circulator. (July 23 Tr. at 129-155).

last day of the petition drive, Mike Jones instructed him to copy names and addresses out of the phone book. (Id. at 409-12). Mr. Rempson further testified that he felt guilty for copying two names and addresses out of the phone book, but that he had felt compelled to do so after Mr. Jones remarked that *he* needed the names in order to get paid, and that Mr. Rempson could not get paid until Mr. Jones did. (Id. at 412-13).

In response to the "signing party" allegations, Mr. Williams testified that he learned of the allegations at the end of the campaign and queried the people in his group. He stated his belief that his people would have told him if the allegations were true. (July 27 Tr. at 171-73). However, although there was insufficient evidence to determine how widespread the phone-book-signing conduct might have been, the Board determined—especially in view of Mr. Rempson's sworn testimony as to his own actions and the genesis of those actions—that at least some of this conduct occurred.

False Advertising

The challengers alleged that the Proponents misrepresented Initiative Measure No. 68 in an effort to obtain signatures. The evidence presented focused on a bright yellow T-shirt with the message "Sign Up! For Jobs, Schools, and Healthcare" (Board Ex. 12); the sales pitch promoted during the official training sessions conducted by Ross Williams; the nature of the communications actually made to potential signers by the circulators; and brochures that were used to describe and promote the Capital Horizon Entertainment Complex project proposed by the Proponents. (Challengers' Exs. 1 and 7).

Based on the evidence presented, the Board finds that the challenged T-shirt, sales pitch and associated communications made to potential signers that revenue from the initiative would be used for schools and health care, as well as other disparate communications, constituted misrepresentations of Initiative Measure No. 68, and were

therefore in violation of the attestation in the circulator's affidavit that prohibits the making of false statements regarding the Initiative. The Board further finds that discussion between the circulator and signer regarding ancillary benefits of the initiative—such as those outlined in the promotional brochures—is protected "core political speech" and fell within acceptable bounds, and therefore rejects that aspect of the challenge.

T-Shirts and Associated Sales Pitch

Background

Proponent Pedro Alfonso testified that Rob Newell, the primary investor in the project, procured the challenged T-shirts that were distributed and worn by individuals associated with the petition drive. (July 28 Tr. at 136). It is unclear how many T-shirts were procured and distributed, although Mr. Towe testified that there were possibly 100 T-shirts and that they were given to his managers for distribution. (July 26 Tr. at 38-39). Ms. Campbell testified that she received one of the T-shirts from Ray Kingsford. (Id. at 290). She further testified that, although she never wore the shirt, she saw a lot of people in the shirts during the first two days of the petition drive. (Id. at 292). Ms. Wilcher testified that upon seeing circulators wearing the T-shirts, she knew that circulators could not wear them, and she instructed Clint Hyatt, an assistant to Carl Towe, that they be collected. (July 27 Tr. at 501-02) Mr. Towe further testified that "the T-shirts were not matching what was [] on the petition, and that we didn't want to have any false representation or misrepresentation of the petition, and that we need—aren't to mislead anybody in any way, what they w[ere] signing, we needed to get those T-shirts off of the streets immediately." (July 26 Tr. at 40).

The evidence revealed that the T-shirts were collected on or about the second day of the petition drive. Tenisha Colbert testified that she wore the T-shirt on the first day that it was given to her, but that she gave it back to Mike Jones as requested after he told her that the T-shirt bore false advertisement. (July 28 Tr. at 24). Danielle Campbell testified that she saw a lot of people wearing the T-shirts during the first two days of the drive, but that there was no one wearing the T-shirts after that. (July 26 Tr. at 290-92).

Based on the testimony presented, the Board was also apprised of the fact that, during circulator training sessions, circulators were coached to utilize certain "sales pitches" in an attempt to garner the maximum number of signatures. The testimony revealed that Ross Williams trained the majority of potential circulators from the Red Roof Inn operation. Mr. Williams testified that he conducted training sessions four times per day for five days, starting on June 30. He estimated that he probably trained between 105 and 110 people. (July 27 Tr. at 64).

During his training sessions, Mr. Williams instructed circulators to rely on education and health care benefits of the Initiative in encouraging potential signers to sign the petition.[38] He testified that he encouraged his trainees to say that the Initiative "was about health care;" "that health care would be part of the package;" "that there would be monies isolated out of the process that would go towards education."[39] (July 27 Tr. at 25, 28, 26). According to Mr. Williams, the source of his information regarding the initiative came from brochures and three poster boards for which Clint Hyatt was

[38] Mr. Williams also urged reliance on the creation of jobs. Because it is safe to assume that a project of the magnitude contemplated by the Capitol Horizon project would generate jobs, the Board believes that such a representation—unlike that regarding education and healthcare—would fall within the ambit of acceptable political speech.

[39] Although denied by Mr. Williams, Ms. Martha Ward—who attended one of the Williams training sessions—testified that, in addition to health care and education, Mr. Williams also instructed his trainees to talk about prescriptions and children. (July 22 Tr. at 42, 50, 52).

responsible, and which simply stated jobs, education, and healthcare, respectively. (July 27 Tr. at 25-26).

Mr. Williams testified that the substance of his training remained constant during the entire period that he trained the circulators. (July 27 Tr. at 167). Although he was told by Clint Hyatt or Carl Towe to collect the T-shirts which bore the message regarding jobs, education and healthcare, he was not aware of why they were being collected. (July 27 Tr. at 160, 165). Indeed, he testified that "[i]t really didn't matter to [him] [why the T-shirts were being pulled back] because [he] had enough to do, and [he] didn't need more information than [he] needed to know." (July 27 Tr. at 165). Mr. Williams testified that, after the T-shirts were collected, he continued to promote the same sales pitch as before concerning the benefits that Initiative Measure No. 68 would bring to education and healthcare. (Id. at 167). He noted that "they knew what [he] was espousing in the presentations [and] [n]o one asked [him] to change that." (Id. at 166).

Analysis

The Proponents conceded in closing arguments that the language emblazoned on the bright yellow T-shirts, "Sign Up! For Jobs, Education & Healthcare" was a misrepresentation.[40] Notwithstanding this concession, the Proponents maintained that Mr. Williams' instructions to circulators to orally communicate the same sentiment to potential signers as an inducement to sign the petition did not suffer from the same infirmity. According to the Proponents, this is so because the text of the initiative

[40] MR. RAY: Madam Chairman, I think the yellow tee shirt was a mistake.
CHAIRMAN LEWIS: Okay. It may be a mistake, but my question is whether it is a misrepresentation?
MR. RAY: Madam Chairman, I would say it's also a misrepresentation, and I think that's why it was pulled as soon as it was learned about.
CHAIRMAN LEWIS: So you would acknowledge that as written and as advertised on that tee shirt, that constitutes a misrepresentation?
MR. RAY: Yes.
(August 2 Tr. at 230).

includes a *nonbinding* recommendation to the City Council to utilize some of the revenue from the VLT operation for education and prescription drugs for seniors. (Proponents' Ex. 1). The Proponents' position is without merit.

The Board finds that there is no credible distinction that can be made between the language on the T-shirt—which the Proponents concede, and the Board agrees, was a misrepresentation—and the oral communications. Both were designed to induce potential signers to sign the petition based on the representation that the initiative would produce benefits for schools and healthcare. But Initiative Measure No. 68 did not—and could not—make any such promise or guarantee, and the Proponents' actions confirm that they were well aware of this fact.

When the Proponents first submitted the proposed initiative measure to the Board, it was entitled the "Jobs, Education, and Healthcare Lottery Expansion Initiative of 2004," and was submitted by the "Citizens for Jobs, Education and Healthcare Initiative Committee." After concerns were raised regarding whether the proposed measure could pass even the first hurdle of being a proper subject for an initiative in view of language in the text that appeared to allocate revenues and to create designated funds for public schools and prescriptions for senior citizens in violation of the applicable law, the Proponents submitted a revised initiative that removed the offending language. The Proponents also changed the title of the proposed measure, deleting the words, "Jobs, Education, and Healthcare," and made a similar change in the name of the Committee.

These changes were not mere happenstance. It was abundantly clear that, although the Proponents were free, under the applicable law, to *recommend* to the Council of the District of Columbia that revenues from the video lottery terminals be used to support schools and prescription drugs for seniors, they could not, consistent with

the law, *direct* that the funds be so used. *Hessey v. District of Columbia Board of Elections and Ethics, et al.*, 601 A.2d 3 (D.C. App. 1991). Simply stated, there could be no guarantee by the Proponents that the Council, in whose discretion the allocation of revenues and the establishment of funds lie, would allocate *any* monies from video lottery terminal revenues to education or healthcare. And, the proposed measure contained no such promise or guarantee. Thus, although the initiative, if passed, would have included a strong *recommendation* that the Council allocate funds from the video lottery terminals to education and healthcare, it was not within the power of the Proponents to actually produce this result.

Nonetheless, on the first day of the petition drive—over three weeks after the title of the initiative had been changed and the text revised—an undisclosed number of circulators appeared wearing T-shirts bearing the message "Sign Up! For Jobs, Schools, & Healthcare." There was, of course, not even a hint in this message that the schools and healthcare that potential signers were being encouraged to sign up for were mere recommendations by the Proponents and not established facts. That promotional T-shirts bearing such a message could find their way to the streets of the District of Columbia notwithstanding the earlier rejection of this precise notion is nothing short of remarkable, and at best, reflects a reckless disregard for the applicable legal requirements by the parties involved. It is therefore not surprising that, upon seeing circulators wearing the T-shirts, Ms. Wilcher gave instructions that they could not be worn and should be collected. Nor is it surprising that, in closing argument, counsel for the Proponents conceded that this message misrepresented the Initiative.[41]

[41] In closing argument, counsel for the Proponents referred to this conceded misrepresentation as a "mistake." If so, it is an inexcusable one.

Mr. Williams' instructions to the circulators were no different. Like the message on the T-shirt, the oral inducement to sign the Petition was grounded in a representation that the Initiative *would* -- not *might* – benefit public schools and healthcare for senior citizens.[42] Like the message on the T-shirt, Mr. Williams' instruction contained not even a hint that the benefit for education and healthcare that was being touted was merely a recommendation that could be rejected in its entirety, rather than a guaranteed result or by-product of the gambling Initiative.[43] Moreover, Mr. Williams' instructions in this regard continued unabated even after the T-shirts were recalled. The absence of any apparent coordination between the Committee and Mr. Williams regarding the basis for the recall of the T-shirts, together with Mr. Williams' apparent lack of concern for matters that bear on his responsibilities as a trainer is again reflective of reckless and inexcusable conduct.

Based on the evidence presented the Board finds that both the message on the T-shirt and Mr. Williams' instructions to the circulators misrepresented Initiative Measure No. 68.

Communication of Misinformation

The evidence reveals that, not only were the circulators instructed to provide information in a manner that constituted a misrepresentation of the Initiative, but they followed those instructions. For example, Danielle Campbell testified that she heard

[42] On one occasion during his testimony, Mr. Williams characterized his instructions regarding the educational and health care benefits of the initiative as an "opportunity to help" in these areas. (July 27 Tr. at 253). In view of the substantial evidence to the contrary—specifically, Mr. Williams' unequivocal earlier testimony; the testimony of Martha Ward; testimonial and other evidence regarding actual conversations between circulators and potential signers—the Board does not credit this characterization of Mr. Williams' training instructions.

[43] It is not surprising that Mr. Williams' instructions did not reflect the difference between a guarantee and a recommendation because he testified that his knowledge regarding the substance of the Initiative did not come from reading it, but from the poster boards displaying the jobs, education and healthcare message from Clint Hyatt upon which he relied.

several circulators tell potential signers that Initiative Measure No. 68 would lower the prices of medicine for senior citizens. (July 26 Tr. at 319-20). Similarly, in a written complaint received by the Board from Dwayne L. Smith, he stated:

> "She [the circulator] asked me to sign the petition for health care in the District. I read the petition twice and did not find any reference to health care but saw references to a video lottery terminal initiative."
> (Board Ex. 26).

The evidence also reveals that circulators also misrepresented the Initiative in other ways. In written complaints received by the Board, the complainants stated:

> Allison Hudgins: "I was approached by an older Caucasian male who asked me if I was a D.C. resident. I responded "yes" and he then asked for my signature on a petition that would keep slots out of the District."
>
> Antonia K. Fajanelli: "I asked whether the petition was for the slot machines. The solicitor said "no, it's just for an entertainment center for movies etc." Based on this misrepresentation, I signed the petition."
>
> Bernice K. McIntyre: "Please remove my name and signature from any list in support of introducing gambling into the District of Columbia as that name and signature was obtained through false misrepresentation. The young man indicated he was a D.C. resident and that the petition was for bringing a baseball stadium to the District."
> Id.

Finally, the Board heard the testimony of signatory Sheryl Sturges, who testified that she was told by a circulator that the firefighters were in support of Initiative Measure No. 68, and that it would bring revenue to the Fire Department. She signed the Petition based on this representation, and probably would not have done so had she known that the representation was not true. (July 26 Tr. at 223-224).

Brochures

The challengers also claimed that brochures that went beyond the specifics of Initiative Measure No. 68 to describe the Capitol Horizon entertainment project and other benefits that the proponents intended to offer constituted a misrepresentation of the Initiative. The brochures displayed the development project, and touted 1500 new permanent jobs, opportunities for D.C. entrepreneurs, and a charitable trust to fund a literacy program for D.C. Public School children. (Challengers' Exs. 1 and 7).

The Board found that the Proponents are entitled to advertise the entirety of the project that they intend to offer in the District of Columbia. As the Supreme Court has noted:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

Meyer v. Grant, 486 U.S. 414, 421-22 (1988).

Moreover, the Board found that, although the language in the brochures may have been carefully crafted to favorably highlight presumably ancillary benefits of the initiative, if passed, the Board nevertheless agrees with the Proponent that the brochures, which speak to what the Initiative may "help create" do not state in any way that Initiative Measure No. 68 guarantees or provides for a hotel, multiplex theater, restaurants or charitable trust. The Board, consistent with the Court decision in *Meyer*, concluded that the speech of the circulator to citizens on the street which either accurately

explains the guaranteed provisions or benefits of the initiative in an attempt to persuade a voter to sign, or speculates what ancillary benefits may result from the initiative is protected speech for First Amendment purposes. It is permissible to talk about how the initiative might affect them personally, how it might affect their local area, their group or local economy. What a circulator cannot do is misrepresent as a guaranteed provision or benefit of an initiative one which is not guaranteed in the initiative. Accordingly, the Board rejects the challenge to the brochures.

Lack of Proper Oversight

There was a general laxity and lack of discipline in the conduct of the petition drive at the Red Roof Inn operation that came from the top, manifested itself in several ways, and created an environment that was ripe for the types of improprieties and irregularities that occurred. First, Mr. Towe viewed the circulator's affidavit as a "legal technicality" on the bottom of a declaration. (July 26 Tr. at 73-74). This is particularly troubling not only because Mr. Towe was the principal of Stars and Stripes, but also because he testified that he apprised his managers of the laws of the District of Columbia. (Id. at 91-92). Such a lackadaisical attitude about a critical component of the circulation process—coming from the top—may help to explain the genesis of the problems that resulted.

Second managers testified that they did not personally review the laws of the District of Columbia pertaining to initiative petitions or the substance of Initiative Measure No. 68 itself. Most significantly, Ross Williams, who was responsible for most of the training at the Red Roof Inn, fell into this category. (July 27 Tr. at 18). Notwithstanding this fact, he testified that when he visited the Office of the Board of

Elections and Ethics, he inquired about the process for getting residents registered to vote, but asked nothing about the initiative petition circulation process. (Id. at 20). He further testified that his sales pitch regarding education and healthcare was not based on a review of the Initiative, but on the posters bearing that message, which he attributed to Clint Hyatt. (Id. at 32-33). As for the brochures, although he distributed them in his training sessions, he had no knowledge of some of its contents, such as the literacy program. (Id. at 35). And, as noted before, Mr. Williams did not concern himself with the details of why the T-shirts were being retracted; he was told to collect them and he simply did what he was told. (July 27 Tr. at 160).

Meanwhile, Clint Hyatt, the assistant to Carl Towe whom the Proponents initially proffered in response to a subpoena by the Board as the person most familiar with the training of circulators, testified that his knowledge of the election laws of the District of Columbia was about a 3 or 4 on a scale of 1 to 10; that he did not have sufficient knowledge to determine the accuracy of training instructions given; and that his experience in petition signature gathering was a mere two weeks.[44]

The recruitment process also suffered from certain serious weaknesses. Although a significant part of the recruitment effort appeared to be focused on ads in the newspaper, the recruitment practice also encouraged non-resident assistants to engage in the seemingly unsupervised recruitment of individuals from off the streets. The lack of supervision of the process provided fertile ground for the irregularities identified in the recruitment of Evelyn Gerst, Angelo Farrell and Forrest Jackson. Further, this unstructured and undisciplined recruitment practice, for which the governing sales pitch

[44] Mr. Hyatt testified that he simply observed Mr. Williams conducting training sessions and conducted none himself. (July 23 Tr. at 276, 278, 286). Mr. Williams testified, however, that Mr. Hyatt conducted about three training sessions. (July 27 Tr. at 62-63).

appeared to be the opportunity to make quick money, undoubtedly contributed not only to the imbalance of power in the field between the D.C. resident circulators and the non-resident "assistants", but also to the problem which the Board faced in trying to locate circulators for purposes of serving subpoenas.[45] Moreover, this recruitment practice, which reduced the important responsibility of a D.C. resident circulator to that of simply getting paid for signing one's name and providing proof of D.C. residency, makes a mockery of the safeguards that are designed to help lend credence and integrity to the initiative petition process.

Further, it appears that even when there were allegations that the law was being violated as a result of the role being played by the non-resident assistants, the response was not sufficiently coordinated. Although Clint Hyatt prepared a memorandum for distribution that was addressed to all circulators and which reinforced the fact that circulators must be D.C. residents,[46] its distribution remains somewhat of a mystery. Mr. Hyatt testified that he had no idea who copied or distributed the memo. (July 23 Tr. at 428-29). He stated that he learned that it had been distributed from Mr. Towe. (Id. at 429). However, Mr. Towe testified that he did not know whether the memo was distributed. (July 26 Tr. at 154). This lack of coordination, recall and/or knowledge on an issue of such significance under D.C. law and so fundamental to the safeguards inherent in the process underscores the apparent indifference to the legal requirements of the petition circulation process.

[45] Of the fifty-three (53) circulators that the Board was unable to subpoena, nine (9) of those individuals listed addresses that were either non-existent or corresponded to premises that were abandoned.

[46] The memo actually misstated the law in stating that non-residents could play no role in the circulation process whatsoever. Challenger Exhibit 6.

Finally, the Stars and Stripes operation was characterized by a very splintered, uncoordinated approach to the management of the petition drive that contributed to the overall lack of oversight and provided ample opportunity for wrongdoing to flourish. Mr. Towe testified that he viewed his managers as "independent contractors"; therefore, he "[could not] intermingle with their people." (July 26 Tr. at 86-87). Further, while he acknowledged that training was conducted by Ross Williams, he was not familiar with what other managers did with "the circulators they hired off of the streets." (July 26 Tr. at 17). Mr. Towe also testified that he was too busy to do a variety of things, including participating in circulator training, going into the field, and monitoring circulator activities in the field. (July 26 Tr. at 63, 91) Meanwhile, the managers acknowledged that they also did not go into the field. (July 27 Tr. at 263, 299). Thus, there appeared to be major gaps in knowledge among those in charge of the operation as to important details of the operation. One was left with the distinct impression that "no one was minding the store."

This environment provided fertile ground for abuses of the process and other wrongdoing to occur. This is especially so given the time-pressured and highly charged context in which this petition drive was taking place – described by Mr. Towe as "abnormal." (July 26 Tr. at 71).[47] All of these factors undoubtedly contributed to the problems that arose.

V. THE PROPONENTS' RESPONSE

In response to the evidence of irregularities and improprieties at the Red Roof Inn, there was a deafening silence from the Proponents. Although the Proponents called a

[47] Mr. Williams also testified that in his approximately 20 years of experience in the business, he had never been faced with the challenge of collecting so many signatures in such a short time frame. He testified that normally, such a collection effort would consume at least thirty days. (July 27 Tr. at 18, 203).

total of five witnesses who were circulators, all of them – without exception – were associated with the 1501 M Street portion of the petition drive operation. All of them – without exception – testified that they had no contact with, or knowledge of, the activities associated with the Red Roof Inn. In essence, the Proponents simply remained mum – choosing not to even cross-examine some of the adverse witnesses – in the face of the indisputably troubling evidence of wrongdoing in the operation at the Red Roof Inn.

The 1501 M Street operation provided a striking contrast to the operation at the Red Roof Inn. The testimony suggested that the circulators there were predominantly D.C. residents who went out to gather signatures on their own. Accordingly, they did not present the issues that arose with the use of non-resident assistants. The 1501 M Street circulators were also more highly paid; appeared to be better trained; and also appeared to include individuals with a higher level of experience in the petition circulation process. By way of example, 1501 M Street circulator Norman Neverson, who has approximately thirty years of involvement with the petition process, testified that he counseled the 65 to 75 circulators that he personally brought in to participate in the petition drive so that they would understand how to properly circulate the petition. (July 25 Tr. at 70, 95). Mr. Neverson also testified that Rob Grocholski of PCI, who conducted the 1501 M Street circulator orientation, went into detail about what circulators should and should not do as far as the circulation process was concerned. (July 25 Tr. at 72-73). Accordingly, the presentation of testimony from circulators from the 1501 M Street operation, who were not in any way connected with the Red Roof Inn, shed no light whatsoever on the problems on which the damaging testimony focused.

Further, the Stars and Stripes and other hotel managers subpoenaed by the Board provided no useful information to alleviate the concerns. Indeed, they appeared

uninformed about what was going on in the field because they were removed from the day to day operations of the circulators. They, therefore, did not provide any testimony that contradicted the substance of the evidence regarding improprieties.

In short, there was considerable evidence presented of improprieties at the Red Roof Inn to which the Proponents provided no credible response. Their repeated refrain that the improprieties were isolated instances and the product of "a few bad apples" was simply insufficient.

VI. CONCLUSION

The testimonial and other evidence revealed substantial irregularities in the petition circulation process at the Red Roof Inn, the cumulative effect of which was to extend the impact of the improprieties beyond the individual examples of wrongdoing to a general pollution of the process that casts doubt on the validity of the signatures gathered during the petition drive. The evidence of circulator affidavits being signed by individuals who did not circulate the petition sheets, forgeries of circulator affidavits and petition sheets, and false advertising of the Initiative placed the veracity of the affidavits in doubt. The individual instances of wrongdoing were significant by themselves. These problems, however, were compounded by the false advertising of the Initiative to which potential signers were exposed and the taint to the process caused by the attendant far-reaching implications of that public exposure.

These problems were further compounded by the existence of an operation at the Red Roof Inn that was managed – from the top – in a manner that created an environment that was fraught with opportunities for abuse of the process, system and laws; an environment that would encourage, on a systemic basis, the the kinds of violations about

which there was testimony. This was confirmed by the fact that individual witnesses who testified about their own violations of law mentioned that others were engaging in similar conduct. And, finally, all of this occurred in a highly charged context with more than ample incentive (*e.g.*, time constraints, meeting of quotas, quick money, etc.) for individuals to skirt the rules. In short, serious violations of law that cast doubt on the validity of the signatures gathered permeated and polluted the petition drive operation conducted from the Red Roof Inn.

Notwithstanding the evidence of improprieties and irregularities with far-reaching implications, and the Board's authority, pursuant to D.C. Official Code § 1-1001.16 and 3 DCMR § 1006.3, to reject an entire initiative petition if the qualifying factors under the law have not been verified, the Board was mindful of its corresponding responsibility to protect the First Amendment rights of D.C. voters in the initiative context. "Indeed, 'petition circulation ... is *core political speech*, because it involves *interactive communication concerning political change*.' *ACLU*, 525 U.S. at 186 (quoting *Meyer*, 486 U.S. at 422). First Amendment protection for such activity is, therefore, *at its zenith*. 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 425 (internal quotations omitted)." *Chandler v. City of Aruada*, 292 F.3d 1236, 1241 (10th Cir. 2002).

With this balancing objective in mind, the Board concluded that the clear evidence of wrongdoing was most concentrated and identifiable in the Stars and Stripes operation, under the leadership of Carl Towe, and his subcontractor, Ross Williams. Accordingly, in addition to those witnesses who testified to individual acts of wrongdoing, the Board rejected all petition sheets attributed to individuals who were clearly associated with Stars and Stripes.

The Board attempted to identify the Stars and Stripes circulators from the documentation provided by the Proponents. The Proponents indicated by way of a chart produced at closing argument that they employed three hundred and thirty-two (332) D.C. resident circulators. In the documentation provided to the Board, many of these circulators were not identified with any organization. Although the testimony suggested that the overwhelming majority of the circulators from the Red Roof Inn operation were affiliated with Stars and Stripes, the Board could identify only sixty-seven (67) circulators affiliated with Stars and Stripes from the records provided. Therefore, the Board, in balancing the interests of the franchise with its duty to ensure the integrity of the process, rejected those sixty-seven (67) circulators where there was clear evidence of Stars and Stripes affiliation.

ORDER

Based on the findings of fact and conclusions of law contained in the Board's Memorandum Opinion, it is hereby **ORDERED** that the petition sheets identified as rejected or conceded in the Board's Memorandum Opinion and all petition sheets attributed to individuals associated with the Stars and Stripes operation are hereby rejected.

August 13, 2004

Wilma A. Lewis
Chairman, Board of Elections and Ethics

Dr. Lenora Cole
Member, Board of Elections and Ethics

Charles R. Lowry, Jr.
Member, Board of Elections and Ethics

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing order was hand-delivered this 13th day of August, 2004 to:

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