

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOSE SANDOVAL, ROY L. ELLIS, JORGE GALINDO, NIKKO JENKINS, JOHN L. LOTTER, RAYMOND MATA, MARCO E. TORRES, and ERIC F. VELA,

Plaintiffs,

v.

JOHN PETER RICKETTS, Governor of the State of Nebraska; DON STENBERG, Nebraska State Treasurer; JUDY GLASSBURNER; AIMEE MELTON; BOB EVNEN; DOUG PETERSON, Attorney General of the State of Nebraska; NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES; and SCOTT R. FRAKES, Director of the Nebraska Department of Correctional Services,

Defendants,

and

ARTHUR L. GALES, JEFFREY HESSLER, and CAREY DEAN MOORE,

Indispensable Party Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COME NOW the Plaintiffs, and for their causes of action against the Defendants allege:

PARTIES

1. Plaintiff Jose Sandoval is a resident of the State of Nebraska. On January 14, 2005, Sandoval was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of Legislative Bill 268 (“LB268”)—an Act to eliminate the death penalty and change and eliminate provisions relating to sentencing—the penalty for Sandoval’s crimes for which he received the death penalty was changed to life imprisonment.

2. Plaintiff Roy L. Ellis is a resident of the State of Nebraska. On February 6, 2009, Ellis was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Ellis’s crimes for which he received the death penalty was changed to life imprisonment.

3. Plaintiff Jorge Galindo is a resident of the State of Nebraska. On November 10, 2014, Galindo was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Galindo’s crimes for which he received the death penalty was changed to life imprisonment.

4. Plaintiff Nikko Jenkins is a resident of the State of Nebraska. On May 30, 2017, Jenkins was unlawfully sentenced to death by the State of Nebraska. Because of the timing of his death sentence, Count III of this action is inapplicable to Jenkins.

5. Plaintiff John L. Lotter is a resident of the State of Nebraska. On February 21, 1996, Lotter was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Lotter’s crimes for which he received the death penalty was changed to life imprisonment.

6. Plaintiff Raymond Mata is a resident of the State of Nebraska. Following an initial death sentence that had been reversed on appeal, on September 29, 2005, Mata was again sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Mata's crimes for which he received the death penalty was changed to life imprisonment.

7. Plaintiff Marco E. Torres is a resident of the State of Nebraska. On January 29, 2010, Torres was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Torres's crimes for which he received the death penalty was changed to life imprisonment.

8. Plaintiff Eric F. Vela is a resident of the State of Nebraska. On January 12, 2007, Vela was sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Vela's crimes for which he received the death penalty was changed to life imprisonment.

9. Indispensable Party Defendant¹ Arthur L. Gales is a resident of the State of Nebraska. Following an initial death sentence that had been reversed on appeal, on December 9, 2003, Gales was again sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Gales's crimes for which he received the death penalty was changed to life imprisonment.

10. Indispensable Party Defendant Jeffrey Hessler is a resident of the State of Nebraska. On May 16, 2005, Hessler was sentenced to death by the State of Nebraska. On

¹ Each of the Indispensable Party Defendants, Arthur L. Gales, Jeffrey Hessler, and Carey Dean Moore, are joined in this lawsuit pursuant to Neb. Rev. Stat. §§ 25-318 and 25-21,159, which require joinder of parties whose claims or interests would be affected by a declaratory judgment action and require that parties whose interests are aligned with the plaintiffs, but have not consented to being plaintiffs, be named as defendants.

August 30, 2015, the effective date of LB268, the penalty for Hessler's crimes for which he received the death penalty was changed to life imprisonment.

11. Indispensable Party Defendant Carey Dean Moore is a resident of the State of Nebraska. Following an initial death sentence that had been reversed on appeal, on April 21, 1995, Moore was again sentenced to death by the State of Nebraska. On August 30, 2015, the effective date of LB268, the penalty for Moore's crimes for which he received the death penalty was changed to life imprisonment.

12. Defendant John Peter Ricketts is the Governor of Nebraska. He is sued both in his official capacity and personally.

13. Defendant Don Stenberg is Nebraska State Treasurer and was co-chairman of Nebraskans for the Death Penalty, Inc. He is sued both in his official capacity and personally. Prior to its dissolution, Nebraskans for the Death Penalty was a Nebraska Corporation which registered as a Ballot Question Committee in favor of a referendum against LB268. Nebraskans for the Death Penalty is listed as a sponsor of the referendum petition.

14. Defendant Judy Glassburner is the Vice Chairwoman of the Nebraska Republican Party in the 3rd Congressional District, was a Board Member of Nebraskans for the Death Penalty, and is listed as a sponsor of the referendum petition.

15. Defendant Aimee Melton is an Omaha City Councilwoman, was a Board Member of Nebraskans for the Death Penalty, and is listed as a sponsor of the referendum petition.

16. Defendant Bob Evnen is a former Nebraska State Board of Education member, was a Board Member of Nebraskans for the Death Penalty, and is listed as a sponsor of the referendum petition.

17. Defendant Doug Peterson is the Attorney General of Nebraska. He is sued only in his official capacity, and not personally.

18. Defendant Nebraska Department of Correctional Services is a Nebraska state agency with authority over the Nebraska state prisons, including the operation of prison facilities, the treatment of prisoners, and the execution of death-row prisoners.

19. Defendant Scott R. Frakes is the Director of the Nebraska Department of Correctional Services. He is sued only in his official capacity, and not personally.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action and the requested relief sought under Neb. Rev. Stat. §§ 25-21,149, 32-1412(4), and 24-302.

21. Venue is proper in this Court under Neb. Rev. Stat. §§ 25-403.01 and 32-1412(4).

PLAINTIFFS' CLAIMS

22. This is an action for declaratory and injunctive relief. Plaintiffs seek a declaration that Legislative Bill 268 (“LB268”), a law eliminating the death penalty in the State of Nebraska, came into effect on August 30, 2015, and the referendum petition and subsequent referendum against LB268 failed to suspend or overturn LB268. Plaintiffs seek to enjoin Defendants, including the Nebraska Department of Correctional Services, Director Frakes, and Attorney General Peterson, from carrying out any executions or taking steps toward carrying out any executions, including executions of any of the Plaintiffs and Indispensable Parties.

23. The referendum against LB268 and reinstating the death penalty was an unlawful exercise of legislative power by the executive branch in violation of Article II-1 of the Nebraska Constitution, which establishes a constitutional separation of the executive, legislative, and judicial powers to ensure a system of checks and balances against the exercise of power by any

one branch. Governor Ricketts and the executive branch improperly seized and exercised legislative power when, after the Nebraska Legislature overrode Governor Ricketts' veto of LB268, the Governor, his staff, and other members of the Nebraska executive branch proposed, initiated, funded, organized, operated, and controlled the referendum campaign against LB268.

24. Moreover, under Nebraska law, the referendum against LB268 was ineffective. Neb. Rev. Stat. § 32-1405(1) requires that the sponsors of a referendum petition submit a sworn statement naming the persons, corporations, and associations sponsoring the referendum. The statement submitted by the sponsors was legally defective for failing to include a sworn statement, under oath, necessary to attest that the identification of sponsors was truthful and accurate.

25. In the alternative, Plaintiffs seek a declaration that even if the referendum against LB268 is found to be valid, LB268 came into effect on August 30, 2015, and remained in effect until October 16, 2015, when Secretary of State John Gale announced that a sufficient number of verified signatures had been submitted in the referendum petition to suspend LB268. The suspension and subsequent repeal of LB268 does not mean that LB268 never existed, but rather that LB268 was no longer operative going forward. On August 30, 2015, LB268 came into effect. Pursuant to Sections 6 and 9, the death penalty was eliminated as a penalty for any crime in Nebraska, and, pursuant to Section 23 of LB268, that change was made retroactive to all criminal proceedings where the death penalty has been imposed but not carried out as of August 30, 2015. Neither the referendum nor any other legislative act has reinstated the death penalty for any crimes prior to August 30, 2015. Based on this alternative declaration, Plaintiffs seek to enjoin Defendants, including the Nebraska Department of Correctional Services, Director

Frakes, and Attorney General Peterson, from carrying out any executions or taking steps toward carrying out any executions of all persons sentenced to death prior to August 30, 2015.

The Legislature Passes LB268 Eliminating the Death Penalty

26. On May 20, 2015, LB268, a law eliminating the death penalty in the State of Nebraska, passed in the Nebraska Legislature by a vote of 32 in favor to 15 against. Pursuant to Article IV-15 of the Nebraska Constitution, LB268 was presented to Governor Ricketts for signature.²

27. Shortly following the vote passing LB268, Governor Ricketts declared that he would veto LB268.³ Governor Ricketts met with Senators to persuade them to sustain his veto. On information and belief, following the vote by the Nebraska Legislature, Governor Ricketts warned persons involved with LB268 that if his veto was overridden, a referendum would ensue. On information and belief, Governor Ricketts requested, ordered, and encouraged his allies, including other members of the executive branch, to begin preparing a referendum against LB268.

28. On May 26, 2015, Governor Ricketts held a veto signing ceremony at the Nebraska State Capitol at which he announced and executed his veto of LB268.⁴ The veto was an exercise of the Governor's lawful executive power under the Nebraska Constitution Article

² Nebraska Legislature Bills and Resolutions, LB268, 104th Legislature (2015-2016), http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=25136.

³ Joe Duggan, *Veto at the Ready, Gov. Ricketts Chases Three Votes in Legislature on Death Penalty Repeal*, Omaha World-Herald (May 22, 2015), http://www.omaha.com/news/legislature/veto-at-the-ready-gov-ricketts-chases-three-votes-in/article_13212b9a-cc55-5941-9d7d-77ec017f50e1.html.

⁴ Office of Governor Pete Ricketts, *Gov. Ricketts' [sic] Vetoes Death Penalty Repeal* (May 26, 2015), <https://governor.nebraska.gov/press/gov-ricketts-vetoes-death-penalty-repeal>.

IV-15, to check the power of the Legislature to enact legislation. Pursuant to Article IV-15 of the Nebraska Constitution, LB268 was returned to the Legislature.

29. Article IV-15 of the Nebraska Constitution allows the Legislature to enact legislation over the Governor's veto if the legislation receives the support of at least three-fifths of the Senators. On May 27, 2015, the Nebraska Legislature passed LB268 by a vote of 30 in favor to 19 against, overriding the Governor's veto and enacting LB268.⁵ At this point, the Governor's executive power under the Nebraska Constitution to block the enactment of LB268 was exhausted.

30. The Nebraska Legislature adjourned on May 29, 2015. Under Article III-27 of the Nebraska Constitution, LB268 would take effect on August 30, 2015.

31. Nevertheless, in a press conference following adjournment of the Legislature, Governor Ricketts declared his intention to execute the individuals previously sentenced to death, stating, "Our plan is to proceed with the executions."⁶

The Executive Branch Submits an Unsworn Statement of Sponsors in Support of a Referendum Against LB268

32. Following the Legislature's override of his veto, Governor Ricketts, along with his staff, his allies, and other members of the Nebraska executive branch acting on Governor Ricketts' request, order, and encouragement, initiated a referendum against LB268.

33. On June 1, 2015, four days after enactment of the law, Nebraskans for the Death Penalty filed documents with the Nebraska Secretary of State seeking a referendum against

⁵ Nebraska Legislature Bills and Resolutions, LB268, *supra* note 1, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=25136.

⁶ Joe Duggan & Paul Hammel, *FDA Says Nebraska Can't Legally Import Drug Needed for Lethal Injections*, Omaha World-Herald (June 1, 2015), http://www.omaha.com/news/legislature/fda-says-nebraska-can-t-legally-import-drug-needed-for/article_0dc1c2d0-0638-11e5-979e-77b47170b978.html.

LB268.⁷ Although the referendum petition submitted to repeal LB268 was ostensibly sponsored by individuals other than Governor Ricketts, none of those individuals swore to the truth and accuracy of their sponsorship.

34. Included in the referendum petition was a document identifying Nebraskans for the Death Penalty and three members of its Board—Vice Chairwoman of the Nebraska Republican Party in the 3rd Congressional District Judy Glassburner, Omaha City Councilwoman Aimee Melton, and former Nebraska State Board of Education member Bob Evnen—as sponsors.⁸ The document was signed by Councilwoman Melton before a notary public. Despite being described as a “Sworn List of Sponsors,” the document failed to include any statement, indication, or evidence that Councilwoman Melton or any of the other sponsors swore under oath to the identification of the sponsors.

35. Neb. Rev. Stat. § 32-1405(1) states that before obtaining any signatures on a referendum petition, there shall be filed with the Secretary of State a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition. The provisions of § 32-1405(1) are mandatory, having the express purpose of safeguarding against the perpetration of frauds and deceptions. Mere substantial compliance is insufficient.

36. A sworn statement serves multiple purposes, including exposing the sponsors to criminal liability for falsification under oath under Neb. Rev. Stat. § 32-1502, and allowing the public and the media to scrutinize the list of sponsors to make an informed judgment before

⁷ Nebraskans for the Death Penalty, *Referendum Filed with Secretary of State: Nebraskans for the Death Penalty to Overturn LB 268, Reinstate Death Penalty* (June 1, 2015), <http://media.graytvinc.com/documents/Nebraskans+for+the+Death+Penalty.pdf>.

⁸ Secretary of State of Nebraska, *Referendum Petition Regarding LB 268 (2015), Sworn List of Sponsors* (June 1, 2015), <http://www.sos.ne.gov/elec/2016/pdf/LB268-referendum.pdf>.

signing the referendum petition. Failure to fully comply with the provision, such as by submitting an unsworn statement listing the names and addresses of the sponsors, is fatal to a referendum.

37. Here, the statement identifying the sponsors of the petition and their addresses is unsworn, as the document bears no indication on its face that the list was “sworn and subscribed,” “under oath,” “under penalty of perjury,” or otherwise sworn to. Although the document is notarized, the signature and seal of a notary do not indicate that the statement was being sworn to under oath. Notarization merely confirms the identity of the signer and the willingness to sign without duress or coercion. Neb. Rev. Stat. § 64-203. It is not the duty of the notary to determine or attest to the truthfulness of the statement being signed. None of the stated sponsors of the referendum petition provided a statement, under oath, that the list of sponsors to the referendum petition was true and accurate.

**The Executive Branch Unlawfully Circumvents
the Legislature’s Veto Override Via Referendum**

38. As noted above, the referendum was initiated by Governor Ricketts, along with his staff, his allies, and other members of the Nebraska executive branch acting on Governor Ricketts’ request, order, and encouragement, in order to circumvent the Legislature’s override of the Governor’s veto.

39. Each of the identified sponsors has publicly known connections to Governor Ricketts. On the day the petition was filed, Councilwoman Melton explained to reporters that she was asked by a person close to the governor to help lead the petition.⁹ Vice Chairwoman

⁹ Joe Duggan & Martha Stoddard, *Omaha Councilwoman Aimee Melton Among Ricketts Allies Launching Group to Bring Back Death Penalty*, Omaha World-Herald (June 2, 2015), http://www.omaha.com/news/nebraska/omaha-councilwoman-aimee-melton-among-ricketts-allies-launching-group-to/article_3f516da1-6823-5f51-869a-c26e8680e1d1.html. Melton later disclaimed her sponsorship but never amended filings to remove her name as arguably the

Glassburner is a supporter of Governor Ricketts and appeared in one of the Governor's campaign ads during the gubernatorial election.¹⁰ And Governor Ricketts is the single largest donor to "Bob Evnen for Nebraska," Evnen's campaign fund, having contributed 19% of the total donations that Evnen received, including \$5,000 while Evnen served on the Board of Nebraskans for the Death Penalty.¹¹ On information and belief, each of these board members formed the Board of Nebraskans for the Death Penalty, joined its Board, and initiated the referendum against LB268 at the behest and under the control of Governor Ricketts and members of the executive branch.

40. Leading figures within Nebraskans for the Death Penalty also have demonstrated ties to Governor Ricketts and the executive branch.

41. Jessica Flanagan, formerly Jessica Moenning, assumed the role of campaign manager and coordinator for Nebraskans for the Death Penalty, receiving payment of \$43,000 through her one-person consulting firm, Bright Strategies.¹² Flanagan is a longtime paid political advisor to Governor Ricketts, dating back to at least the Governor's 2006 Senate campaign. Flanagan served as a paid advisor to Governor Ricketts in his 2014 gubernatorial campaign and, following his election, wrote the Governor's first State of the State address.¹³ In

primary sponsor. *The Wheels Down Politics Show – Aimee Melton and Judge Ronald E. Reagan* (June 12, 2005), <http://wheelsdownpolitics.com/blog/2015/06/12/the-wheels-down-politics-show-aimee-melton-and-judge-ronald-e-reagan/>

¹⁰ Duggan & Stoddard, at n. 9, *supra*.

¹¹ Omaha World-Herald, Campaign Finance: Bob Evnen For Nebraska, <http://www.dataomaha.com/campaign-finance/07CAC01034/bob-evnen-for-nebraska>.

¹² Omaha World-Herald, Campaign Finance: Nebraskans for the Death Penalty, <http://www.dataomaha.com/campaign-finance/15BQC00419/nebraskans-for-the-death-penalty-inc>.

¹³ Paul Hammel, *Gov. Pete Ricketts Changing Staff Lineup; Privately Paid Adviser Will Go On Public Payroll*, Omaha World-Herald (Dec. 22, 2015),

the infancy of the Governor's administration, Flanagan, as a privately paid consultant, traveled regularly to the Governor's Office for meetings and used publicly-funded office space at the State Capitol. On December 21, 2015, while work on the referendum against LB268 was ongoing, Governor Ricketts announced that Flanagan would become a publicly paid special advisor to the governor for external affairs, receiving a salary of \$130,000.¹⁴ As a publicly paid advisor to the governor, Flanagan was a member of the executive branch.

42. Chris Peterson, another consultant to Governor Ricketts, was hired to be the spokesperson for Nebraskans for the Death Penalty, receiving through his one-person consulting firm, CP Strategies, \$90,957 in payment.¹⁵ Peterson was also a paid consultant to Governor Ricketts in his 2014 gubernatorial campaign.

43. Don Stenberg, Nebraska's State Treasurer, former Attorney General, and a member of the executive branch, also served as co-chairman of the referendum campaign alongside Nebraska State Senator Beau McCoy.¹⁶ State Treasurer Stenberg is a known political ally of Governor Ricketts. Although State Treasurer Stenberg later became described as an "honorary" co-chair, he played a substantial role in advancing the referendum petition.

44. Leonard Steven Grasz, who served as Secretary and Treasurer for Pete Ricketts for Governor, Inc. from September 2013 to the present, was also the Assistant Secretary to

http://www.omaha.com/news/nebraska/gov-pete-ricketts-changing-staff-lineup-privately-paid-adviser-will/article_2cb78ab2-d939-5d26-9cce-11ac80cc119e.html.

¹⁴ Office of Governor Pete Ricketts, *Gov. Ricketts Announces Two Staff Transitions* (Dec. 21, 2015), <https://governor.nebraska.gov/press/gov-ricketts-announces-two-staff-transitions>.

¹⁵ Omaha World-Herald, *Campaign Finance: Nebraskans for the Death Penalty*, <http://www.dataomaha.com/campaign-finance/15BQC00419/nebraskans-for-the-death-penalty-inc>.

¹⁶ JoAnne Young, *Circulators Will Be Out Saturday Gathering Signatures to Overturn Death Penalty Repeal*, *Lincoln Journal Star* (June 5, 2015), http://journalstar.com/legislature/circulators-will-be-out-saturday-gathering-signatures-to-overturn-death/article_cd4fe9d1-2c90-56b0-9177-47bb6e479cc1.html.

Nebraskans for the Death Penalty from June 2015 to March 2017.¹⁷ He served simultaneously as legal counsel to Pete Ricketts for Governor and to Nebraskans for the Death Penalty.¹⁸

45. Governor Ricketts and his father and mother, Joe and Marlene Ricketts, were the primary donors to Nebraskans for the Death Penalty as the group sought to obtain the signatures to place the referendum on the ballot. Of the approximately \$244,000 received by the group in its first month of existence (June 2015), \$200,000, or over 80%, came from the Ricketts family.¹⁹ Governor Ricketts made another \$100,000 donation the following month, in July 2015.²⁰ In total, Nebraskans for the Death Penalty received \$1,446,085 over the course of its existence—\$300,000 of that amount, or 21%, came directly from Governor Ricketts.²¹ Another \$125,000, or an additional 9%, came from Joe and Marlene Ricketts. On information and belief, Governor Ricketts, his staff, and others at his direction used Governor Ricketts' position as Governor of Nebraska and the resources of the State to raise funds from other major donors to Nebraskans for the Death Penalty and otherwise support the activities of Nebraskans for the Death Penalty. On

¹⁷ Leonard Steven Grasz, *United States Senate Committee on the Judiciary: Questionnaire for Judicial Nominees*, <https://www.judiciary.senate.gov/imo/media/doc/Grasz%20SJQ.pdf>.

¹⁸ Husch Blackwell, *Steve Grasz*, <https://www.huschblackwell.com/professionals/steve-grasz>.

¹⁹ Paul Hammel, *Pete and Joe Ricketts Have Contributed \$200,000 to Pro-Death Penalty Group*, Omaha World-Herald, http://www.omaha.com/news/nebraska/pete-and-joe-ricketts-have-contributed-to-pro-death-penalty/article_e761a0e4-9b68-56fe-97fc-1db7e79fd5b0.html.

²⁰ Martha Stoddard, *Ricketts Gives Another \$100,000 to Nebraskans for the Death Penalty*, Omaha World-Herald, http://www.omaha.com/news/nebraska/ricketts-gives-another-to-nebraskans-for-the-death-penalty/article_787ac960-4282-57cc-b76c-bf998b756d4b.html.

²¹ Omaha World-Herald, *Campaign Finance: Nebraskans for the Death Penalty*, <http://www.dataomaha.com/campaign-finance/15BQC00419/nebraskans-for-the-death-penalty-inc>.

information and belief, major donors to Nebraskans for the Death Penalty have close ties to Governor Ricketts.²²

46. Governor Ricketts also began to raise money for the referendum from the general public at least as of July 2015, including by sending letters to Nebraskans with the Governor's title prominently displayed that requested donations be made directly to Nebraskans for the Death Penalty. The letter included an envelope where a recipient of the letter could agree, "Yes Governor. I will support Nebraskans for the Death Penalty. Enclosed is my contribution of:" with suggestions for donation amounts and instructions that checks be made payable to Nebraskans for the Death Penalty. In response to public inquiries to the Governor's office regarding the referendum, Governor Ricketts and his staff routinely directed the public to learn more information by contacting Nebraskans for the Death Penalty and visiting its website.

**LB268 Comes into Effect Prior to Verification of the Petition Signatures,
Changing the Penalty for Plaintiffs' Crimes to Life Imprisonment**

47. Pursuant to the Nebraska Constitution, Article III-3, a referendum is added to the ballot if the referendum petition is signed by at least five percent of registered voters as well as by five percent of the registered voters of each of two-fifths of the counties of the state. If the referendum petition is signed by at least ten percent of registered voters, and also by five percent of the registered voters of each of two-fifths of the counties of the state, the petition suspends the Act.

48. Pursuant to Neb. Rev. Stat. § 32-1409, upon receipt of the signatures, the Secretary of State must initiate the process of reviewing the signatures to determine the validity

²² See Robynn Tysver, *New Ads in Nebraska Governor's Race Go Negative, Target Jon Brunning; Sources a Secret*, Omaha World-Herald (Mar. 6, 2014), http://www.omaha.com/news/new-ads-in-nebraska-governor-s-race-go-negative-target/article_9d59a072-e108-5e7b-bdf8-0d9cab65298c.html.

and sufficiency of the signatures and whether the constitutional and statutory requirements have been met.

49. On August 26, 2015, members of Nebraskans for the Death Penalty purportedly delivered approximately 166,000 signatures in support of the referendum against LB268 to Secretary Gale.²³ Although Nebraskans for the Death Penalty purported to deliver sufficient signatures to suspend operation of the law under Article III-3 of the Nebraska Constitution, by August 30, 2015, Secretary Gale had not made his determination pursuant to Neb. Rev. Stat. § 32-1409 as to the validity and sufficiency of the signatures. The submission of signatures in support of a referendum, without a determination that the signatures are valid and sufficient to satisfy the requirements of the Nebraska Constitution, does not suspend the effect of the Legislature's acts, and did not alter the effective date of LB268. Governor Ricketts himself acknowledged that there was a process to be followed with regard to verification of signatures before determining that LB268 was suspended.²⁴

50. Pursuant to Article III-27 of the Nebraska Constitution, and as stated by the records of the Nebraska Revisor of Statutes,²⁵ LB268 took effect on August 30, 2015, eliminating the death penalty in the State of Nebraska.

51. Section 6 of LB268 amends existing Nebraska statutes to make the crime of murder in the first degree a Class IA felony, striking the prior law that provided a procedure for

²³ JoAnne Young, *Death Penalty Supporters Turn Over 166,000 Signatures*, Lincoln Journal Star (Aug. 26, 2015), http://journalstar.com/news/state-and-regional/govt-and-politics/death-penalty-supporters-turn-over-signatures/article_ddf6eec1-641d-50d0-a0d5-4055129a725a.html.

²⁴ Zach Pluhacek, *Ricketts: 'One Step at a Time' on Death Penalty*, Lincoln Journal Star (Sept. 1, 2015), http://journalstar.com/news/local/911/ricketts-one-step-at-a-time-on-death-penalty/article_7e5e49e0-445f-5b80-bd34-6b002e5134f3.html.

²⁵ Nebraska Revisor of Statutes, *Operative Dates for Legislative Bills Enacted During the 2015 Legislative Session*, <http://nebraskalegislature.gov/pdf/reports/revisor/datelist2015.pdf>.

determining if murder in the first degree is a Class IA felony, punishable by life imprisonment, or a Class I felony punishable by death. Section 9 amends existing Nebraska statutes to eliminate altogether the designation of Class I felonies, punishable by death, but preserves the prior statute designating life imprisonment as the mandatory punishment for Class IA felonies. The effect is to eliminate the possibility of a death sentence, and to make mandatory life imprisonment the state's harshest penalty. Section 23 of LB268 reflects the Legislature's clear intent to make these changes retroactive, and states, "It is the intent of the Legislature that in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." When LB268 took effect on August 30, 2015, these provisions became law. Section 6 of LB268 amended Neb. Rev. Stat. § 25-105 eliminating the death penalty,²⁶ Section 9 amended Neb. Rev. Stat. § 28-303 eliminating Class I felonies punishable by death, and Section 23 took effect as Neb. Rev. Stat. § 29-2502,²⁷ as assigned by the Nebraska Revisor of Statutes, implementing the Legislature's clear intent to retroactively change the penalty in all criminal proceedings in which the death penalty had been imposed to life imprisonment. As of August 30, 2015, the penalty for the crimes of all persons previously sentenced to death was changed to life imprisonment, and it became unlawful for Nebraska to execute any of those individuals.

²⁶ Internet Archive, *Nebraska Revised Statute § 28-105* (Sept. 17, 2015), <https://web.archive.org/web/20150917123825/http://www.legislature.ne.gov/laws/statutes.php?statute=28-105>.

²⁷ Internet Archive, *Nebraska Revised Statute § 29-2502* (Sept. 19, 2015), <https://web.archive.org/web/20150919031003/http://nebraskalegislature.gov/laws/statutes.php?statute=29-2502>.

52. On October 16, 2015, Secretary Gale announced the completion of the signature verification process for the referendum against LB268.²⁸ Secretary Gale found that the referendum petition had met the constitutional requirements to place the referendum on the ballot and to suspend the effect of LB268. Specifically, Secretary Gale stated that over 143,000 signatures had been verified, greater than ten percent of registered voters, and the signatures of more than five percent of registered voters were collected in 85 of Nebraska's 93 counties, greater than the two-fifths of the total counties.

53. The announcement by Secretary Gale that LB268 had been suspended did not re-impose the death penalty on those prisoners for whom the penalty for their crimes LB268 had changed to life imprisonment on August 30, 2015.²⁹ LB268 came into effect at least from August 30, 2015 to October 16, 2015. During that time period, LB268 carried the full force of law. The subsequent suspension of LB268 did not undo the Legislative acts that occurred during that time period, including the provisions of Sections 6, 9, and 23 of LB268 that carried out the Legislature's clear intent to retroactively change the penalty for the crimes of those already sentenced to death to life imprisonment.

54. The Legislature, on the one hand, and the electorate, on the other hand, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other. For the same reason, the actions of the electorate in suspending or repealing a Legislative act are not superior to the actions of the Legislature in enacting that act, and do not retroactively undo the act. To suspend a law is not to pretend the law never existed, but rather to halt the

²⁸ Office of Secretary of State John A. Gale, *Signature Verification Completed for Death Penalty Referendum* (Oct. 16, 2015), http://www.sos.ne.gov/admin/press_releases/archive/2015/Death-Penalty-Qualifies-NR.pdf.

²⁹ *See supra* note 25.

operation of the law going forward. Thus, the suspension of LB268, even if found effective, only suspended LB268 as of October 16, 2015, by which time the penalty for the crimes of all persons sentenced to death as of August 30, 2015 had already been changed to life imprisonment. The suspension did not, and could not, further declare that the penalty for their crimes was changed once more to death; accordingly, all such prisoners remain subject to a penalty of life imprisonment.

55. On November 8, 2016, a vote was held on the referendum. The official canvass of votes was issued on December 5, 2016,³⁰ and subsequently the results of the referendum were proclaimed by Governor Ricketts pursuant to Article III-4 of the Nebraska Constitution, stating that the Referendum against LB268 had passed, such that LB268 was repealed.

56. For the same reasons that the suspension of LB268 failed to re-impose the death penalty, the enactment of the referendum repealing LB268, even if found effective, only repealed LB268 from the effective date of the repeal, by which time the penalty for the crimes of all persons sentenced to death as of August 30, 2015 had already been changed to life imprisonment. The repeal did not further declare that the penalty for their crimes was changed once more to death; accordingly, all such prisoners remain subject to a penalty of life imprisonment.

The Executive Branch Continues to Be Involved in the Referendum to Unlawfully Circumvent the Legislature's Veto Override

57. On information and belief, once Secretary Gale certified the referendum against LB268 for the November 2016 ballot, Governor Ricketts, State Treasurer Stenberg, and other members of the executive branch continued to direct, guide, and oversee the activities of

³⁰ Nebraska Secretary of State, *Revised Official Report of the Board of State* (Dec. 5, 2016), <http://www.sos.ne.gov/elec/2016/pdf/2016-canvass-book.pdf>.

Nebraskans for the Death Penalty, and continued to request, order, and encourage staff, consultants, and political allies to operate the political campaign in support of the referendum repealing LB268, until the referendum vote on November 8, 2016.

58. Under the Nebraska Constitution, the powers of the government are expressly divided among the branches of government, and each branch is prohibited from encroaching on the duties and prerogatives of the others: “The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.” Neb. Const. art. II-1. The purpose of the separation of powers doctrine is to preserve the independence of each of the three branches of government in their own respective and proper spheres thus tending to prevent the despotism of an oligarchy of the Legislature or Judges, or the dictatorship of the Executive.

59. The power of referendum is a power within the legislative authority that is expressly reserved by the people. Neb. Const. art. III-1. The power of referendum is a coequal exercise of legislative power by the people to approve or repeal the enactments of the Legislature.

60. The direct involvement of Governor Ricketts, State Treasurer Stenberg, and other members of the executive branch in proposing, initiating, financing, organizing, managing, and directing the referendum petition and subsequent referendum against LB268, after said law was duly passed by a three-fifths majority of the Legislature over the Governor’s veto, constituted an unlawful exercise of the legislative power of referendum by members of the executive branch, in violation of the separation of powers provisions of the Nebraska Constitution. The Constitution

prohibits persons within one branch from exercising the powers belonging to another branch. Although Governor Ricketts, State Treasurer Stenberg, and other members of the executive branch are also citizens of the State of Nebraska, the constitutional separation of powers provisions continue to apply to each of these individuals, even when those individuals are not exercising executive powers. In seizing upon the legislative power of referendum to circumvent the Legislature's override of his veto, Governor Ricketts and other members of the executive branch elevated the authority of the executive branch and encroached upon legislative power and prerogatives, while undermining the authority of the legislative branch. This is precisely the type of usurpation of powers that the Nebraska Constitution's separation of powers clause is intended to prevent.

61. But for the unlawful actions of Governor Ricketts, State Treasurer Stenberg, and other members of the executive branch in proposing, initiating, financing, organizing, managing, and directing the referendum petition and subsequent referendum against LB268, the referendum would not have occurred and would not have passed. The executive branch's use of the power of referendum to circumvent the lawful veto of the Legislature violates Nebraska's separation of powers, rendering the referendum invalid.

62. Because the referendum against LB268 is invalid, both as an unlawful exercise of executive power and for failing to include a statement sworn under oath that identifies the sponsors of the referendum, LB268 remains the law in Nebraska. Defendants Governor Ricketts, Director Frakes, and the Nebraska Department of Correctional Services, however, continue to treat Plaintiffs and the Indispensable Parties as if they may be executed, including by holding

them on death row and asserting the State's continuing plan to execute them.³¹ The continued failure of these Defendants to recognize the continued effectiveness of LB268 as an Act that eliminated the death penalty, if not enjoined, will cause irreparable harm to these persons, who face unlawful execution by the State of Nebraska. These persons face ongoing emotional and psychological harm from the unlawful re-imposition of the death penalty and the continuing prospect of being executed by the State of Nebraska, despite the fact that they are no longer subject to the death penalty after LB268 was passed on May 27, 2015, and came into effect on August 30, 2015.

63. Alternatively, as of August 30, 2015, when LB268 became law, this controlling statute changed the penalty for the crimes of all persons subject to the death penalty to life imprisonment. Defendants Governor Ricketts, Director Frakes, and the Nebraska Department of Correctional Services, however, continue to treat all persons sentenced to death as of August 30, 2015 as if they may be executed, including by holding them on death row and asserting the State's continuing plan to execute them.³² The continued failure of these Defendants to recognize that the penalty for these prisoners was changed to life imprisonment, if not enjoined, will cause irreparable harm to these persons, who face unlawful execution by the State of Nebraska. These persons face ongoing emotional and psychological harm from the unlawful re-imposition of the death penalty and the continuing prospect of being executed by the State of Nebraska, despite the fact that they are no longer subject to the death penalty after LB268 was passed on May 27, 2015, and came into effect on August 30, 2015.

³¹ Nebraska Department of Correctional Services, *NDCS Provides Notice of Substances to be Employed in an Execution by Lethal Injection*, <https://www.corrections.nebraska.gov/ndcs-provides-notice-substances-be-employed-execution-lethal-injection>.

³² *Id.*

COUNT I: DECLARATORY JUDGMENT

64. Plaintiffs repeat and incorporate by reference paragraphs 1-63 as if set forth fully herein.

65. A genuine dispute exists concerning whether the referendum purporting to repeal LB268 was legally sufficient and effective and therefore whether LB268 is still in effect.

66. The actions by Governor Ricketts, State Treasurer Stenberg, and members of the executive branch in proposing, initiating, financing, organizing, managing, and directing a referendum petition and referendum to repeal a law passed over the Governor's veto, as described above, improperly encroach on the powers exclusively held by the Legislature and violate the Nebraska Constitution's separation of powers provisions.

67. But for the unlawful actions of Governor Ricketts, State Treasurer Stenberg, and members of the executive branch, the referendum petition and referendum against LB268 would not have occurred and would not have passed.

68. Plaintiffs therefore request a declaration that the referendum purporting to repeal LB268 was unconstitutional and invalid as an unlawful exercise of legislative power by the executive branch and that LB268 is still in full force and effect.

COUNT II: DECLARATORY JUDGMENT

69. Plaintiffs repeat and incorporate by reference paragraphs 1-68 as if set forth fully herein.

70. A genuine dispute exists concerning whether the referendum purporting to repeal LB268 was legally sufficient and effective and therefore whether LB268 is still in effect.

71. The referendum against LB268 is ineffective for failing, from its inception, to include a sworn statement of the sponsors, stating under oath that the list of identified sponsors for the referendum is truthful and accurate.

72. Under Neb. Rev. Stat. § 32-1405(1) and Nebraska law precedents, that failure renders the referendum ineffective.

73. Plaintiffs therefore request a declaration that the referendum purporting to repeal LB268 was legally insufficient and invalid and that LB268 is still in full force and effect.

COUNT III: DECLARATORY JUDGMENT

74. Plaintiffs repeat and incorporate by reference paragraphs 1-73 as if set forth fully herein.

75. A genuine dispute exists because Defendants have treated the referendum purporting to repeal LB268 as though it reinstated the death penalty for each of the persons sentenced to death as of August 30, 2015, even though, by operation of Sections 6, 9, and 23 of LB268, the penalty for those crimes was changed to life imprisonment as of August 30, 2015.

76. The submission of unverified signatures on August 26, 2015, in favor of a referendum against LB268, did not suspend the effect of LB268.

77. On August 30, 2015, pursuant to Article III-27 of the Nebraska Constitution, LB268 came into effect, and the penalty for the crimes of all persons sentenced to death as of that date was changed from the death penalty to life imprisonment.

78. The announcement by Secretary Gale on October 15, 2015, that sufficient signatures had been submitted to suspend the effect of LB268 did not reinstate the death penalty for the crimes of all persons sentenced to death as of August 30, 2015, which penalty had already been changed to life imprisonment on August 30, 2015.

79. The vote on the referendum on November 8, 2016, and subsequent proclamation by the Governor pursuant to Article III-4 of the Nebraska Constitution that the referendum had repealed LB268, did not reinstate the death penalty for the crimes of all persons sentenced to death as of August 30, 2015, which penalty had already been changed to life imprisonment on August 30, 2015.

80. Plaintiffs therefore request a declaration that each of Plaintiffs Sandoval, Ellis, Galindo, Lotter, Mata, Torres, and Vela, and each of Indispensable Party Defendants Gales, Hessler, and Moore, is no longer subject to the death penalty but rather is subject to a penalty of life imprisonment.

WHEREFORE, Plaintiffs request the following relief and judgment:

1. A declaratory judgment in favor of the Plaintiffs pursuant to the Nebraska Declaratory Judgments Act, §§ 25-21,149 to 25-21,164, finding and determining that:
 - a. The submission of unverified referendum petition signatures on August 26, 2015 did not stay the effective date of LB268;
 - b. LB268 came into effect on August 30, 2015, eliminating the death penalty as a punishment in Nebraska, and retroactively changing the penalty for all crimes where the death penalty had previously been imposed to life imprisonment, including for all of the Plaintiffs and Indispensable Parties;
 - c. Governor Ricketts, State Treasurer Stenberg, and other members of the executive branch unconstitutionally proposed, initiated, financed, organized, managed, and directed the referendum against LB268;

- d. The sponsors of the referendum against LB268 failed, in violation of Nebraska law, to submit a sworn statement, under oath, identifying the sponsors and their addresses;
- e. The referendum against LB268 was unconstitutional, invalid, and legally insufficient; and
- f. LB268, which eliminates the death penalty in Nebraska, remains in full force and effect.

2. A judgment in favor of Plaintiffs and against the Defendants, pursuant to Neb. Rev. Stat. §§ 25-1062 to 25-1080 and § 25-21,156, entering a permanent injunction enjoining Defendants and the State from carrying out the execution of Plaintiffs or Indispensable Parties, from taking further steps to carry out the execution of Plaintiffs or Indispensable Parties, or from carrying out or taking further steps to carry out the execution of any other persons.

- 3. An order and judgment that Plaintiffs recover the costs of this action.
- 4. Such other and further relief as the Court deems just and proper.

Dated: December 4, 2017

By: 

Amy A. Miller, #21050
AMERICAN CIVIL LIBERTIES UNION OF
NEBRASKA
134 S. 13th Street, Suite 1010
Lincoln, Nebraska 68508
Telephone: (402) 476-8091 ext. 106

Facsimile: (402) 476-8135
amiller@aclunabraska.org

Christopher L. Eickholt, #21472
EICKHOLT LAW LLC
721 South 14th Street
Lincoln, Nebraska 68508
Telephone: (402) 310-5663
spike@eickholtlaw.com

Brian Stull, NC Bar No. 36002
pro hac vice application pending
AMERICAN CIVIL LIBERTIES UNION
201 Main Street, Suite 402
Durham, NC 27707
Telephone: (919) 628-9469
bstull@aclu.org

Brett J. Williamson, Cal. Bar No. 145235
pro hac vice application pending
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Telephone: (949) 823-6900
Facsimile: (949) 823-6994
bwilliamson@omm.com

Luann Simmons, Cal. Bar No. 203526
pro hac vice application pending
lsimmons@omm.com
Bill Trac, Cal. Bar No. 281437
pro hac vice application pending
btrac@omm.com
O'MELVENY & MYERS LLP
2 Embarcadero Center, 28th Floor
San Francisco, CA 94111
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Plaintiffs