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Secretary of State

STATE OF NEVADA

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*Deputy Secretary
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OFFICE OF THE
SECRETARY OF STATE

April 2, 2013

Lucas Foletta, General Counsel & Policy Director
Office of the Governor
101 Carson Street
Carson City, NV 89701

Dear Mr. Foletta:

The Secretary of State's office is in receipt of your letter, dated April 1, 2013, requesting the Secretary of State's position as to whether the Legislature has met and satisfied its requirements to place an alternate measure to Initiative Petition 1 ("The Education Initiative") on the 2014 General Election ballot. Upon consultation with the Attorney General's office, it is our opinion that construing Article 19's explicit rejection requirement such that it would not require a vote of the Legislature on the merits of the petition would be inconsistent with the purpose of Article 19 and the plain language of the constitution. As such, the Secretary of State's office concurs with your interpretation that the Legislature has not satisfied its requirements to reject the measure qualifying it to place an alternate measure on the 2014 General Election ballot.

Should you have any additional questions, please feel free to contact me.

Respectfully,

ROSS MILLER
Secretary of State

By: _____

A handwritten signature in black ink, appearing to read "S. E. Gilles", written over a horizontal line.

Scott E. Gilles, Esq.
Deputy Secretary for Elections

cc: Attorney General

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Office of the Governor

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SECRETARY OF STATE
ELECTIONS DIVISIONS

April 1, 2013

The Honorable Ross Miller
Secretary of State
State of Nevada
101 Carson Street, Suite 3
Carson City, NV 89701

Dear Secretary of State Miller:

As you know, on February 4, 2013, in accordance with Article 19 of the Nevada Constitution, your office submitted to the Legislature Initiative Petition 1, titled "The Education Initiative." The petition proposes a revenue measure to increase funding for public education through the imposition of a so-called "margins tax." On March 5, 2013, six Republican members of the Nevada Senate announced their intent to propose an alternative measure to the petition to compete with the Education Initiative. Though the specifics of the proposal have not been released, public statements indicate that the foundation of the competing measure will be a tax on a portion of the mining industry.¹

Since March 5, 2013, a number of questions have been raised publicly about the process associated with the Legislature's prerogative to place a competing measure on the ballot. Much of the public discussion has centered on the meaning of Article 19's requirement that the Legislature "reject" a proposed statute or amendment within 40 days of commencement of the regular session before proposing a competing measure. During the 76th Legislative Session, the Legislature affirmatively rejected that session's Initiative Petition 1² with the passage of Senate Concurring Resolution 4 ("SCR 4), entitled "Rejecting Initiative Petition 1," within 40 days of commencement of the session before

¹ See March 5, 2013, Senate Republican Press Release entitled "Senate Republican Leadership Calls for an Alternative Ballot."

² The 76th Legislative Session's Initiative Petition 1 was titled "Imposes an additional sales and use tax in certain areas of larger counties for the construction, improvement, equipment, operation and maintenance of a sports and entertainment arena through public and private cooperation."

proposing a competing measure. In doing so, the Legislature adopted a procedure that appeared to track the plain language of Article 19.

That notwithstanding, on March 17, 2013, the Legislative Counsel Bureau released an internal memorandum (“legislative counsel memo”) from the chief litigation counsel to the legislative counsel indicating that in the case of the Education Initiative “the Legislature is not required to take any specific type of legislative action in order to reject a statutory initiative.” Legislative Counsel Memo at 1.³ The memo states further:

[I]f the Legislature simply postpones or ceases all proceedings on the statutory initiative in the regular course of its legislative business by, for example, refusing to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative, the Legislature has rejected the statutory initiative for purposes of Article 19, Section 2(3). *Id.*

The implication of the legislative counsel memo is that the Legislature may act to propose a measure to compete with the Education Initiative despite the fact that, unlike the process adopted in 2011, no affirmative steps were taken to reject the petition within 40 days of commencement of the session.

The discrepancy between the Legislature’s recent practice and the opinion reflected in the legislative counsel memo has introduced ambiguity relating to the requirements of placing a competing measure on the ballot. This ambiguity is underscored by the fact that the analysis in the legislative counsel memo is, in this office’s view, inconsistent with the plain meaning of Article 19.

Article 19(2)(3) requires that once the Secretary of State transmits an initiative petition to the Legislature, “[t]he petition shall take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby shall be enacted or rejected by the Legislature without change or amendment within 40 days.” It states further:

If the statute or amendment to a statute is rejected by the Legislature, or if no action is taken thereon within 40 days, the Secretary of State shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election. . . . If the Legislature *rejects* such proposed statute or amendment, the Governor may recommend to the Legislature and the Legislature may propose a different measure on the same subject, in which event, after such different measure has been approved by the Governor, the question of approval or disapproval of each measure shall be submitted by the Secretary of State to a vote of the voters at the next succeeding general election. *Id.* (emphasis added).

³ March 17, 2013 Memorandum re: Legislative rejection of statutory initiatives under Article 19, Section 2(3) of the Nevada Constitution.

As the legislative counsel memo points out, the plain meaning of the term “reject” includes the following definitions: “to refuse to hear, receive, or admit,” and “to refuse to acknowledge, adopt, believe, acquiesce in, receive or submit to,” and “to refuse to accept, consider, submit to, take for some purpose, or use.” Legislative Counsel Memo at 3 *citing Webster’s Third New International Dictionary* 1915 (1993); *Webster’s Ninth New Collegiate Dictionary* 993 (1990). With respect to the Legislature’s prerogative to place a competing measure on the ballot following “rejection,” the relevant issue is what form must the rejection take?

The legislative counsel memo points out that the appropriate rule of construction when interpreting a term related to legislative practice is to construe the term “with reference to existing customs in legislative and parliamentary bodies.” *Id.* at 3 *citing* Luther S. Cushing, *Elements of the Law & Practice of Legislative Assemblies* § 2341 (1856). With respect to the custom of “rejecting” a bill, the memo notes that although the modern practice is to reject a bill by postponing or ceasing all proceedings on a bill, the British Parliament’s early practice was to reject a bill by direct motion. *Id.* (citations omitted). The Legislature’s most recent action to place a competing measure on the ballot was preceded by an express rejection of the initiative measure proposed by the people, in accordance with the early parliamentary practice.

As was stated above, in 2011, the Legislature expressly rejected that session’s Initiative Petition 1 with the passage of SCR 4, entitled “Rejecting Initiative Petition 1,” before proposing an alternative. SCR reads in pertinent part:

WHEREAS, Section 2 of Article 19 of the Nevada Constitution authorizes the Legislature to propose a competing measure to Initiative Petition No. 1; and

WHEREAS, There are alternatives to Initiative Petition No. 1 that could be proposed by the Legislature that would better serve the interests of the residents of the State of Nevada; and

WHEREAS, This Legislature intends to propose a competing measure for submission to the voters on the November 2012 general election ballot; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the members of the 76th Session of the Nevada Legislature hereby reject Initiative Petition No. 1; and be it further

RESOLVED, That the Secretary of the Senate prepare and transmit a copy of this resolution to the Governor of the State of Nevada and the Secretary of State of the State of Nevada.

In choosing to directly reject the 2011 session's Initiative Petition 1, the Legislature acted in conformance with the early parliamentary practice of rejecting the petition by direct motion. The 2011 Legislature's rejection of Initiative Petition 1 was not altogether different from the 1921 Legislature's rejection of a statutory initiative relating to divorce. As the legislative counsel memo points out, in that case the Legislature voted on the initiative on the 31st day of the session, but the initiative failed to receive the constitutional majority. *Id.* at 5 (internal citations omitted). Thereafter, on the 60th day of the session, the Legislature passed Assembly Bill 65 as a competing measure. Thus, in both 2011 and 1921 the Legislature addressed the initiative petitions before it as a body, expressing its rejection by a formal vote related to the substantive provision placed before it by the Secretary of State.

The Legislature placed a competing measure on the ballot on one other occasion, in 1981. In that instance, as the legislative counsel memo points out, the legislature did not address the petition placed before it before submitting a competing measure to the Governor for his approval. *Id.* at 6 (internal citations omitted). Despite the 1981 Legislature's actions, the weight of the Nevada Legislature's past practice appears to suggest that the Legislature must reject an initiative petition placed before it by a vote of the body—either by expressly rejecting the petition or by the petition failing to secure the constitutionally required majority for passage—before proposing a competing measure.

That a vote of the Legislature on the merits of the petition is a requirement of rejection is not unlike the requirements of rejection by the voters. As you know, ballot questions confront the voters with a simple choice: vote "yes" or "no." A question that does not receive the constitutionally required number of votes to be approved is deemed disapproved or rejected. As the Nevada Supreme Court pointed out in *State ex rel. Doyle et al. v. Koontz*, 69 Nev. 247 (1952), "[t]he entire purpose of both the constitutional provisions and the statutes [relating to initiative petitions] is to submit to the electors the *question* as to whether the proposed measure should be adopted or rejected." (emphasis in original).

To construe Article 19's rejection requirement otherwise is to interpret the Constitution in favor of an unresponsive legislature, which seems inconsistent with the purpose behind Article 19. The availability of the initiative process is, as one court put it, the "outgrowth of popular discontent with the unresponsiveness of government in dealing with felt social needs of the people." *Fritz v. Gorton*, 83 Wash. 2d 275, 281 (Wash. 1974). To allow the Legislature to compete with a measure initiated by the people without directly addressing the people's preferred alternative by a vote allows an officious

Legislature to disrupt the people's process without unequivocally declaring its dissatisfaction with that choice. To the extent Article 19 is designed to force an unresponsive legislature to address a policy matter placed before it by the people, requiring less than an up or down vote does nothing to compel responsiveness and is therefore inconsistent with its purpose.

In light of the conflicting opinions on the matter referenced here, this office requests that you provide guidance under the interpretive authority granted your office under NRS 293.247 as to whether in the case of Initiative Petition 1, the Legislature has satisfied its responsibility to reject the measure so as to qualify it to place a competing measure on the 2014 ballot. If you need any further clarification of this request, please feel free to contact me.

Sincere regards,

A handwritten signature in black ink, appearing to read 'L. Foletta', written over the typed name.

LUCAS FOLETTA
General Counsel & Policy Director
Office of the Governor
State of Nevada