

**LETTER OPINION
2011-L-04**

March 24, 2011

The Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter requesting my opinion on whether outstanding initiative petitions must contain the number of signatures required at the time the petitions were approved for circulation or at the time the petitions would be submitted to the Secretary of State. Based on the following, it is my opinion that an initiative petition must contain the required number of signatures based on the most recent federal decennial census at the time the petition is submitted to the Secretary of State.

ANALYSIS

There are two state constitutional provisions which are relevant to your question. For an initiated statutory measure, the constitution provides:

The petition may be submitted to the secretary of state if signed by electors equal in number to two percent of the resident population of the state at the last federal decennial census.¹

For an initiated constitutional amendment, the requirement is that the petition be “signed by electors equal in number to four percent of the resident population of the state at the last federal decennial census.”²

You indicate in your letter that there were a number of petitions approved for circulation during 2010. At the time of these approvals, the “last” federal decennial census available

¹ N.D. Const. art. III, § 4.

² N.D. Const. art. III, § 9.

was the one conducted in 2000.³ The signature numbers based on the 2000 federal decennial census would have been correct had any of the currently outstanding petitions been submitted prior to release of the 2010 federal decennial census data. However, none of the currently outstanding petitions was submitted before release of that census data. Petition circulators do have one year to gather sufficient signatures for submission, so it is possible completed petitions could be submitted sometime during 2011.⁴

You further indicate in your letter that the United States Census Bureau released new federal census data in December 2010. The new census data show that the population in North Dakota increased to a total of 672,591 which would increase the number of signatures required to place an initiated measure on the ballot to 13,452 signatures and to 26,904 for an initiated constitutional measure, up from 12,844 and 25,688 signatures, respectively. You question whether the 2000 federal decennial census numbers would be used for petitions initially approved for circulation in 2010 but which have not yet been submitted or whether the new 2010 census numbers would apply to these outstanding initiated petitions.

The North Dakota Supreme Court has stated the following with regard to interpreting constitutional provisions:

The sole object in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and the people who adopted it, and such intention and purpose are to be found in and deduced from the language of the constitution itself. *Dawson v. Tobin*, 74 N.D. 713, 24 N.W.2d 737 (N.D. 1946). In construing constitutional provisions we generally apply principles of statutory construction, giving effect and meaning to every provision and reconciling, if possible, apparently inconsistent provisions.⁵

Thus, like statutes, words in constitutional provisions are to be understood in their ordinary sense, unless a contrary intention plainly appears.⁶ And words and phrases should be construed according to the context and usual rules of grammar and usage.⁷ The ordinary

³ You indicate that the population figure you used at this point was 642,200 and that for a statutory initiative requirement of 2%, the minimum number of signatures required would equal 12,844, and the number for a constitutional initiative of 4% would equal 25,688 signatures.

⁴ See N.D.C.C. § 16.1-01-09(7); see also N.D.C.C. § 1-01-50.

⁵ *Pelkey v. City of Fargo*, 453 N.W.2d 801, 804 (N.D. 1990) (emphasis added).

⁶ N.D.C.C. § 1-02-02.

⁷ N.D.C.C. § 1-02-03.

meaning of “at” is: “[o]n, near, or by the time . . . of.”⁸ The ordinary meaning of the word “last,” as used in reference to the pertinent federal decennial census, means: “[j]ust past; most recent . . . [m]ost up-to-date; newest.”⁹ Thus, the phrase “at the last” would mean on or near the time of the most recent or up-to-date event.

A plain reading of N.D. Const. art. III, §§ 4 and 9 would indicate that the census data to be used in computing the required percentages of signatures would be the most recent federal decennial census data near the time of filing since the constitutional language provides for submitting petitions signed by electors equal in number to the applicable percentage of the population “at the last federal decennial census.” The newest or most recent census data available following the dissemination of the 2010 federal decennial census in December 2010 would be the 2010 census data, not the 2000 data.

The time of submitting the petition is the pertinent time for determining the number of signatures. “For a petition to qualify as an initiative or referred measure under a state constitutional initiative and referendum provision, the petition must prima facie contain the required number of signatures at the time of filing.”¹⁰

Further, “[i]n a number of cases, it has been held or recognized that a census is effective from the date of official publication, promulgation, or announcement.”¹¹ Thus, the effective date of the 2010 federal decennial census was December 21, 2010, the date of official publication, promulgation, or announcement.¹² After the effective date of the 2010 census data, the signature requirements would be based on the new data since it is the most current; the 2000 data would not be the “last federal decennial census” within the meaning of the applicable provisions of the North Dakota Constitution. As the North Dakota Supreme Court noted, “[w]e are of the opinion that this [statute providing for the salary of a

⁸ The American Heritage Dictionary 89 (4th coll. ed. 2010).

⁹ The American Heritage Dictionary 782 (4th coll. ed. 2010).

¹⁰ 42 Am Jur. 2d Initiative and Referendum § 34 (2010) (citing Walker v. McCuen, 886 S.W.2d 577 (Ark. 1994)) (emphasis added); see also 82 C.J.S. Statutes § 154 (2009) (“At the time of filing, the petition must contain the proper number of legal signatures as specified in constitutional and statutory provisions.”). (Emphasis added.)

¹¹ W. R. Habeeb, 43 A.L.R.2d 1353 § 2(a) (1955) (citing inter alia State ex rel. Nedreloe v. Kennard, 166 N.W. 514 (N.D. 1918)).

¹² U.S. Census Bureau News, Media Advisory - U.S. Census Bureau to Release First 2010 Census Counts, <http://2010.census.gov/news/releases/operations>.

sheriff to be based on the population of a county at the last preceding federal census] becomes effective as soon as the census is reported.”¹³

A somewhat analogous situation was presented to the North Dakota Supreme Court in Larkin v. Gronna.¹⁴ Larkin was nominated as candidate for a six-year term as railroad

¹³ State ex rel. Nedreloe v. Kennard, 166 N.W. at 514. See also City of Detroit v. Nims, 47 N.W.2d 4 (Mich. 1951) (tax collections distributable to local governments based on latest federal decennial census figures in April 1950 should be used and that prior to official promulgation of 1950 census results, 1940 figures should be used); 1999 S.D. Op. Atty. Gen. 02 (where number of signatures required to place initiated petition on ballot based on ten percent of total votes cast for governor “in the last gubernatorial election” and where the initiative process begins and there is an intervening gubernatorial election during the signature gathering process, the latest election controls the signature requirements); 33 Or. Op. Atty. Gen. 633 (1968) (notwithstanding filing of a preliminary initiative petition under old law, sponsors nevertheless subject to new constitutional requirements as to number of signatures for a completed initiative petition).

Prior to 1978, the North Dakota Constitution used flat figures and not percentages. In the Debates of the North Dakota Constitutional Convention of 1972, the background for the constitutional change to percentages was discussed:

The question might arise why did the committee decide to go percentages and not a flat figure? Of the 21 states that do have initiative and referendum, the staff spot checked I think twelve states. Every one of them used a percentage figure of one kind or another, some used a percentage of the votes cast in the last gubernatorial election, some used a percentage of the voters, and some used a percentage of population. It was the feeling of the committee that to have a constitutional provision that would be versatile and that would be easy to determine, and it would not be changing every year or so, but would be based on a ten-year decennial census would be the best approach.

Debates, North Dakota Constitutional Convention of 1972, vol. I, p. 888 (Jan. 28, 1972) (Statement of Delegate Sinner). The constitutional amendments referred to herein were passed in 1978.

While there was no discussion of the issue presented here, the history of this provision indicates that switching from a set number of signatures for an initiative petition to a percentage based on population as measured by the decennial census would be versatile, easy to determine, and the “best approach.”

¹⁴ 285 N.W. 59 (1939).

commissioner at the spring primary election. However, at that election, the term of office for railroad commissioner was shortened to two years by constitutional amendments. Larkin subsequently won the fall general election, but brought suit claiming that the amendment did not affect his term of office. The Supreme Court rejected that argument stating:

It is immaterial there was no nomination for a two-year term as petitioner claims in his fifth point. He was a candidate for commissioner of railroads for the ensuing term, and that meant commissioner of railroads with the term as it existed at the time of the election in November.¹⁵

Thus, in this instance, although the persons circulating petitions which were approved in 2010 may have expected to need only the number of signatures that were based on the 2000 census, these petitions nonetheless must be submitted with the required number of signatures as that number is determined at the time the completed petitions are actually submitted, which will be after the 2010 census data has been issued.

Based on the foregoing, it is my opinion that the number of signatures on an initiated statutory or constitutional petition which may be submitted to the Secretary of State in 2011 must be based on the most recent federal decennial census data, which in this case would be data released by the United States Census Bureau in December of 2010.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁶

¹⁵ 284 N.W. at 68.

¹⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).