IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RECALLND	)	
	)	Supreme Court No. 20100228
Petitioner,	)	
	)	
vs.	)	
	)	
Secretary of State, Al Jaeger,	)	
	)	
Respondent.	)	

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

1. The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed amicus curiae briefs on constitutional law issues in cases all over the country.

2. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

3. This case is of interest to the ACRU because we are especially concerned to seek to ensure that the legal and constitutional rights of the citizens of North Dakota to participatory democracy and democratic accountability are fully recognized and protected, regardless of political correctness.

STATEMENT OF THE CASE

4. The North Dakota Constitution states in Article III, Section 10,

> "Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition of electors equal in number to twenty-five percent of those who voted at the preceding general election for the office of governor in the state, county or district in which the official is to be recalled."

5. Citizens of the state of North Dakota formed a committee entitled RECALLND for the purpose of recalling United States Senator Kent Conrad, who is an elected official of the state of North Dakota. As provided under North Dakota law N.D.C.C. Sect. 16.1-01-09.1, RECALLND filed a request on May 3, 2010 with the Secretary of State of North Dakota for approval of petitions for circulation providing for a recall election for Senator Conrad. As long as that request is in proper form, North Dakota law expressly provides that "The Secretary of State *shall* prepare a signature form that includes provisions for identification of the recall…." Id. (emphasis added).

6. Nevertheless, the Secretary did not comply with that requirement. Instead, on May 13, 2010, the Secretary of State declined to approve the application of RECALLND for the circulation of recall petitions, writing in a letter to the recall committee, "Based on an opinion issued on May 13, 2010, by the Attorney General, North Dakota's Constitution and its state's laws do not provide for a recall of a person elected to a federal government position. Therefore, I have no authority to approve for circulation the petition you submitted."

7. On July 14, 2010, RECALLND filed its Complaint in the North Dakota Supreme Court, which has original jurisdiction in this matter. The Complaint seeks only "a Declaratory Order compelling the Secretary of State to approve the Committee's application" for circulation of recall petitions. On August 4, 2010, the North Dakota Supreme Court issued an Order providing for briefing and for oral argument to be held in October 2010.

SUMMARY OF ARGUMENT

8. Undeniably, United States Senator Kent Conrad is an elected official of the state of North Dakota. Therefore, under the plain meaning of the express language of the North Dakota Constitution, he is subject to recall under North Dakota law. Indeed, if Kent Conrad is not an elected official of the state of North Dakota, what state is he an elected official of? Could the Supreme Court of North Dakota possibly rule that Kent Conrad is *not* an elected official of the state of North Dakota?

9. Petitioner requests only an Order to compel the Secretary of State to approve it's application for the circulation of recall petitions, as to form, so that it can begin to collect signatures, as required by North Dakota statute, as well as by the state Constitution. It is not asking for an Order to remove Senator Conrad from office. Consequently, the issue of whether recall of a United States Senator is constitutional under either the North Dakota or U.S. Constitutions is not yet presented by this litigation.

10. The law is well settled that the courts will not address constitutional questions unless necessary to resolve a particular case. The constitutional issue would not be presented by this case until the Petitioner had gathered the signatures of 80,000 citizens and voters of North Dakota asking for a recall of Senator Conrad, a majority of North Dakota voters voted for such a recall in a recall election, and the Petitioner then sought a court order mandating the removal of Senator Conrad. That constitutional issue may never arise because the Committee may not succeed in obtaining the required signatures, or a majority of North Dakota voters may not vote to recall Senator Conrad. Or if the Committee does obtain 80,000 signatures from the citizens and voters of North Dakota supporting such a recall election, and a majority of North Dakota voters do vote to recall

Senator Conrad, the Senator may choose to resign in the face of such a powerful and dramatic political statement.

11. All that the Petitioner is seeking now, in fact, is an Order to allow it to proceed with political activity protected by the North Dakota and U.S. Constitutions. The process of asking for signatures on a petition to recall Senator Conrad, and signing such a petition, is political expression by the citizens and voters of North Dakota. That expression is core political speech fully protected by the First Amendment. Moreover, the process of publicly requesting such signatures, and signing such a public petition, is an exercise by the citizens and voters of North Dakota of their right to petition their government for redress of grievances, also fully protected under the First Amendment. The right of North Dakotans to engage in such activity is, in fact, recognized by North Dakota statute, which the Secretary of State failed to follow.

12. The U.S. Constitution allows for the recall of U.S. Senators.

13. The only logical way to read Article III of the North Dakota Constitution is as a whole, rather than trying to parcel out some of the provisions as applying to some of the rights and not to others, especially since all the rights in the Article involve quite similar petition processes. On that basis, the Secretary of State's denial of the application of RECALLND for approval of its recall petitions for circulation was not in accordance with North Dakota law. The North Dakota Constitution expressly provides for original jurisdiction in the North Dakota Supreme Court for review of that denial.

ARGUMENT

I. THE NORTH DAKOTA CONSTITUTION ALLOWS THE RECALL OF ANY ELECTED OFFICIAL OF THE STATE, WHICH INCLUDES A U.S. SENATOR.

14. Growing out of the deep roots of the Progressive movement over a century ago, North Dakota has been a national leader in citizen democracy and participation with such provisions as initiative, referendum and recall. This is reflected in Article III, Section 10 of the North Dakota Constitution, which provides for recall as follows,

> "Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition of electors equal in number to twenty-five percent of those who voted at the preceding general election for the office of governor in the state, county, or district in which the official is to be recalled."

Undeniably, United States Senator Kent Conrad is an elected official of the state of North Dakota. Therefore, under the plain meaning of the express language of the North Dakota Constitution, he is subject to recall under North Dakota law.

15. Indeed, if Kent Conrad is not an elected official of the state of North Dakota, what state is he an elected official of? Could the Supreme Court of North Dakota possibly rule that Kent Conrad is *not* an elected official of the state of North Dakota?

16. The Attorney General argues that "any elected official of the state" means only state government officials. 2010 Op. Atty. Gen. N.D. 8 (May 13, 2010). But if that is what the drafters meant, then that is what they would have said. It would have been easy enough to phrase the provision as "Any elected state official," or "Any elected state or local official." But that is not what they meant because that is not what they did.

17. The Attorney General also argues "that if the legislature amends an existing statute, it is a 'clear indication that the Legislature intended to change the law.'" Id., at 4.

As the Attorney General notes, the prior recall provision in the state Constitution, adopted in 1921, stated, "The qualified electors of the state or of any county, or of any congressional, judicial, or legislative district may petition for the recall of any elective congressional, state, county, judicial or legislative officer…." Id., at 5. The Attorney General admits that language did provide for recall of Congressional representatives.

18. No doubt, if the legislature amends an existing statute it is quite clear it meant to change the law. The 1979 amendment changing Article III of the North Dakota Constitution expressly changed the signature requirement for recall petitions from 30% of voters in the last election to 25%, and eliminated the requirement that a special election be held within 40 to 45 days after the petition signatures are filed. It also increased the number of petition signatures required for initiative and referendum. Id. at 7.

19. But as to who can be recalled, the 1979 amendment simply replaced run on language with more concise language that means the same thing in plain English. That is the only effect of changing the 1921 language, "The qualified electors of the state or of any county, or of any congressional, judicial or legislative district may petition for the recall (of) any elective congressional, state, county, judicial or legislative officer by filing a petition…" with the current 1979 language, "Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition…." Note that "of the state" is conceded to include congressional representatives in the 1921 language, but somehow it supposedly does not in the 1979 language.

20. The Attorney General concedes that the legislative history regarding the 1979 amendment "is very sparse and not particularly instructive." Id. at 7. But surely if the people were giving up an historic power, which they had enjoyed for decades, to recall

Congressional representatives in those amendments as the Attorney General claims, there would have been some discussion of it. Indeed, the Attorney General fails to provide any direct legislative history at all involving the 1979 amendments indicating that the framers or the people made such a change. The best he can do is a statement from a single legislator regarding proposed amendments in 1972 that were rejected by the people at the ballot box. Moreover, that legislator's statement says that judicial officers were removed from recall as well, id. at 9, but that is expressly contradicted by other legislative history offered by the Attorney General saying they were not, id. at 8.

21. This Court should not read an historic right of the people, in which North Dakota has been a national leader, out of the Constitution without clear and express authorization to do so.

II. PETITIONER SEEKS NOW ONLY APPROVAL TO PROCEED WITH CONSTITUTIONALLY PROTECTED ACTIVITY.

22. Petitioner requests only an Order to compel the Secretary of State to approve it's application for the circulation of recall petitions, as to form, so it can begin to collect signatures. It is not asking for an Order to remove Senator Conrad from office. Consequently, the issue of whether recall of a United States Senator is constitutional under either the North Dakota or U.S. Constitutions is not yet presented by this litigation.

23. The law is well settled that the courts will not address constitutional questions unless necessary to resolve a particular case. In Hamdan v. Rumsfeld, 548 U.S. 557, 720 (2006), the U.S. Supreme Court was sowing in an already well plowed field when it wrote that courts will not decide claims that are "contingent [upon] future events that may

not occur as anticipated, or indeed may not occur at all.'" (quoting Texas v. United States, 523 U.S. 296 (1998). In Scott v. Harris, 550 U.S. 372, 388 (2007), Justice Breyer noted:

> "older, wiser judicial counsel 'not to pass on questions of constitutionality …unless such adjudication is unavoidable.' Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944); see Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)('The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.')."

Accord Burton v. United States, 196 U.S. 283 (1905)(U.S. Supreme Court will not decide constitutional issue unless absolutely necessary to disposition of case); Renne v. Geary, 501 U.S. 312 (1991); Califano v. Saunders, 430 U.S. 99 (1977); United States v. Scurry, 193 N.J. 492, 500 n. 4 (2008)(courts "do not address constitutional questions when a narrower, non-constitutional result is available."); Randolph Town Ctr., L.P. v. County of Morris, 186 N.J. 78, 80 (2006)("[c]ourts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation."); O'Keefe v. Passaic Valley Water Com'n., 132 N.J. 234, 240 (1993)("Courts should not reach constitutional questions unless necessary to the disposition of the litigation."); John Paul Stevens, The Bill of Rights: A Century of Progress, 59 *U. Chi. L. Rev.* 13, 37 (1992)(doctrine of judicial restraint obliges federal judges to avoid "unduly expansive constitutional adjudication"); Ronald D. Rotunda & John Nowak, *Treatise on Constitutional Law*, 2.13(g) at 240 (2d. ed.1992)(citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

24. The constitutional issue would not be presented by this case until the Petitioner had gathered the signatures of 80,000 citizens and voters of North Dakota asking for a recall of Senator Conrad, a majority of North Dakota voters voted for such a

recall in a recall election, and the Petitioner then sought a court order mandating the removal of Senator Conrad. That constitutional issue may never arise because the Committee may not succeed in obtaining the required signatures, or a majority of North Dakota voters may not vote to recall Senator Conrad. Or if the Committee does obtain 80,000 signatures from the citizens and voters of North Dakota supporting such a recall election, and a majority of North Dakota voters do vote to recall Senator Conrad, the Senator may choose to resign in the face of such a powerful and dramatic political statement.

25. Rushing ahead to decide the constitutional issue now would logically require this Court to overrule all of the authorities cited above. It would precisely require it to decide claims that are contingent upon future events that may not occur as anticipated, or indeed may not occur at all.

26. All that the Petitioner is seeking now is an Order to allow it to proceed with political activity protected by the North Dakota and U.S. Constitutions. The process of asking for signatures on a petition to recall Senator Conrad, and signing such a petition, is political expression by the citizens and voters of North Dakota. That expression is core political speech fully protected by the First Amendment.

27. Moreover, the process of publicly requesting such signatures, and signing such a public petition, is an exercise by the citizens and voters of North Dakota of their right to petition their government for redress of grievances, also fully protected under the First Amendment.

28. Indeed, the right to engage in such political activity is precisely recognized by the North Dakota statute providing for the right of citizens to participate in a petition to recall, N.D.C.C. Sect. 16.1-01-09.1, which states,

> "A request of the Secretary of State for approval of a petition to recall an elected official…may be presented over the signatures of the sponsoring committee on individual signature forms that have been notarized. The secretary of state shall prepare a signature form that includes provisions for identification of the recall…."

29. Petitioner in this case is literally asking at this point only for enforcement of this statutory right. Nothing about enforcement of that right would violate either the North Dakota or U.S. Constitutions. To the contrary, that right is actually protected by the North Dakota and U.S. Constitutions, as discussed above. See also Anderson v. Celebreeze, 460 U.S. 780, 788 (1983)("[A]n election campaign is an effective platform for the expression of views on the issues of the day."); Illinois Bd. of Election v. Socialist Workers Party, 440 U.S. 172, 186 (1979)("[A]n election campaign is a means of disseminating ideas."); N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002) (election laws "will be interpreted to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day."); Herbst Gaming, Inc. v. Heller, 141 P. 3d 1224 (Nev. 2006)(recognizing the benefit of allowing the people to vote on initiative even if later found unconstitutional, precluding pre-election review of the substantive provisions of the initiative); Hooper v. Hart, 56 F.R.D. 476 (W.D. Mich. 1972)(court would not hear suit seeking declaratory judgment that U.S. Senators from Michigan were subject to recall under state law because the suit did not present a justiciable case or actual controversy).

30. In virtually parallel litigation now proceeding in New Jersey, the Appellate Division earlier this year recognized the validity of this argument in ruling that the circulation of petitions for recall of Senator Robert Menendez can proceed, reserving for later decision the constitutional issues regarding recall of a U.S. Senator, if and when those issues are presented. Committee to Recall Robert Menendez v. Wells, 413 N.J. Super. 435, 995 A.2d 1109 (App.Div. 2010), cert. granted, 201 N.J. 498, 992 A.2d 793 (2010). The court said,

> "[W]e neither declare the recall provision in our State Constitution as applied to a United States Senator definitively valid or invalid. There is, and there will be, no necessity for our courts to resolve this difficult constitutional issue if the Committee's petition drive fails to collect the necessary, approximately, 1,300,000 signatures. Pending that possible eventuality, we see no urgent reason to now decide the question of invalidity or validity with finality. All we need to decide, as we have done, is whether there is a sufficient basis for the Committee to proceed with its initiative and for the Secretary of State to perform the ministerial function. To go beyond that limited holding and 'embrace unnecessary constitutional questions' would depart from the 'older, wiser counsel' of judicial restraint."

995 A.2d at 1123. That decision is now pending on appeal to the New Jersey Supreme Court.

31. Consequently, this Court should grant the relief requested by the Petitioner for now, and defer the constitutional issues until later, if and when presented.

III. THE U.S. CONSTITUTION ALLOWS THE RECALL OF U.S. SENATORS

32. In the virtually identical, parallel, ongoing litigation in New Jersey, the Appellate Division earlier this year correctly noted, "the United States Constitution has no express provision precluding the recall of United States Senators or Representatives."

995 A.2d at 1119. It also recognized, “we can find no case or precedent which addressed the issue before us or precludes recall under the Seventeenth Amendment.” Id. at 1120. The court also recognized the critical distinction between this case and U.S. Term Limits v. Thornton, 514 U.S. 779 (1995). The term limits at issue in that case infringed upon “the right of the people to vote for whom they wish.” 514 U.S. at 820. The case upheld the principle that “’the people should choose whom they please to govern them.’” Id. at 819. Justice Kennedy with the concurring fifth vote emphasized this reasoning, Id. at 844, but it was the basis of the four Justice plurality as well. Id. at 819, 820.

33. But recall results in just the opposite. It does not restrict “the right of the people to vote for whom they wish,” but, rather reinforces the principle in Term Limits that “the people should choose whom they please to govern them.” As the court below recognized in distinguishing Term Limits, “[The present] case deals with neither the qualifications clause nor with handicapping the electorate or its choice; even a recalled Senator could run for reelection.” 995 A. 2d at 1121.

34. The same principle was upheld in Powell v. McCormack, 395 U.S. 486 (1969), where the U.S. Supreme Court again proclaimed, “A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’” Id. at 547. This principle again upholds recall, as recall simply extends the power of the people to choose whom they please to govern them. *See also*, N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002)(The legislature intended that election laws “will be interpreted ‘to allow the greatest scope for public participation in the electoral process…and most importantly to allow the voters a choice on Election Day.”); Timothy Zick, The Consentof the Governed: Recall of United States

Senators, 103 Dick. L. Rev. 567, 589 (1999)("As the Constitution does not bar the people of the states the power to recall their federal legislators, they should be free to exercise that power.").

35. Other states have recognized the validity of recall for members of Congress. Wisconsin, a birthplace of the Progressive movement that historically promoted recall, added a recall provision applying to congressional representatives to its state Constitution in 1926. That provision states,

> **Recall of elective officers. Section 12.** The qualified electors of the state, of any congressional, judicial or legislative district or of any county may petition for the recall of any incumbent elective officer after the first year of the term for which the incumbent was elected, by filing a petition with the filing officer with whom the nomination the nomination petition to the office in the primary is filed, demanding the recall of the incumbent.

Wisconsin Const., Art. XIII, Sec. 12. The Attorney General of Wisconsin issued an opinion in 1979 upholding the constitutionality of this recall provision in regard to U.S. Senators. 68 Op. Atty. Gen. Wis. 140, 1979 Wisc. AG LEXIS 61. Relying on this provision, citizens initiated recalls against the two sitting U.S. Senators in 1997 with no legal denial or challenge claiming it was unconstitutional, but they failed to collect the required signatures from 25% of registered voters. Wisconsin GOP Congressman Backs Drive to Recall Senators, Washington Post A04 (Apr. 22,1997). Overall, at least eleven states today maintain state recall provisions that apply to congressional representatives. Besides New Jersey and Wisconsin, these include Arizona, Colorado, Louisiana,

Michigan, Montana, Nevada, North Dakota, Oregon and Washington.[1]
http://www.recallcongressnow.org (viewed 5/7/10).

36. Support for recall of congressional representatives goes all the way back to colonial times. John Armor, Is a State-Based Recall of a U.S. Senator Constitutional?, American Thinker, www.americanthinker.com, April 1, 2010 ("Recall was available for the voters of a colony to remove an official with whom they had become dissatisfied. It first appeared in New England in 1639."). The concept of popular sovereignty, that the people hold the ultimate power, provides the basis for recall, with elected representatives subject to removal by the will of the people as they please. Such popular sovereignty first appeared on American shores in the Mayflower Compact of 1610, with the free citizens of the *Mayflower* agreeing that they would "enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient…." Id. The most famous and bold statement of such popular sovereignty appeared in our Declaration of Independence,

> "That to secure these [God-given] rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

[1] The Attorney General cites an unpublished case from Idaho as ruling that recall of a U.S. Senator is unconstitutional under the U.S. Constitution. Rankin v. Canarrusa, Civ. No. 39700 (D.C. Idaho, Sept. 28, 1967). But that court found that Idaho state law provided for recall only of state officials, not Congressional representatives.

Id. If the people hold the right to alter or abolish their entire government, and institute a new one, then surely they would have the power to remove and replace a discredited representative or official.

37. The first President of the United States, George Washington, recognized recall as well, writing in a letter dated Nov. 10, 1787, just after the Constitutional Convention over which he presided,

> "The power under the Constitution will always be in the People. It is entrusted for certain defined purposes…and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled."

Letter from George Washington to Bushrod Washington, Nov. 10, 1787, *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, Section 29:311 (Ed. John C. Fitzpatrick).

38. The Tenth Amendment to the Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Since this power was not delegated to the United States by the Constitution, nor prohibited by it to the States, the power of recall is reserved by the Tenth Amendment to the states, and to the people.

39. In addition, both the text of the original Constitution, and of the Seventeenth Amendment, leave to the states the details of election law, rather than providing for a federal election law. The states consequently define who can vote and how elections are conducted. That is why the states today have the constitutional authority to require photo IDs to vote, and the authority to bar convicted felons from voting. It is also why states can require a candidate to face the voters multiple times to be elected to the Senate,

depending on how primaries are conducted, and whether run-offs are required. States providing for Congressional recall would merely involve another exercise of these powers.

IV. UNDER N.D. CONST. ARTICLE III, SECTIONS 2, 6, AND 7, THE SECRETARY OF STATE FAILED TO COMPLY WITH NORTH DAKOTA LAW.

40. Article III of the North Dakota Constitution covers "Powers Reserved to the People." The powers included are the rights to Initiative, Referendum and Recall. The Article includes 10 sections specifying the procedures and protections applying to the rights.

41. The only logical way to read that Article is as a whole, rather than trying to parcel out some of the provisions as applying to some of the rights and not others, especially since all three rights involve quite similar petition processes. That would ensure full scope and protection for the powers and rights of the people specified, and the policies and principles on which they are based. Otherwise, there may be no provision of North Dakota law that actually requires approval of the Secretary of State before beginning circulation of recall petitions, and Section 10 would apply to any petitions with sufficient signatures that on its face called for a recall election of a particular office holder covered by the Section.

42. On this basis, the Secretary of State failed to comply with North Dakota law in declining Petitioner's request for approval of the recall petitions for circulation based on an opinion of the Attorney General regarding the substance of the recall. Article III, Section 2 provides that the petition "must be submitted to the secretary of state for

approval as to form." It further provides that, "The secretary of state shall approve the petition for circulation if it is in proper form…."

43. This is why this Court ruled in Municipal Services Corp. v. Kusler, 490 N.W. 2d 700, 706 (N.D. 1992),

> "[T]he Secretary's constitutional responsibility under Art. III, Sec. 2, N.D. Const., to approve the form of a petition is limited to ascertaining whether the petition complies with the statutory requirements for form and whether the petition contains impermissible, extraneous statements. In reviewing a petition for form, the Secretary must not be concerned with the merits of the petition or with the substance of its text."

The Court added,

> Form is to be distinguished from substance. Art. III, Sec. 2 N.D. Const., limits the Secretary's review to whether the petition "is in proper form and contains the names and addresses of the sponsors and full text of the measure." It does not authorize a review of the substance or merits of the text of the measure. When a petition is challenged, neither the Secretary nor this court should be concerned with the substance or merit of the proposed measure, because under our system of government, the resolution of a proposal's merit rests with the electorate."

490 N.W. 2d at 705.

44. Consequently, the Secretary of State had no power to reject the application from Petitioner for approval of recall petitions for circulation based on an opinion of the Attorney General regarding the substance of the proposed recall. The Secretary's function and power is purely ministerial, to examine the application for approval of petitions purely for compliance with the required form, and leave the substance to the people, and, ultimately, the courts.

V. ORIGINAL JURISDICTION IN THIS MATTER APPROPRIATELY LIES WITH THE NORTH DAKOTA SUPREME COURT.

45. Article III, Section 7 of the North Dakota Constitution states, "All decisions of the secretary of state in the petition process are subject to review by the supreme court in the exercise of original jurisdiction." Article III, Section 6 adds, "All decisions of the secretary of state in regard to any such petition shall be subject to review by the supreme court."

46. The Secretary of State's denial of the application of RECALLND for the circulation of recall petitions is undeniably a decision of the Secretary of State in the petition process. Therefore, the North Dakota Constitution expressly provides for original jurisdiction in the North Dakota Supreme Court for review of that denial.

47. There are no disputed facts in this matter. The dispute involves only questions of law which this Court is fully equipped to resolve. There is no reason, therefore, for the Court not to settle this matter on original jurisdiction.

CONCLUSION

48. For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should grant the relief requested by Petitioner, and order the Secretary of State to grant the requested approval of the Petitioner's application for recall petitions.

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