

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MIKE TRUCANO, DON ROSE,)
MARK O'NEILL and)
PETE THOMPSON,)

CIV NO. 09-306

Petitioners,)

APPLICATION FOR
WRIT OF MANDAMUS

vs.)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

CHRIS NELSON, in his capacity as)
Secretary of State for South Dakota,)

JUL 27 2009

Respondent.)

Judy Yaddeman Clerk
By _____ Deputy

Petitioners, by and through their counsel of record, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, hereby submit this Application for Writ of Mandamus pursuant to SDCL §§ 21-29-2 and 2-1-18 which requests that the court order Chris Nelson, in his capacity as Secretary of State, to certify that the referendum petition regarding House Bill 1240 has been signed by the required number of qualified electors pursuant to SDCL Chapter 2-1 and to place House Bill 1240 on the general election ballot on November 2, 2010.

FACTS

On June 22, 2009, Petitioners Mike Trucano, Don Rose, Mark O'Neill, and Pete Thompson filed a referendum petition with the Secretary of State's Office. The petition sought to submit to the voters of the State of South Dakota at the general election on November 2, 2010, for their approval or rejection the following:

An Act to prohibit smoking tobacco or carrying lighted tobacco products in certain places and to require certain person to inform violators of the prohibition. HB 1240 was passed by the Senate March 4, 2009 and was passed by the House of Representatives on March 9, 2009. The Governor signed HB 1240 on March

19, 2009.

See Exhibit A, blank Referendum Petition, attached. The petition included 24,927 signatures, although Petitioners needed only 16,776 signatures to bring the issue to a public vote. SDCL § 2-1-3, -4. Pursuant to SDCL § 2-1-16, the Secretary of State verified the requisite number of signatures, and certified that the petition had been signed by the required number of qualified electors. The referendum was therefore to be placed on the next general election ballot pursuant to SDCL § 2-1-17.

While the smoking ban was to take effect on July 1, 2009, the implementation of that law was stayed by virtue of the Secretary of State's certification of Petitioners referendum petition. The ban would have only become effective after the official canvass of the November 2, 2010, general election if the majority of South Dakota voters passed the referred measure. SDCL § 2-1-12. A great deal of publicity was generated over this issue, with the public being informed that the smoking ban was forestalled until the November 2010 election.

On July 2, 2009, smoking-ban proponents filed a challenge with the Secretary of State, challenging 9,891 signatures. Secretary Nelson upheld 8,845 of those challenges, leaving Petitioners 221 signatures short of the requisite number to place the referendum on the ballot.

Secretary Nelson notified Petitioners on July 23, 2009, that his office had determined their petition was lacking the requisite signatures. Secretary Nelson's rejected signatures fell into 26 categories, many of which indicated improper notary information. See Exhibit B, List of rejected signatures by category, attached. Of the 8,845 rejected signatures, 2552 alone were rejected due to "Incorrect Notary Commission

Expiration Date.” It is undisputed, however, that all notaries involved in the 2552 rejected signatures were fully-commissioned notaries public, none having expired commissions.

Petitioners have not yet received additional information, such as the names of the notaries determined to have provided incomplete or improper information, or the petition itself. Any additional, relevant information received from Respondent or others will be submitting at the time prior to the hearing to be scheduled in this matter.

REMEDY OF MANDAMUS

“The writ of mandamus may be issued by the Supreme and circuit courts . . . to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” SDCL § 21-29-1. The South Dakota Supreme Court has held that an application for writ of mandamus is the appropriate method for review of the Secretary of State's decision not to validate signatures on petition sheets and to compel the Secretary to place referred measures on the election ballot. *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 11, 552 N.W.2d 830, 833. See *Corbly v. City of Colton*, 278 N.W.2d 459 (S.D. 1979) (affirming the trial court's refusal of an application for writ of mandamus for referral of a planning and zoning ordinance); *State ex rel. Coon v. Morrison*, 249 N.W. 318 (SD 1933) (affirming writ of mandamus to compel secretary of state to file referendum petitions containing contradictions between petition and affidavit as to residence of some of signers).

“The circuit court has discretion in granting or denying a writ of mandamus[.]” *Id.* (quoting *Black Hills Cent. R. Co. v. City of Hill City*, 2003 S.D. 152, ¶ 9, 674 N.W.2d 31, 34).

“To prevail in seeking a writ of mandamus, the petitioner must have a clear legal right to

performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.” *Okerson v. Common Council of City of Hot Springs*, 2009 SD 30, ¶ 6, 767 N.W.2d 531, 533, (quoting *Sorreles v. Queen of Peace Hosp.*, 1998 SD 12, ¶ 6, 575 N.W.2d 240, 242.). “The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. SDCL § 21-29-2.

ARGUMENT & AUTHORITIES

a. Incorrect Notary Commission Expiration Date

The Court must determine whether there is a legal requirement for an accurate notary public expiration date on the Petition, and if so, whether the Commission expiration date provided was sufficient to substantially satisfy the requirement. *Larson v. Hazeltine*, 552 N.W.2d 830, 833 (S.D. 1996). The Court must then analyze the statutory and administrative provisions governing the verification which must be provided by the circulator of the petition. *Id.* at 833. S.D.C.L. § 2-1-10 states:

Each person, who circulates and secures signatures to a petition to initiate a constitutional amendment or other measure or to refer legislation to the electors, shall sign a verification before filing the petition with the officer in whose office it is by law required to be filed. The verification shall prescribe that the circulator made reasonable inquiry and, to the best of the circulator's knowledge, each person signing the petition is a qualified voter of the state in the county indicated on the signature line and that no state statute regarding the circulation of petitions was knowingly violated. The State Board of Elections shall prescribe the form for the verification. The verification shall be witnessed by a notary public commissioned in South Dakota or other officer authorized to administer oaths pursuant to § 18-3-1. Any person who falsely swears to the verification provided for in this section is guilty of a Class 1 misdemeanor.

As the statute indicates, the State Board of Elections prescribes the form for the verification. The Board has done so within South Dakota Administrative Rules, specifically 5:02:08:00 through 03 and 08.

A.R.S.D. 5:02:08:00.01(1)(b) states that a signature on a petition sheet may not be counted if the circulators' verification is not completed or is improperly completed according to subdivision 5:02:08:00(3) unless the missing information is completed elsewhere on the petition sheet. A.R.S.D. 5:02:08:00(3) requires only that "[t]he verification was completed and signed before an officer authorized to administer oaths." Therefore, under both A.R.S.D. 5:02:08:00.01 and :00.3, the circulators' verification at issue in this case was completed properly.

There is no question in this case that the 2,552 signatures at issue were listed on a petition whereby the verification was completed and signed before an authorized notary public. It is undisputed that the notaries public at issue were fully commissioned, and none were operating under expired commissions. It is also undisputed that the circulators' verifications at issue included the printed name of the circulator, the circulators' residence address, and complete date as required by A.R.S.D. 5:02:08:00.01. In other words, no statute or regulation requires a notary public to accurately indicate his or her commission expiration date.

Moreover, S.D.C.L. § 2-1-10 allows the verification of the circulator to be witnessed by any officer authorized to administer oaths as listed in S.D.C.L. § 18-3-1, which includes judges, clerks, county auditors, county treasurers, registers of deed, mayors, municipal officers, township clerks etc. Obviously, such officers authorized to administer oaths would not be required to indicate when their commissions expire, as such public officials are not "commissioned." Petitioners have fully complied with the law governing referendum petitions.

Even if the Court finds that petitioners have not fully complied with the law, petitioners have substantially complied. Courts must begin their analysis by recognizing the statutory law governing this area. S.D.C.L. § 2-1-11 states that "[t]he petitions herein provided for shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere

technicality.” See also *Larson* at 835. “Courts must begin with the presumption that petitions which are circulated, signed, and filed are valid, and with the presumption that the circulators’ affidavit is legal.” *Id.*

“Substantial compliance” with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Id. at 835; quoting *Rans v. State*, 390 N.W.2d 64, 66 (S.D. 1986) (citations and quotations omitted). As the *Larson* court held, omissions of an item not expressly required by statute or rule can not be considered an essential element of the circulators’ verification based on the language of the law itself. *Larson* at 836. As the *Larson* court found, failure to list the circulators’ city is not a complete absence of a circulator’s affidavit. *Id.*

The Court must also look to the general purpose of the requirement at issue to determine if the notary public’s commission expiration date is a substantial element of the information required. *Id.* “The purpose of the circulator’s verification is to establish the genuineness of the signatures on the petition, and to allow potential challengers to contact the circulators to verify the signatures.” *Id.* The notary publics in question have provided enough information to be contacted by anyone seeking to establish the genuineness of the petition’s signatures. The notary public’s commission expiration has nothing to do with the ability of potential challengers to contact that circulator in order to verify signatures. Clearly, petitioners have fulfilled the purpose of the statutes and regulations, which simply require that the verification be completed and signed before an officer authorized to administer oaths. A.R.S.C. 5:02:08:00.3.

b. Other reasons for rejection

The Secretary of State also rejected thousands of other signatures based on various reasons which may also be an improper application of law. Attached as Exhibit A is a list of signatures rejected, totaling 8,845, listing the numerous reasons the Secretary of State rejected such signatures. For the same reasons that a verified petition is valid despite an incorrect notary commission expiration date, signatures may also be valid despite a missing notary seal. As established above, notary publics are only one of many officers authorized to administer oaths. S.D.C.L. § 18-3-1. Thus, such officers need not place a notary seal in order to verify a petition. The Secretary of State rejected 409 signatures for a missing notary seal. Similarly, 85 signatures were rejected due to "invalid notary." Again, the circulators' verification may have been made by an officer authorized to administer oaths other than a notary public. The Secretary of State also rejected 70 signatures because of "no expiration date." As stated above, officers authorized to administer oaths would not have a commission expiration date to fill in, nor would such an omission invalidate the signatures on that petition.

The Secretary also rejected 255 voters due to "inactive registration." Our statutes allow any qualified voter to sign a petition, and inactive registrants are not unqualified. SDCL §§12-4-1, 12-3-1, -1.1, 2-1-6.

Larson v. Hazeltine held that some information may not be a substantial element of the information required on a petition. Under this case law, numerous other reasons given by the Secretary of State for rejected signatures may not hold up under legal scrutiny.

PRAYER FOR RELIEF


Whereas Petitioners have fully complied with the law governing referendum petitions, Petitioners respectfully request the Court issue a writ of mandamus ordering as follows:

1. That the Respondent Chris Nelson, in his capacity as Secretary of State, certify that referendum petition regarding HB 1240 has been signed by the required number of qualified electors pursuant to SDCL Chapter 2-1;
2. That the Respondent Chris Nelson, in his capacity as Secretary of State, place the referendum regarding House Bill 1240 on the general election ballot on November 2, 2010.

Dated this 25th day of July, 2009.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By:


Sara Frankenstein
Attorney for Petitioners
440 Mt. Rushmore Road
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
(605) 719-3471 fax
sfrankenstein@gpnlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2009, I mailed by Federal Express, next business-day delivery and first-class United States mail, postage pre-paid, a true and correct copy of an Application for Writ of Mandamus to:

Sherri Sundem Wald
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Fax: (605) 773-4106
Email: sherri.wald@state.sd.us


Sara Frankenstein

000446 REFERENDUM PETITION

WE, THE UNDERSIGNED qualified voters of the state of South Dakota, petition that the following law, as enacted by the Legislature of the state of South Dakota, be submitted to the voters of the state of South Dakota at the general election on November 2, 2010 for their approval or rejection pursuant to the Constitution of the state of South Dakota.

ENTITLED, An Act to prohibit smoking tobacco or carrying lighted tobacco products in certain places and to require certain persons to inform violators of the prohibition. HB 1240 was passed by the Senate March 4, 2009 and was passed by the House of Representatives on March 9, 2009. The Governor signed HB 1240 on March 19, 2009.

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

NAME		RESIDENCE	DATE/COUNTY
SIGN 1 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 2 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 3 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 4 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 5 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 6 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 7 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 8 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 9 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 10 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 11 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 12 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 13 PRINT		STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION

EXHIBIT

NAME	RESIDENCE	DATE/COUNTY
14 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
15 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
16 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
17 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
18 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
19 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
20 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
21 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
22 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
23 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
24 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
25 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
26 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
27 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
28 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
29 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
30 SIGN PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION

VERIFICATION BY PERSON CIRCULATING PETITION

INSTRUCTIONS TO CIRCULATOR: This section must be completed following circulation and before filing.

Print name of the circulator _____ Residence Address _____ City _____ State _____

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, that I made reasonable inquiry and to the best of my knowledge each person signing the petition is a qualified voter in the county indicated on the signature line, that no state statute regarding petition circulation was knowingly violated, and that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration.

Signature of Circulator

Sworn to before me this _____ day of _____
(Seal)

Signature of Officer Administering Oath

My Commission Expires _____

Title of Officer Administering Oath

8845 Net Invalid Count

3578 Not Registered
2552 Incorrect Notary Commission Expiration Date
449 Incomplete Date in Circulator Verification
439 Blank or Crossed out Line
409 Invalid or Missing Notary Seal
375 Invalid or no Circulator Printed Name
337 Incomplete or No Residence Address

312 No County of Registration
255 Inactive Registration
238 No Date of Signing
235 Duplicate
225 Illegible or No Printed Name
147 PO Box in First Class Municipality
136 No Notary Signature
124 Invalid or No Circulator Signature
85 Invalid Notary
82 Invalid or No Circulator Address
74 No Signature
72 Invalid Date of Signing
70 No Expiration Date
69 Signed After Circulator Verification
42 Circulator Notarized Petition
42 Missing Complete Notarization
20 Out-of-State Circulator Address
12 Incomplete Circulator Address
2 Signer Notarized Petition

EXHIBIT

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CIV NO. **09-306**

MIKE TRUCANO, DON ROSE,)
MARK O'NEILL and)
PETE THOMPSON,)

Petitioners,)

NOTICE OF APPEARANCE

vs.)


CHRIS NELSON, in his capacity as)
Secretary of State for South Dakota,)

Respondent.)

The undersigned attorney, Sara Frankenstein, of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, hereby notices her appearance, as counsel on behalf of Pctitioners in the above-entitled action, and requests that copies of all further pleadings, affidavits, or motions be served upon the undersigned attorney.

Dated this 25th day of July, 2009.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: 

Sara Frankenstein
Attorney for Petitioners
440 Mt. Rushmore Road
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
(605) 719-3471 fax
sfrankenstein@gpnalaw.com

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

JUL 27 2009

 Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2009, I mailed by Federal Express, next business day delivery and first-class United States mail, postage pre-paid, a true and correct copy of a **NOTICE OF APPEARANCE** to:

Sherri Sundem Wald
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Fax: (605) 773-4106
Email: sherri.wald@state.sd.us


Sara Frankenstein

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MIKE TRUCANO, DON ROSE,)
MARK O'NEILL and)
PETE THOMPSON,)
)
) Petitioners,)
)
) vs.)
)
)
CHRIS NELSON, in his capacity as)
Secretary of State for South Dakota,)
)
) Respondent.)

CIV NO. 09-306

EX-PARTE
MOTION FOR STAY

Petitioners, by and through their attorney, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, respectfully move the Court to issue an order staying the enactment of HB 1240 into law, until resolution of Petitioners Application for Writ of Mandamus.

Pursuant to SDCL 2-14-1, an act of the Legislature, which does not prescribe when it shall take effect, if passed at a regular session, takes effect on the first day of July after its passage, "[s]ubject to the provisions of the Constitution and statutes relating to vetoes and the referendum, an act of the Legislature." In the present case, petitions were collected seeking to refer HB 1240 to a vote of the people pursuant to SDCL § 2-1 *et seq.* Respondent rejected a number of signatures on the petition for reasons set forth in Petitioners Application for Writ of Mandamus. It is necessary to stay the enactment of HB 1240 until such time that the Application for Writ of Mandamus can be addressed by the court to both protect the referendum rights of this state's citizens including Petitioners and to alleviate confusion among South Dakota's business owners.

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

JUL 27 2009

Judy Addelman Clerk

By

Deputy

SDCL § 2-14-16 delays the effective date of all acts or laws of the legislature to allow South Dakota citizens time to obtain sufficient signatures to begin the referendum process. See also *SDDS, Inc. v. South Dakota*, 481 N.W.2d 270 (S.D. 1992). As is fully set forth in Petitioners Application for Writ of Mandamus, signatures were submitted pursuant to SDCL § 2-1 *et seq* in a timely fashion. The question to be addressed pursuant to Petitioners application, namely whether signatures declared invalid by Respondent are in fact proper, must be addressed prior to enactment of HB 1240 or the referendum process will be frustrated. The citizens of South Dakota are entitled to a judicial determination addressing whether or not sufficient, valid signatures exist referring HB 1240 to a vote of the people prior to its enactment. Such a determination is mandated by SDCL § 2-14-16 which delays the enactment of legislation pending the referendum process. This process cannot be completed until a resolution of the disputed signatures can be made making enactment improper at this time.

Further, immediate enactment will lead to confusion among business owners and their customers. Pursuant to SDCL § 2-14-16, enactment of legislation is stayed during the referendum process. Requiring business owners to immediately cease smoking at their establishments will lead to confusion if it is later determined enough valid signatures exist to refer HB 1240 to a vote of the people. Both business owners and customers would face confusion as to whether they would be forced to continue to operate smoke-free environments or whether the provisions of SDCL § 2-14-16 would permit them to allow smoking until HB 1240 can be referred to a vote of the people.

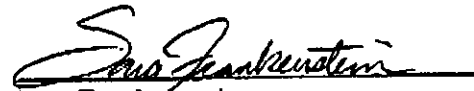
The South Dakota Attorney General's Office recognizes the problems created by immediate enactment of HB 1240 prior to resolution of Petitioners' Application for Writ of

Mandamus and does not oppose Petitioners' ex-parte motion for stay. As there is no opposition of Petitioners' motion, no hearing has been requested or necessary.

Dated this 25th day of July, 2009.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By:



Sara Frankenstein
Attorney for Petitioners
440 Mt. Rushmore Road
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
(605) 719-3471 fax
sfrankenstein@gpnalaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2009, I mailed by Federal Express, next business day delivery and first-class United States mail, postage pre-paid, a true and correct copy of the Ex-Parte Motion for Stay to:

Sherri Sundem Wald
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Fax: (605) 773-4106
Email: sherri.wald@state.sd.us


Sara Frankenstein

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MIKE TRUCANO, DON ROSE,)
MARK O'NEILL and)
PETE THOMPSON,)

Civ. No. 09-306

ORDER

Petitioners,)

vs.)

CHRIS NELSON, in his capacity as)
Secretary of State for South Dakota,)

Respondent.)

Pending before the Court is Petitioners' Ex Parte Motion for Stay dated July 25, 2009.

Said motion came before this Court without hearing and without a record, but is unopposed by Respondent.

THE COURT DOES NOW:

GRANT Petitioners' request that the Court issue an order staying the enactment of HB 1240 into law, until resolution of Petitioners' Application for Writ of Mandamus.

Dated the 27th day of July, 2009.

BY THE COURT:

Mark Bantz

Circuit Court Judge

ATTEST:

Jacques Bowers
Clerk of Courts

(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUL 27 2009

Judy Hillman Clerk
By *[Signature]* Deputy