

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

LYLE KOENIG,

Plaintiff,

vs.

DOUG PETERSON,

Attorney General of the
State of Nebraska, in his official capacity,

and

JOHN GALE,

Secretary of State of the
State of Nebraska, in his official capacity,

Defendants.

Case No.: CI15-_____

**COMPLAINT
AND
PETITION FOR PROPOSED
CHANGES TO BALLOT
LANGUAGE FOR PETITION
FOR PROPOSED
REFERENDUM ON LB 268**

COMES NOW the Plaintiff and for his cause of action against the Defendants alleges:

PARTIES

1. Plaintiff Lyle Koenig is a resident of the State of Nebraska, registered voter, and citizen supporter of LB 268 passed in 2015. He is opposed to the current Referendum effort attempting to suspend and overturn that law.
2. Defendant Doug Peterson is the duly elected Attorney General of the State of Nebraska. He is sued only in his official capacity.
3. John Gale is the duly elected Secretary of State of Nebraska. He is sued only in his official capacity.

STANDING OF PLAINTIFFS, JURISDICTION AND VENUE

4. Plaintiff has standing and this Court has jurisdiction over this action and the requested relief sought under Neb.Rev.Stat. §32-1410(3) and Neb.Rev.Stat. §32-1412.
5. Venue in this Court is proper under Neb.Rev.Stat. § 32-1410 and §32-1412.

PLAINTIFF'S CLAIM:

6. A Referendum petition was filed on or about June 1, 2015, seeking to suspend and ultimately repeal by election, the several laws which LB 268 enacted in the First Legislative Session (2015) of the 104th Nebraska Legislature. The Legislature enacted LB 268 on May 27, 2015, overriding a veto by Nebraska Governor Pete Ricketts. LB268 became effective August 30, 2015 and repealed the death penalty and many related provisions of Nebraska law which refer to and regulate imposition and execution of the death penalty for capital crimes in this state. The Referendum's Object Clause read as follows:

“Restore the death penalty by repealing all of LB 268 enacted by the Legislature of Nebraska, 104th Legislature, First Session (which eliminates the death penalty and replaces it with a sentence of life in prison) and when this Petition has been signed by ten percent of the registered voters, to suspend the effective date of LB 268 until it has been voted upon by the voters of Nebraska.”

7. On or about August 26, 2015, persons supporting the referendum filed an unknown number of signatures on Referendum petition, asserting they had accumulated more than 166,000 such signatures. Some, but not all, of the verification of the signatures has been

completed. No formal decision has been made as to placing the issue on the ballot or suspending LB 268.

8. On or about September 2, 2015, the Secretary of State John Gale transmitted a copy of the measure to Attorney General Doug Peterson requesting that ballot language be drafted and supplied to the Secretary.
9. In response, on or about September 11, 2015, the Attorney General delivered a letter to Secretary Gale pursuant to Neb.Rev.Stat. §32-1410(2), wherein he provided his proposed ballot title, along with a similarly worded explanatory statement to be used on the Nebraska general election ballot. Attached hereto and incorporated by reference is a copy of such letter as Exhibit “A”.
10. Under Neb.Rev.Stat. § 32-1410(3) and § 32-1412, Nebraska residents dissatisfied with the proposed ballot title and explanatory language are allowed ten days to file an appeal from the day the Attorney General makes his ballot language decision. Plaintiff files his objections to the language, pursuant to Neb.Rev.Stat. §32-1410(3) and §32-1412.
11. According to the attached Exhibit “A”, the Attorney General’s letter of September 11, 2015, Defendant Gale would expect to put the following explanatory statement (first two paragraphs) and ballot title (third paragraph) on the Nebraska general election ballot for November 8, 2016:

“A vote to “Retain” will eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment by retaining Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature. [Emphasis added here by Plaintiff.]

A vote to “Repeal” will keep the death penalty as a possible penalty for the crime of murder in the first degree by repealing Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature.

The purpose of Legislative Bill 268, passed by the First Session of the 104th Nebraska Legislature in 2015, is to eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment.

Shall Legislative Bill 268 be repealed?” [Emphasis added by Plaintiff.]

12. Plaintiff is “dissatisfied with” and appeals for a change to the Ballot Title. While Neb.Rev.Stat. §32-1410(3) only expressly refers expressly to the Ballot Title, Plaintiff is equally dissatisfied with the Explanatory Statement for an identical reason, and both are objected to and appealed. The Ballot Title and the Explanatory Statement both erroneously imply that under LB 268, the law was changed so that there could be a sentence imposed for a Class IA felony (first degree murder) of something less than the “maximum” of life imprisonment. In actuality, under LB 268 the only sentence for a Class IA felony is “life imprisonment.” There is no maximum or minimum sentence, only a sentence of life imprisonment. Plaintiff therefore submits that:

- a. The Referendum’s filed and printed Object Clause is an adequate and sufficient statement that is clear and the best guide for the Ballot Title. It does not require any of the additional language proposed by the Attorney General, and especially not the insertion of the concept that under LB 268 there would be a “maximum” sentence of life in prison, which by necessary implication would easily be understood to mean that there is some lesser sentence available to the sentencing

court for such a crime, which there is not. Prior to LB 268 taking effect, such persons convicted of that crime could either be sentenced to death, or to life imprisonment. LB 268 removes any option for death, leaving life imprisonment as the sole legal sentence.

- b. The Object Clause as printed on the referendum petitions made no mention of the “maximum penalty.” The insertion of this language is therefore unfair in that it implies incorrectly to persons who may vote on the referendum issue that, under LB 268, there is a penalty for first degree murder which is less than or more lenient than life imprisonment. Such implication and indication unfairly and incorrectly goes beyond the scope and the exact language of the ballot initiative.
- c. The Explanatory Statement, along with the Ballot Title, are written with the seeming purpose or at least the potential effect of unfairly exaggerating the result of LB 268. It could leave voters concerned that LB 268 allows a too lenient sentence of less than life imprisonment, since the word “maximum” necessarily implies that there is something less than “maximum”. By contrast, the Referendum Petition’s actual Object Clause is worded more neutrally and accurately describes the effect of LB 268.

13. Nothing herein is intended, nor should it be construed to assert, imply or concede, that the Referendum filings, and particularly the alleged sworn statement of every sponsoring person, is legally sufficient or valid, or that the Referendum should in fact be placed on the ballot.

14. The Plaintiff has no other remedy, legal or equitable, beyond this appeal.

15. Pursuant to Neb.Rev.Stat. §32-1410(3) Plaintiffs offer the following alternative

Ballot Title:

“The purpose and effect of Legislative Bill 268, passed by the First Session of the 104th Nebraska Legislature in 2015, is to eliminate the death penalty as a penalty for first degree murder and replace it with a sentence of life in prison.

Shall Legislative Bill 268 be repealed?”

16. Plaintiff also contends that the Court, as additional necessary relief to make the correction of the Ballot Title effective, should also order that the Explanatory Statement be made consistent with the above proposed Ballot Title suggested in Paragraph 15 by deleting any implication that LB 268 could result in a penalty of less than life imprisonment.

PRAYER FOR RELIEF

The Plaintiff requests the following relief and judgment:

1. A judgment in favor of Plaintiff and against the Defendants, under the authority of Neb. Rev. Stat. §32-1410(3). The entry of judgment in favor of Plaintiff is requested to include a determination that the Ballot Title and Explanatory Statement prepared by the Attorney General’s office is unlawfully misleading by incorrect implication, confusing, and unfairly slanted in favor of the Referendum proponents by suggesting through use of the adjective “maximum”, that a sentence less than life in prison is possible under LB 268;
2. Further Plaintiff requests that a Ballot Title be prepared by the Court for use by the Defendant Secretary of State in preparing the ballot, if and only if the Referendum on

LB 268 is found to be legally sufficient and must go on the ballot. The Court's language for the Ballot Title is requested to avoid any suggestion that there could be a sentence upon conviction of less than life in prison for first degree murder. Plaintiff requests that the Court's Ballot Title language be certified to defendant, Secretary of State Gale;

3. An order and judgment that Plaintiff recover the costs of this action;
4. Such other and further relief as the Court deems just in the premises.

Dated: September 21, 2015.

Lyle Koenig, Plaintiff, by and through his attorneys:



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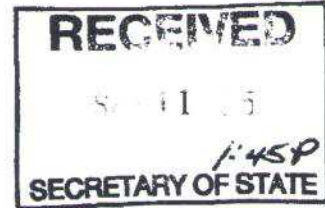
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DOUGLAS J. PETERSON
ATTORNEY GENERAL

September 11, 2015

The Honorable John A. Gale
Nebraska Secretary of State
Room 2300, State Capitol
Lincoln, NE 68509

Dear Secretary Gale:

Pursuant to Neb. Rev. Stat. § 32-1410(2) (2008), you have notified us that you have received a statutory repeal proposed by referendum for referral to the people of Nebraska on the November, 2016, general election ballot. Your notification was received by our office on September 2, 2015.

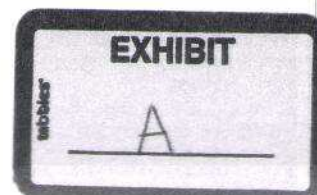
In accordance with the duty imposed by § 32-1410(2), we have prepared the following ballot title and explanatory statement for that statutory referendum. As provided by statute, the explanatory statement is to directly precede the ballot title on the ballot and be printed in italics:

A vote to "Retain" will eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment by retaining Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature.

A vote to "Repeal" will keep the death penalty as a possible penalty for the crime of murder in the first degree by repealing Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature.

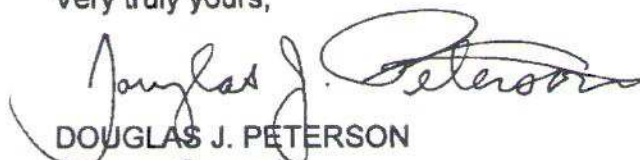
Below this explanatory statement, the following language should be inserted for the ballot title:

The purpose of Legislative Bill 268, passed by the First Session of the 104th Nebraska Legislature in 2015, is to eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment. Shall Legislative Bill 268 be repealed?



You are reminded that § 32-1410(3) requires that you serve a copy of this language upon the persons offering or filing the initiative petition by mail or electronic transmission forthwith.

Very truly yours,



Handwritten signature of Douglas J. Peterson in cursive script.

DOUGLAS J. PETERSON
Attorney General