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JOHN KUEHN, APPELLANT, V. ROBERT B. EVNEN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, AND ANNA WISHART ET AL., APPELLEES AND CROSS-APPELLEES.

___ N.W.3d ___

Filed September 4, 2026. No. S-24-901.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
2. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong.
5. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
6. **Trial: Evidence: Records: Appeal and Error.** Generally, it is not the function of an appellate court to review evidence that was not presented to the trial court. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

7. **Courts: Pleadings.** A trial court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.

Appeal from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Affirmed.

Andrew LaGrone, of La Grone Law, L.L.C., Steven E. Guenzel, of Johnson Flodman Guenzel & Wasserburger, L.L.P., and Anne Marie Mackin, pro hac vice, of Lex Politica, P.L.L.C., for appellant.

Michael T. Hilgers, Attorney General, Zachary B. Pohlman, Lincoln J. Korell, and Zachary A. Viglianco, for appellee Robert B. Evnen.

Daniel J. Gutman, Alexander S. Arkfeld, Sydney L. Hayes, and Kaitlin A. Madsen, of Gutman Law Group, for appellees Anna Wishart et al.

FUNKE, C.J., CASSEL, STACY, PAPIK, FREUDENBERG, and BERGEVIN, JJ., and SCHREINER, District Judge.

FUNKE, C.J.

I. INTRODUCTION

In September 2024, John Kuehn filed this action pursuant to Neb. Rev. Stat. § 32-1412(2) (Cum. Supp. 2024) seeking to enjoin Robert B. Evnen, in his official capacity as the Secretary of State of Nebraska (the Secretary), from placing two initiative measures regarding medical cannabis on the ballot for the November 2024 general election. Kuehn also named as defendants the sponsors of the two measures—Anna Wishart, Crista Eggers, and Adam Morfeld (collectively the Sponsors). The Secretary filed a cross-claim against the Sponsors in which he challenged the legal sufficiency of the two initiative petitions and sought declaratory relief. After the measures were adopted by voters in the general election, the district court for Lancaster County rejected the challenges raised by

Kuehn and by the Secretary. Kuehn appeals, and the Secretary cross-appeals.

On appeal, Kuehn and the Secretary generally assert that the district court erred in failing to invalidate numerous petition signatures based on circulator fraud and improper notarizations and that with such signatures properly excluded, the petitions lacked the required number of valid signatures to have been placed on the ballot. They raise issues, including whether the holding in *Barkley v. Pool*,[1] which dealt with circulator fraud in the initiative petition process, also applies to notaries in the same context and whether an adverse inference may be drawn from a witness' invocation of the Fifth Amendment in a civil case.

We conclude that the district court did not err as a matter of law when it declined to apply *Barkley v. Pool* in the manner urged by Kuehn and the Secretary or when it declined to draw adverse inferences based on invocation of the Fifth Amendment. We further find no error in the court's findings to support its rejection of Kuehn's and the Secretary's challenges to the legal sufficiency of the petitions. We therefore affirm the district court's order.

II. BACKGROUND

Kuehn and the Secretary challenged the legal sufficiency of petitions to place two initiative measures on the ballot. The first measure (Legalization Petition) sought to legalize cannabis for medical purposes in Nebraska. The second measure (Regulatory Petition) sought to establish the Nebraska Medical Cannabis Commission to regulate the manufacture and distribution of medical cannabis.

The two measures were placed on the ballot following campaigns to obtain the required number of signatures. Under Neb. Const. art. III, § 2, a petition for the enactment of a law must "be signed by seven percent of the registered voters of the state" and "the registered voters signing such petition

[1] *Barkley v. Pool*, 103 Neb. 629, 173 N.W. 600 (1919).

shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state." The Secretary determined that to meet the 7-percent requirement for the 2024 election, each petition needed to be signed by at least 86,499 registered voters, and that to meet the two-fifths requirement, a petition needed signatures from 5 percent of registered voters in each of 38 of the 93 counties of the State.

On July 3, 2024, the Sponsors submitted to the Secretary petition pages purported to contain 114,367 signatures for the Legalization Petition and 114,596 signatures for the Regulatory Petition. After reviewing the signatures, the Secretary determined that the Legalization Petition and the Regulatory Petition met the requirements with 89,962 verified signatures and 89,856 verified signatures, respectively.

1. Pretrial Filings and Rulings

On September 12, 2024, Kuehn filed a complaint against the Secretary and the Sponsors pursuant to § 32-1412(2). Kuehn sought, among other things, expedited relief enjoining the Secretary from certifying the Legalization Petition and the Regulatory Petition for placement on the ballot. In a news release dated September 13, 2024, the Secretary announced that he had certified both petitions for the general election ballot, but the Secretary also stated that "'[a]n investigation conducted by the Attorney General's office has uncovered serious questions about the signature gathering process for these petitions'" and that while he was certifying the petitions to appear on the ballot, "'in light of the Attorney General's investigation . . . a court could order later that the initiatives be thrown out.'"

In an amended complaint filed September 17, 2024, Kuehn sought expedited injunctive relief requiring the Secretary to "de-certify" the petitions for placement on the ballot, as well as a declaratory judgment that the petitions were legally insufficient and that the Secretary's certification of the petitions

was invalid and without legal effect. Kuehn alleged multiple grounds of insufficiency, but, as relevant here, he alleged that after the exclusion of numerous signatures that were invalid for various reasons, the petitions would not include sufficient valid signatures.

The Secretary's answer to Kuehn's amended complaint included a cross-claim against the Sponsors, in which the Secretary alleged that "[i]n order to carry out [his statutory] duties . . . to assess the legal sufficiency of initiative petitions, it is imperative that the uncertainty regarding the validity of the signatures at issue in this case . . . be resolved." The Secretary sought declaratory relief under the Uniform Declaratory Judgments Act (UDJA),[2] including "an order declaring the number of valid signatures submitted by the Sponsors" for the Legalization Petition and for the Regulatory Petition, and the Secretary requested that, if the court determined that insufficient signatures were submitted, the court declare the petitions legally insufficient and order "the legal (not physical) removal of the measures from the ballot before the election." The Secretary further requested that, if the court declared the petitions legally insufficient after the election, the court enter an order declaring the measures "void because they were not properly placed on the ballot" and declaring the results of the election to be "void and of no effect."

The Sponsors moved to dismiss both Kuehn's action and the Secretary's cross-claim for lack of subject matter jurisdiction and for failure to state claims upon which relief could be granted. The district court overruled the Sponsors' motion to dismiss Kuehn's amended complaint as to the claims that the petitions contained an insufficient number of valid signatures, but the court sustained the motion as to other claims and dismissed those claims with prejudice.

The district court also overruled the Sponsors' motion to dismiss the Secretary's cross-claim. However, the court stated

[2] Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016).

that the Sponsors had not challenged the Secretary's standing to bring the declaratory judgment action. Noting that the issue of standing may be raised by a party or by the court on its own motion at any time, the court discussed the standing issue and ordered the parties to brief the issue. The court stated that the Secretary had "an interest" in the outcome of the litigation, but the court questioned whether the Secretary had a personal stake or the legal or equitable right, title, or interest necessary for standing. The court noted the Secretary had already certified the petitions as legally sufficient to be placed on the ballot, and the court cited the concurrence in *State ex rel. Collar v. Evnen*,[3] which indicated that once a petition is certified, there did not appear to be any "process by which the Secretary can change his mind and 'rescind his legal sufficiency determination.'"

At a later hearing, after considering the briefs and arguments of the parties, the district court stated that it was "still skeptical" of the Secretary's standing and whether the Secretary could "have brought this litigation against [the Sponsors] on his own." But the court stated that it did not need to decide the issue of the Secretary's standing because, "as a practical matter, the issues raised by [the Secretary's] cross-claim will be determined on [Kuehn's] claims, whether or not the Secretary . . . is allowed to bring the cross-claim." The court stated that it would overrule the Sponsors' motion to dismiss the Secretary's cross-claim and "leave the issue whether the Secretary . . . has standing up to the appellate courts to decide at a later date."

2. Trial

A trial was held on October 29 and 31 and November 1 and 4, 2024. At trial, Kuehn and the Secretary presented evidence in support of their claims of misconduct by several circulators and notaries who worked on the petition campaign. Kuehn began by presenting testimony of witnesses who work

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[3] *State ex rel. Collar v. Evnen*, 317 Neb. 608, 621, 10 N.W.3d 900, 909 (2024) (Heavican, C.J., concurring).

for the Secretary's office and who testified regarding law and procedures related to oversight of the ballot certification process and oversight of notaries. Kuehn then presented testimony by an individual Kuehn had hired to perform petition signature reviews of the Legalization Petition and the Regulatory Petition, and the Secretary presented testimony by an investigator from the Nebraska Attorney General's office who had also reviewed the petitions. Both witnesses testified regarding the procedures they used to conduct their reviews, and both testified regarding the number of petition pages and signatures they determined should be invalidated based on wrongdoing by circulators or notaries.

Other witnesses called by the Secretary included Michael Egbert and Jennifer Henning, both of whom had acted as circulators and admitted to committing some wrongdoing. The Secretary also called as witnesses three other persons—Garrett Connely, Shari Lawlor, and Eggers—who had worked on the petition campaigns in different capacities, including as circulators or notaries. Each of these witnesses invoked the Fifth Amendment during their testimony. Connely's pretrial deposition was admitted during his testimony. Three others who had worked on the petition campaign as circulators, notaries, or both—Jacy Todd, Shannon Coryell, and Kimberly Bowling-Martin—were ruled unavailable as witnesses. The court received pretrial depositions of Coryell and Bowling-Martin that were offered by the Secretary to show that they had invoked the Fifth Amendment during their depositions. The court received a pretrial deposition of Todd that was offered by the Sponsors. Evidence regarding each of these circulators and notaries is discussed below in connection with the district court's findings regarding Kuehn's and the Secretary's allegations relating to them.

3. District Court Order

On November 26, 2024, the district court entered its order ruling on Kuehn's amended complaint and the Secretary's

cross-claim. The court stated in its order that "the election [had] passed and the voters [had] approved both initiatives." After summarizing the procedural background and the evidence at trial, the court first addressed certain preliminary matters, including whether the relief sought in this action was moot and whether the court could and should, as Kuehn and the Secretary urged, draw adverse inferences from the invocation of the Fifth Amendment by witnesses who had worked on the petition campaign.

(a) Mootness

The district court stated that because the election had passed and the voters had approved both initiatives, it needed to decide whether the relief sought in this action was moot. Citing precedent of this court,[4] the district court concluded that Kuehn's request for injunctive relief to prevent certifying the initiatives and placing them on the ballot was moot, but that Kuehn's request for a declaratory judgment that the petitions were legally insufficient, that the measures were invalid, and that the Secretary's certification of the petitions was invalid and without legal effect was not moot. The court concluded that the Secretary's request in his cross-claim for injunctive relief to legally remove the initiatives from the ballot was moot, but that the Secretary's request to declare the number of valid signatures and to declare the initiatives and the election results void if there were not sufficient signatures was not moot.

(b) Fifth Amendment and Adverse Inferences

The district court addressed Kuehn's and the Secretary's urging that the court draw adverse inferences from the invocation of the Fifth Amendment by deposition and trial witnesses who had worked on the petition campaign. The court declined to do so for two reasons. First, the court determined

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[4] See, *Chaney v. Evnen*, 307 Neb. 512, 949 N.W.2d 761 (2020); *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

that drawing inferences from a claim of the Fifth Amendment privilege against self-incrimination was expressly prohibited by Neb. Rev. Stat. § 27-513(1) (Reissue 2016), which provides that "[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel" and that "[n]o inference may be drawn therefrom." The court cited criminal cases in which this court has treated invocation of the Fifth Amendment as a claim of privilege under § 27-513.[5] The court acknowledged that this court has held that a fact finder in a civil case may draw an adverse inference from a defendant's invocation of the Fifth Amendment,[6] but the court noted that the issue whether § 27-513 permits an adverse inference in a civil case had not been presented or decided in any of the cases.

Second, the district court stated that even if it had discretion to draw an adverse inference, it would not do so in the matter. The court stated that the "witnesses who claimed the privilege against self-incrimination in this case are notaries whom [Kuehn and the Secretary] accuse of notarizing affidavits outside the circulators' presence." The court further stated that the "Attorney General, while representing the Secretary in this case, is simultaneously leading a criminal investigation into this very conduct," and "[a]t least two witnesses . . . have already been charged with official misconduct for notarizing petitions outside of a circulator's presence." The court reasoned that it was "not surprising under these facts that the witnesses would broadly assert their Fifth Amendment privilege" and that "[t]his circumstance undermines the reliability

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[5] See, *State v. Britt*, 310 Neb. 69, 963 N.W.2d 533 (2021); *State v. Clausen*, 307 Neb. 968, 951 N.W.2d 764 (2020); *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006), *disapproved on other grounds, State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025).

[6] See, *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 302 N.W.2d 674 (1981).

of any inference that the Court might draw from the claim of privilege." The court further reasoned that "trying the case while the criminal investigation is ongoing is relevant to the appropriateness of an adverse inference," and the court noted "the Attorney General's unique role [representing the Secretary] in this case" while "simultaneously leading . . . a criminal investigation into the conduct of these witnesses." The court reasoned that the Attorney General "could influence whether a particular witness invoked the privilege against self-incrimination," which was "also relevant to the appropriateness of an adverse inference."

(c) Allegations Regarding Circulators

After reviewing Nebraska election law, the district court turned to Kuehn's and the Secretary's claims that some signatures should lose the presumption of validity because of circulator fraud. Before addressing allegations related to specific circulators, the court reviewed the decision in *Barkley v. Pool*, which it described as "[t]he leading case on circulator fraud in Nebraska." The court described two rules from *Barkley v. Pool* that were important to this case. The court stated that the first rule was that "when a circulator impeaches himself or herself by swearing a false affidavit, the factfinder may reject all the affidavits sworn by the circulator," and the "result is that all the signatures collected by that individual lose their presumption of validity." The court stated that the parties in this case described the effect as the circulator's falsity in one affidavit being "'imputed'" to their other affidavits. The court stated that the second rule was that "when the presumption of validity is rebutted, the proponents of the initiative may rehabilitate those signatures by showing that they are nonetheless genuine." The court noted that much had changed since *Barkley v. Pool* was decided in 1919, including that "technology has made it easier for county election officials to compare a signature on a petition to an individual's voter registration record." But the court stated that *Barkley v. Pool* had not been

overruled and that therefore, it would follow the decision "to the best of its ability."

Regarding specific claims of circulator fraud, the district court found that Kuehn had not adequately pled that any circulator committed fraud. But the court reviewed the Secretary's allegations regarding circulator fraud by Egbert and by four other circulators. Regarding the four circulators other than Egbert, the court found that the Secretary had not shown that any of the four had committed any fraud, and it concluded that none of the signatures collected by those individuals should lose their presumption of validity. No party assigns error to the district court's determination regarding the four other circulators, and therefore, the allegations related to them are not discussed further herein.

(i) Michael Egbert

Egbert testified at the trial that he had worked as a paid circulator for the petition campaigns. Egbert testified that no one had watched him sign his petition pages and that he had not appeared before a notary to have his affidavits notarized. Egbert was shown pages of his petitions that were notarized by Todd and other pages that were notarized by Eggers, and he testified that he did not appear before either person when the pages were notarized and that they did not witness him affixing his signature. Egbert further testified that he was facing criminal charges and that he understood the charges as being "for falsifying the petition" because he had "wrote people's names in that didn't sign the petition" and had "got out a phone book and just started writing down names." On cross-examination, Egbert testified that his conduct in writing down names from a phone book was not something that he had been instructed to do and that it was a choice he alone had made.

The district court stated in its order that a county election official had flagged Egbert's fraudulent conduct and that before certifying the petitions, the Secretary had subtracted the facially fraudulent signatures collected by Egbert. The court stated that

it was not clear how many of the remaining signatures were forged by Egbert, but it found Egbert had "falsely swor[n] in his circulator's affidavit that each person whose name appears on his petition personally signed in his presence." Applying *Barkley v. Pool*, the court concluded that it was appropriate to reject all petitions collected by Egbert because his testimony had been impeached.

(ii) Jennifer Henning

The district court next addressed evidence regarding another circulator, Henning. Henning testified at the trial that she acted as a circulator for the petition campaign. Henning was shown some of the petition pages that she had collected as a circulator and that were notarized by Eggers. Henning testified that she was not in the presence of Eggers when the petitions were notarized and that she had not signed the petitions as a circulator in Eggers' presence. Henning testified similarly regarding petition pages she had collected that were notarized by Connely.

The district court determined that neither Kuehn nor the Secretary alleged fraud by Henning and that possible circulator fraud by Henning was not before the court. But the court considered evidence regarding Henning to the extent it was relevant to claims of improper notarization and a general practice of "rule-breaking" in the campaign. The court found no evidence that Eggers directed Henning to sign petitions circulated by others, and to the extent Henning testified that Eggers had done so, the court did not find the testimony credible. But the court found that on a certain date, Eggers had notarized some of Henning's petitions outside of Henning's presence, and that therefore, the signatures on those pages were "presumptively invalid." Although the court did not invalidate any signatures as the result of Henning's acts as a circulator, as discussed below, the court again considered Henning's testimony in connection with allegations of improper notarization by Eggers and by Connely.

(iii) Summary of Findings Regarding Circulator Fraud

Summarizing its findings regarding alleged circulator fraud, the court concluded that 487 signatures collected by Egbert for the Legalization Petition and 541 signatures collected by Egbert for the Regulatory Petition had lost the presumption of validity and that the Sponsors would have the burden of rehabilitating those signatures in a potential second phase of the trial.

(d) Allegations Regarding Notaries

The district court also considered Kuehn's and the Secretary's claims of what they described as "malfeasance" by notaries. The court cited Neb. Rev. Stat. § 32-628(3) (Reissue 2016), which provides that every page of a petition must include an affidavit signed by the circulator and subscribed and sworn to before a notary public. The court described claims that "some petitions were notarized outside of the circulator's presence; some petitions are missing the notary's stamp; some petitions were notarized by the same person who circulated the petition; and some petitions are missing the circulator's signature or the notary's signature." The court found that there were instances of what it termed "improper notarizations."

We note in this regard that the district court described such instances as "improper notarizations," rather than adopting the terminology "notary malfeasance" used by Kuehn and the Secretary. Kuehn and the Secretary assert that notaries in the petition campaign violated rules governing notaries, including Neb. Rev. Stat. § 64-105 (Cum. Supp. 2024), which provides, in part, that a notary public shall not perform any notarial act if the principal is not in the presence of the notary at the time of the notarial act.[7] For purposes of this decision,

[7] See, also, Neb. Rev. Stat. § 64-113(2) (Cum. Supp. 2024) (providing that "malfeasance in office means, while serving as a notary public, . . . failure to follow the requirements of and procedures for notarial acts provided for in Chapter 64").

we do not find it necessary to determine whether the improprieties found by the district court are properly characterized as malfeasance, and we will generally refer to the instances using the district court's terminology.

The district court reviewed Nebraska election law regarding requirements for circulator affidavits and the need for such affidavits to be notarized. The court considered such requirements in the context of the alleged improprieties involving notaries in the petition campaign and the effect of any improprieties on whether a petition contains sufficient valid signatures to be determined legally sufficient. The court concluded that

> under Nebraska's election statutes, the signatures on a petition lose their presumption of validity if (1) the circulator's affidavit was notarized outside of the notary's presence; (2) the circulator notarized their own affidavit; (3) the notary did not apply their stamp; (4) the notary did not sign the certificate; or (5) the circulator did not sign the affidavit."

The court stated that both Kuehn and the Secretary agreed that "the signatures on improperly notarized pages can be rehabilitated."

(i) Application of Barkley v. Pool *to Notaries*

The district court next addressed Kuehn's and the Secretary's argument that the reasoning in *Barkley v. Pool* regarding circulator fraud should be extended to notaries.[8] The court described the issue as "whether the improper notarization of some petition pages by a particular notary should be imputed to all other pages notarized by that particular notary." The court stated that Kuehn and the Secretary argued that "if a notary signed and stamped a certificate stating that a circulator appeared before them on a particular day and that circulator did not, in fact, appear before them on that particular day," a court "should presume that every page notarized by that individual is similarly defective." The court stated that Kuehn and the Secretary

[8] See *Barkley v. Pool, supra* note 1.

would apply the rule "to other defects, like a notary forgetting to apply their stamp or sign the certificate."

The district court rejected this argument and determined that it would not impute improper notarization of one petition page to other pages notarized by the same notary. The court gave three reasons for its determination. First, the court distinguished the circulator fraud at issue in *Barkley v. Pool* from improper notarization. The court stated that the circulators in *Barkley v. Pool* forged signatures and then lied about it under oath, which the court described as giving false testimony. The court described *Barkley v. Pool* as applying the general rule that when testimony on a material point is impeached, all testimony of that witness may be rejected unless corroborated. The court stated that a notary is not placed under oath and that therefore, a notary who notarizes an affidavit outside the presence of the circulator or who forgets to sign the certificate or apply the notary's stamp does not give false testimony. The court reasoned that because a notary is not giving false testimony, the rule cited in *Barkley v. Pool* to the effect that other "testimony" may be rejected does not apply in the context of an improper notarization.

As its second reason, the district court stated that it was "reluctant to create an apparently novel rule of imputation." The court cited Neb. Const. art. III, § 4, which provides that constitutional "provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation." The court reasoned that because art. III, § 4, grants the Legislature the power to enact rules to facilitate the initiative process, "[b]y implication, courts do not have the power to create new rules for the initiative process." The court stated that the "proposed rule of imputation" related to improper notarization would need to be found in the statutes and that the rule "is simply not there." The court questioned whether a statute enacting the rule would facilitate the initiative process, and it noted that this court has

held that legislation that "hampers or renders ineffective the power reserved to the people" is unconstitutional.[9]

As its third reason, the district court stated that even if the rule from *Barkley v. Pool* applied to improper notarization, the rule was discretionary, and that in its discretion, it would not apply the rule in this case. The court relied on language from *Barkley v. Pool* that testimony "may" be rejected unless corroborated. The court stated that while it found that some improper notarization occurred, Kuehn and the Secretary had "not shown that improper notarization was so widespread that the Court should impute these errors to all petitions touched by that notary."

The district court stated in summary that it would "not assume that all the pages notarized by an individual are invalid just because that individual improperly notarized another page." The court stated that whether injunctive relief or declaratory relief is sought, the general rule was that the party seeking relief has the burden to prove the party's case by a preponderance of the evidence. Applying this burden of proof, the court stated that improper notarization could be shown by direct or circumstantial evidence and that "[a] general practice of notarizing petitions outside of the circulator's presence could be relevant circumstantial evidence." But the court emphasized that Kuehn and the Secretary were required "to show by a preponderance of the evidence that every page that they allege was improperly notarized was, in fact, improperly notarized."

(ii) General Practice of Rule-Breaking or Improper Notarization

Before considering allegations regarding specific petition pages and specific notaries, the district court considered arguments by Kuehn and the Secretary that there was a general practice of rule-breaking by the campaign or a general pattern

[9] See *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999).

of improper notarization within the campaign that was not tied to any specific notary. The court stated that it would consider all the evidence when deciding whether each challenged petition page was improperly notarized, but that it was helpful to first summarize the evidence regarding general practices.

The court first considered evidence of text messages between Eggers and other individuals working on the campaign that Kuehn and the Secretary pointed to as evidence of "a general culture of lawlessness within the campaign." The court focused on exchanges in which Eggers said things such as, "There is no more nice campaign. We don't follow the rules anymore," and "There are no rules," and in which she advised others to "push the limits." The court found that while these messages contained some discussion of rule-breaking, when read in context, the messages had "little bearing on notarization," and were, instead, a discussion of "venue rules." The court found that use of the word "rules" was not a reference to Nebraska election laws. Further, the court found that there was "direct evidence that Eggers and Connely told campaign members to follow Nebraska's election laws." (Emphasis omitted.) The court concluded that it did not find that "Eggers generally told campaign members to break Nebraska's election laws" and that, instead, it found that "Eggers (through Connely) told campaign members to follow the law." The court noted, however, that it would find below that "Eggers and other members of the campaign did not always do so."

Regarding a general practice of improper notarization, the district court found that there were communications that "strongly suggest that some petition pages were notarized outside of the circulator's presence." The court stated that in its findings regarding specific pages and notaries, it would find that "this happened on several occasions." But the court found that other evidence showed that "the campaign generally notarized petitions in the circulator's presence" and that "petitions were regularly signed by circulators in a notary's presence."

(iii) Findings Regarding Specific Notaries

The district court proceeded to consider evidence regarding specific instances of impropriety by specific notaries. The court set forth its findings regarding alleged improper notarization by eight individuals: Eggers, Connely, Todd, Coryell, Lawlor, Marcie Reed, Patricia Petersen, and Bowling-Martin. The court's findings regarding each person were as follows.

a. Crista Eggers

The district court found that Eggers notarized four of Egbert's petitions outside his presence, but the court stated that those petitions had already been excluded based on Egbert's fraud and would not be included in the court's count for Eggers. The court also found that Eggers had notarized a petition that was not signed by the circulator, but because the Secretary had excluded the sole signature on that page from his certified count, the signature was not included in its count. The court then found that Eggers had notarized several petitions circulated by Henning outside of Henning's presence, and the court determined that the signatures on those pages should lose their presumption of validity. The court reviewed evidence of the circumstances surrounding Eggers' improper notarization of Henning's petitions and stated that although it did not excuse or justify Eggers' improper notarization of the petitions, when understood in context, the evidence did not reflect Eggers' normal practice. The court stated that other evidence urged by the Secretary did not support a finding that "Eggers notarized great (but unknown) quantities of petitions" outside the presence of the circulators. The court found that 27 signatures on the Legalization Petition and 26 signatures on the Regulatory Petition had lost their presumption of validity based on Eggers' improper notarization of several petition pages. But the court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence

that any other petitions have lost their presumption of validity because Eggers improperly notarized them."

b. Garrett Connely

The district court stated that in his deposition, Connely admitted that he had notarized several of Henning's petitions outside of her presence. The court found that the evidence suggested that when he had improperly notarized Henning's petitions, "Connely, like Eggers, made an exception to accommodate Henning's inability to meet [a] deadline" but that there was "no credible evidence that Connely did the same for any other circulator."

The district court also addressed the Secretary's challenge to "about a dozen petitions that Connely circulated because he initially applied his own notarial stamp to those petitions." The court noted that Connely's stamp was crossed out and that the petitions were notarized by another notary. The court further noted that the Secretary challenged several petitions that Lawlor circulated and initially applied her own notarial stamp; Lawlor's stamp was crossed out and Connely notarized the petitions. The court determined it was possible that "a dual circulator and notary like Connely could accidentally stamp, or even stamp and sign, one of their own petitions and then quickly correct their error with another notary who was present." Citing the burden of proof on Kuehn and the Secretary, the court found that "a crossed-out notary stamp does not show that a petition was, more likely than not, notarized outside of the circulator's presence."

In addition to the Henning petitions that Connely notarized outside her presence, the district court found a few additional petition pages connected to Connely that either were not signed by the circulator or were not signed by the notary. The court found that 145 signatures on the Legalization Petition and 147 signatures on the Regulatory Petition had lost their presumption of validity based on Connely's improper notarization of several petition pages. But the court stated that, after reviewing the

evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Connely improperly notarized them."

c. Jacy Todd

The district court reviewed Todd's testimony, including his testimony that Egbert had always signed in his presence when Todd notarized Egbert's petitions. The court stated that Egbert testified that he never signed his petitions in Todd's presence. The court found Todd to be the more credible witness, but the court also noted that Egbert's petitions had already lost their presumption of validity based on Egbert's circulator fraud.

Apart from the Egbert petitions, the court found that two other petitions were improperly notarized by Todd because one was not signed by the circulator and one was not signed by the notary. The court found that 14 signatures on the Legalization Petition and 1 signature on the Regulatory Petition had lost their presumption of validity based on Todd's improper notarization of the two petitions. But the court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Todd improperly notarized them."

d. Shannon Coryell

The district court stated that the Secretary challenged several petitions notarized by Coryell that had initially been stamped or stamped and signed by the circulator. These were like the petitions described above in connection with Connely, where the initial stamp or stamp and signature were crossed out and a different person notarized the circulator's petition, and at least one of the petitions was circulated and initially self-notarized by Lawlor. The Secretary also challenged "several petitions that Coryell self-notarized but were then re-notarized by others." Like its analysis regarding Connely,

the court determined that these actions did not show that the petitions were notarized outside of the circulator's presence. The court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any petitions have lost their presumption of validity because Coryell improperly notarized them."

e. Shari Lawlor

The district court noted that it had already considered most of the petitions related to Lawlor in connection with its analysis of initial self-notarization and renotarization related to Connely and Coryell. But the court found that one petition was both circulated and notarized by Lawlor. The court found that 11 signatures on the Legalization Petition had lost their presumption of validity based on Lawlor's improper notarization of the petition. But the court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Lawlor improperly notarized them."

f. Marcie Reed

The district court considered evidence related to Reed and rejected allegations that Reed notarized several pages outside the circulator's presence, but it found that three petition pages were improperly notarized because they were not stamped by the notary. The court found that 10 signatures on the Regulatory Petition had lost their presumption of validity based on Reed's improper notarization of the petitions. But the court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Reed improperly notarized them."

g. Patricia Petersen

The district court found that like some of the notaries discussed above, Petersen had renotarized some petitions that were originally notarized by the circulator. But the court found that changes made to the affidavits on these petitions indicated that the circulator was not present when Petersen renotarized the petitions. The court found that 23 signatures on the Legalization Petition and 67 signatures on the Regulatory Petition had lost their presumption of validity based on Petersen's improper notarization of several petition pages. But the court stated that after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Petersen improperly notarized them."

h. Kimberly Bowling-Martin

The district court found that Bowling-Martin notarized two petitions that had not been signed by a circulator and that other petitions were missing a notary stamp. The court found that 1 signature on the Legalization Petition and 34 signatures on the Regulatory Petition had lost their presumption of validity based on Bowling-Martin's improper notarization of petition pages. But the court stated that, after reviewing the evidence, both direct and circumstantial, it found that Kuehn and the Secretary had "not shown by a preponderance of the evidence that any other petitions have lost their presumption of validity because Bowling-Martin improperly notarized them."

i. Robin Vodehnal

The district court also discussed its findings regarding Vodehnal, a circulator who was alleged to have circulated petitions after they were notarized. The court found that on two petitions circulated by Vodehnal, the signatures of voters were dated after the date of the notary's certificate. The court found that three signatures on petitions circulated by Vodehnal for

the Legalization Petition were irregular on their face and lost the presumption of validity.

(e) Widespread, Coordinated Fraud

The district court discussed and rejected the Secretary's argument that "both initiatives should be thrown out" because even if they had sufficient valid signatures, the initiatives were "tainted by '[w]idespread, coordinated fraud.'" The court refused to reach such a conclusion, reasoning that (1) the Secretary had not pled this claim, (2) the Nebraska Constitution does not allow a court to declare that initiatives are invalid whether or not they have sufficient valid signatures and does not "contemplate courts throwing out petitions because of wrongdoing in the signature-gathering process for reasons other than a numerical insufficiency of valid signatures," and (3) there was not sufficient evidence to conclude that there was pervasive circulator fraud or a pervasive practice of notarizing petitions outside of the circulators' presence.

(f) Conclusion

Based on its findings regarding both circulator fraud and improper notarizations, the court held that 711 signatures on the Legalization Petition had lost their presumption of validity[10] and that 826 signatures on the Regulatory Petition had lost their presumption of validity.[11] The court stated that the challengers needed to disqualify at least 3,464 signatures on the Legalization Petition and at least 3,358 signatures on the Regulatory Petition for the court to conclude that the petitions

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[10] The 711 signatures on the Legalization Petition included those that lost their presumption of validity because of circulator fraud by Egbert (487), Vodehnal's circulating petitions after they were notarized (3), and improper notarizations by Eggers (27), Connely (145), Todd (14), Lawlor (11), Petersen (23), and Bowling-Martin (1).

[11] The 826 signatures on the Regulatory Petition included those that lost their presumption of validity because of circulator fraud by Egbert (541) and improper notarizations by Eggers (26), Connely (147), Todd (1), Reed (10), Petersen (67), and Bowling-Martin (34).

lacked sufficient valid signatures to have been placed on the ballot. Based on the number of signatures that it found had lost their presumption of validity, the court stated that Kuehn and the Secretary had "fallen short in this lawsuit."

The district court stated that because Kuehn and the Secretary were "well short" of "rebut[ing] the presumption of validity for a material number of signatures, a second phase of trial is not necessary." The court therefore declared that the Legalization Petition contained 89,251 valid and legal signatures, that the Regulatory Petition contained 89,030 valid and legal signatures, and that the petitions fulfilled all constitutional and statutory requirements and were legally sufficient under Nebraska law. The court dismissed Kuehn's complaint and the Secretary's cross-claim.

After the district court entered its order, both Kuehn and the Secretary filed motions to amend their pleadings to conform to the evidence under Neb. Ct. R. Pldg. § 6-1115(b) (codified in 2008). The court overruled both motions.

Kuehn appeals and the Secretary cross-appeals the district court's order.

III. ASSIGNMENTS OF ERROR

Kuehn assigns, consolidated and restated, that the district court erred in determining as a general matter that (1) proven malfeasance by a notary may not be imputed to that notary's other acts and (2) an adverse inference cannot be drawn from an individual's invocation of the Fifth Amendment in a civil matter. Kuehn then assigns that the district court erred in the following with respect to specific individuals: (1) failing to impute proven malfeasance to other material acts of (a) Eggers (as notary), (b) Connely (as notary), (c) Lawlor (as notary and as circulator), and (d) Vodehnal (as circulator); and (2) failing to find malfeasance and therefore retaining a presumption of validity of other material acts by (a) Todd (as notary) and (b) Coryell (as notary and as circulator). Regarding Eggers, Connely, and Lawlor, Kuehn also argues that the court erred in

failing to draw adverse inferences from their invocation of the Fifth Amendment. Kuehn further assigns that the district court erred in (1) determining that the petitions had sufficient valid signatures to satisfy the 7-percent constitutional requirement to be placed on the ballot and (2) overruling his motion to amend his complaint to conform to the evidence.

In his cross-appeal, the Secretary assigns, consolidated and restated, that the district court erred in (1) failing to find that *Barkley v. Pool* applies generally to notaries and specifically to four notaries in this case—Eggers, Connely, Bowling-Martin, and Petersen, and (2) failing to find a general practice of rule-breaking by notaries in the petition campaigns.

IV. STANDARD OF REVIEW

[1] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[12]

[2-4] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[13] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[14] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong.[15]

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[12] *N'Da v. Golden*, 318 Neb. 680, 18 N.W.3d 570 (2025).

[13] *PSK v. Legacy Outdoor Advertising*, 318 Neb. 1, 13 N.W.3d 81 (2024).

[14] *Id.*

[15] *Id.*

The parties disagree on the standard of review that we should apply when reviewing the district court's factual findings in this case. Their disagreement turns on whether this declaratory judgment action is an action at law or in equity. In the district court, the Sponsors argued that as a ballot challenge, this was an action in equity that required proof by clear and convincing evidence. The Secretary argued that because he sought a declaratory judgment, the appropriate standard of proof was a preponderance of the evidence. In its order, the district court agreed that the Secretary's cross-claim was an action at law, but the court did not explicitly determine the nature of Kuehn's claims. When finding that the Secretary had not shown fraud by circulators other than Egbert, the court stated that it made the finding "whether the burden of proof is by a preponderance of the evidence or by clear and convincing evidence." But when considering claims of improper notarization, the court determined that Kuehn and the Secretary were required to show improper notarization by a preponderance of the evidence.

The Sponsors argue on appeal that because no party assigned error to the district court's determination that this is an action at law, we should treat the district court's factual findings as having been made in a bench trial of a law action and should not disturb those findings unless clearly wrong. Kuehn contends that this is an action in equity and that questions of fact should be reviewed de novo. He asserts that because the district court decided only the nature of the Secretary's claim, and not his claim, he had no determination to appeal and is not estopped from arguing on appeal that this is an action in equity.

We conclude that it is not necessary for us to determine whether claims for declaratory relief in this case are equitable and subject to a de novo standard of review or legal and properly reviewed for clear error.[16] The determinative issues

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[16] See, similarly, *Malousek v. Meyer*, 309 Neb. 803, 962 N.W.2d 676 (2021).

in this appeal involve questions of law that we review independently whether the claims are equitable or legal. To the extent the district court's findings of facts are at issue, for the reasons set forth in our analysis, we see no error in the district court's ultimate findings and determinations regarding the claims in this case whether our review of fact findings is de novo or for clear error.

[5] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[17]

V. ANALYSIS

Before we consider other issues in this appeal, we note that on February 25, 2026, after this appeal was argued to this court, Kuehn filed a "Request for Judicial Notice" in which he requested that we take judicial notice of court proceedings that occurred in February 2026 in a case involving one of the campaign workers. Although there was testimony in the district court that the case had been filed, evidence of proceedings that occurred in 2026 was obviously not presented to or considered by the district court, which entered its order in November 2024. Therefore, Kuehn's request for judicial notice is an improper attempt to expand the appellate record.

[6] Generally, it is not the function of an appellate court to review evidence that was not presented to the trial court.[18] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[19]

We conclude that the court records attached to Kuehn's motion may not properly be judicially noticed, and we reject his attempt to expand the appellate record with evidence not

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[17] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[18] *Timothy L. Ashford, PC LLO v. Roses*, 313 Neb. 302, 984 N.W.2d 596 (2023).

[19] *Id.*

considered by the trial court. We therefore deny Kuehn's request for judicial notice and strike the attachments thereto.

1. Mootness and Standing

The Sponsors assert that we lack jurisdiction over the Secretary's cross-appeal because the Secretary lacked standing to bring his cross-claim. They assert that the Secretary cannot seek declaratory relief under the UDJA because he does not have a legally protectible interest or right in the controversy regarding the legal sufficiency of the petition. They assert that Nebraska's election statutes governing the initiative and referendum process provide the remedy for challenging the legal sufficiency of petitions, and they cite § 32-1412(2), which provides that a "resident" can challenge whether an initiative or referendum petition is legally sufficient by filing a suit against the Secretary seeking to enjoin the Secretary from certifying the petition or placing the measure on the ballot. The Sponsors argue that the Secretary cannot use the UDJA to create a separate remedy when he lacks a cause of action under the statute that provides the exclusive statutory remedy. The Sponsors also contend that the Secretary's cross-claim was not justiciable because he failed to join indispensable parties, namely the "tens of thousands of Nebraska voters whose valid signatures" would be invalidated based on his challenge.[20] The Sponsors cite § 25-21,159 of the UDJA, which provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ."

In reply, the Secretary argues that because Kuehn has standing to bring this action under the "one-plaintiff rule,"[21] we need not determine whether he has standing because he and Kuehn both seek the same relief. The Secretary also argues he has standing in his own right under the UDJA, specifically

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[20] Brief for appellees the Sponsors at 37-38.

[21] Brief for appellee the Secretary on cross-appeal at 10.

§ 25-21,150, which provides: "Any person . . . affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." The Secretary asserts that he is uniquely affected by Nebraska election laws, specifically Neb. Rev. Stat. § 32-1409(1) (Cum. Supp. 2024), which require him to "determine the validity and sufficiency of signatures on the pages of [a] filed petition," and he argues that under § 25-21,150, he can ask the courts to determine questions, including "whether signatures certified by impeached notaries are 'valid[] and sufficien[t].'"[22] The Secretary also argues that he was not required to join as indispensable parties every voter who signed the petitions because the Sponsors are able to represent the interest of the voters in this action, and we have said that "it is possible to represent the interests of an indispensable party in a representative fashion."[23]

The Sponsors further argue that any justiciable right or interest the Secretary may have had under the UDJA is now moot because the purpose of the declaratory relief sought in this action "was to undo what has already been done," namely, the Secretary's own certification of the petitions and placing the measures on the ballot.[24] The Sponsors argue that without some limiting principle, "the Secretary could challenge ballot measures in perpetuity based on purported uncertainties regarding signature validity."[25] The Secretary argues that his claim under the UDJA, like Kuehn's claim for declaratory relief, did not become moot after the election.

In its order, the district court addressed whether the requests for relief in this action became moot after the election.

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[22] Reply brief for appellee the Secretary on cross-appeal at 12.

[23] *SID No. 2 of Knox Cty. v. Fischer*, 308 Neb. 791, 799-800, 957 N.W.2d 154, 160 (2021).

[24] Brief for appellees the Sponsors at 37.

[25] *Id.*

Relying on *Duggan v. Beermann*,[26] the court determined that although any requests for injunctive relief were moot after the election, declaratory relief could still be granted.

The Sponsors' arguments in this regard raise concerns regarding both the Secretary's standing and the mootness of the relief sought by both parties. But under the circumstances of this case, we do not find it necessary to determine these matters to resolve this appeal. Because Kuehn and the Secretary seek the same relief, we review the district court's resolution of Kuehn's request for declaratory relief irrespective of whether the Secretary has standing. Furthermore, because the district court determined that Kuehn and the Secretary could not succeed on the merits of their claims, and because we find no error in that determination, we would affirm the court's dismissal of Kuehn's and the Secretary's claims regardless of whether the Secretary had standing and whether the requests for declaratory relief were moot.

2. Legal Sufficiency of Petitions

Both Kuehn and the Secretary challenged the legal sufficiency of the petitions on the basis that if all signatures that should lose the presumption of validity because of the actions or failures of circulators and notaries were excluded, neither the Legalization Petition nor the Regulatory Petition had sufficient valid signatures to be certified and placed on the ballot.

The assignments of error present two general legal arguments regarding the district court's analysis of the legal sufficiency of the petitions: (1) whether the reasoning in *Barkley v. Pool* applies to improper notarizations and (2) whether an adverse inference may or should be drawn against a witness who invokes the Fifth Amendment privilege against self-incrimination in a civil case. In addition, Kuehn and the Secretary each assign error to the court's findings regarding specific campaign workers. The Secretary also assigns that the

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[26] *Duggan v. Beermann, supra* note 4.

court erred in failing to find a general practice of rule-breaking by notaries in the petition campaign, and Kuehn also assigns that the court erred in determining that the petitions met constitutional requirements for sufficient valid signatures.

We first address the legal issues regarding the application of *Barkley v. Pool* and the Fifth Amendment. We then address the district court's findings regarding specific campaign workers, a general practice of rule-breaking, and whether the petitions had sufficient valid signatures to meet constitutional requirements.

(a) Application of *Barkley v. Pool*

Kuehn and the Secretary urged the district court to extend the reasoning in *Barkley v. Pool* to the acts of notaries so that when one or more petition pages are shown to have been improperly notarized by a particular notary, the signatures on all other petition pages notarized by that notary should lose the presumption of validity. The district court rejected these arguments and determined that it would not "impute" improper notarizations. We agree that *Barkley v. Pool* did not require the district court to reach the determinations Kuehn and the Secretary urged, and we conclude that the district court did not err when it determined that it was not appropriate to invalidate signatures on all pages notarized by an individual based on that individual's improper notarization of one or more pages.

The parties suggest various interpretations regarding what *Barkley v. Pool* requires and how it applies to challenges to the legal sufficiency of petitions, like the challenge in this case. As such, we look more closely at the court's holding in that case.

The plaintiffs in *Barkley v. Pool* filed an action under a predecessor statute to § 32-1412,[27] which this court described as "expressly provid[ing] that injunction will lie to prevent the secretary of state from submitting a referendum petition that is legally insufficient."[28] The plaintiffs sought to enjoin

[27] Rev. Stat. § 2339 (1913).

[28] *Barkley v. Pool*, *supra* note 1, 103 Neb. at 631, 173 N.W. at 601.

the Secretary of State from submitting to the voters a referendum petition on an act passed by the Legislature, and this court noted that the "plaintiffs proved that the names of many persons were fraudulently written [on the petitions] by three of the circulators."[29] Based on this proven fraud, the district court found that all certificates of the three circulators, even "where the particular certificate has not been proven false or fraudulent by direct attack upon the signatures covered by the certificates," lacked evidentiary value and that supporters of the referendum had the burden "to furnish testimonial proof of the genuineness of the signatures and the truthfulness of these certificates."[30]

On appeal, supporters of the referendum argued that all "signatures must be presumed genuine and counted, except in such cases where the plaintiffs have affirmatively shown that the particular signature is false or fraudulent."[31] This court rejected that argument and determined that "[i]n view of the proof of fraud, of forgery, and of perjury that was perpetrated by [the three] circulators[,] . . . [t]he trial court did not err in finding from the evidence that all certificates of the three circulators were impeached and unworthy of credence" and that the trial court did not err "in refusing, in the absence of proof of the genuineness of any of the purported signatures appearing on such petitions, to count any names thereon for the referendum."[32] This court reasoned that "when the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated," and that although "the discredited petitions may have contained the genuine signatures of some persons[,] . . . error cannot be predicated on their rejection, because the burden of proof was on the [supporters of the referendum] to establish that fact . . . when the

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[29] *Id*. at 632-33, 173 N.W. at 601.

[30] *Id*. at 634, 173 N.W. at 602.

[31] *Id*. at 635, 173 N.W. at 602.

[32] *Id*.

probative value of the certificates of the three circulators was destroyed."[33] This court quoted with approval the following portion of an Oregon Supreme Court decision:

> "As the circulator of a petition is the agent of the signer, and his oath is the only evidence of the genuineness of the signature, it follows as a matter of course that, where he is shown to have acted fraudulently, the value of his verification is destroyed, and the petition must fall, unless the genuine signatures are affirmatively shown. But, in the absence of evidence of intentional fraud or guilty knowledge on the part of the circulator, it would be an unjust rule to deprive the honest signer of his right to have his signature counted merely because some disqualified person signed, or because some person, without the knowledge of the circulator, affixed a fictitious name, or gave a fictitious address."[34]

Kuehn and the Secretary argue that a circulator's notarized affidavit is evidence of the matters asserted in the affidavit and the value of the affidavit because evidence depends on the honesty and credibility of the notary as much as that of the circulators at issue in *Barkley v. Pool*. Therefore, proven "malfeasance" by a notary with respect to one or more petition pages impeaches the credibility of the notary as to every petition page and requires that signatures on all pages notarized by that notary should lose the presumption of validity.

In response, the Sponsors cite legal propositions that "the right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter" and that "[t]he power of initiative must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the

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[33] *Id*.

[34] *Id*. at 635-36, 173 N.W. at 602 (quoting *State ex rel. v. Olcott*, 62 Or. 277, 125 P. 303 (1912)).

people is effectual."[35] They argue that extending *Barkley v. Pool* in the manner urged would hinder the right of initiative and that "there is no constitutional or statutory basis for invalidating large swaths of signatures based on purported notarial errors."[36]

The Sponsors distinguish the circulator fraud in *Barkley v. Pool* from the improper notarizations in this case. The Sponsors argue that the reasoning in *Barkley v. Pool* was that "the circulator of a petition is the agent of the signer, and [the circulator's] oath is the only evidence of the genuineness of the signature" and that "the value of [the circulator's] verification is destroyed" where there is "evidence of intentional fraud or guilty knowledge on the part of the circulator."[37] The Sponsors further argue that circulators directly interact with the signers of the petition and therefore can provide evidence of the genuineness of their signatures in a way that other individuals, including notaries, cannot. The Sponsors note that, in this case, the district court found no "'intentional fraud'" by any of the challenged notaries.[38] They argue that circulator fraud calls into question whether the petitions contain sufficient valid signatures of registered voters and is therefore fundamentally different from improper notarization that does not directly call the genuineness of such signatures into question.

The Sponsors also note the district court's observation that much has changed since *Barkley v. Pool* was decided in 1919, including that "technology has made it easier for county election officials to compare a signature on a petition to an individual's voter registration record." They argue that it is no

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[35] *State ex rel. Brooks v. Evnen*, 317 Neb. 581, 594, 10 N.W.3d 887, 897 (2024).

[36] Brief for appellees the Sponsors at 40.

[37] *Barkley v. Pool, supra* note 1, 103 Neb. at 635, 636, 173 N.W. at 602 (quoting *State ex rel. v. Olcott, supra* note 34).

[38] Brief for appellees the Sponsors at 32.

longer true that the circulator's oath is the only evidence of the genuineness of signatures, as this court stated in *Barkley v. Pool*, because today county election officials verify signatures prior to the Secretary's certification of a petition. They contend that verification of signatures on the petitions in this case "was already accomplished before the Secretary certified the measures for the ballot."[39]

The district court applied *Barkley v. Pool* in this case to the extent it determined that the signatures on all petitions circulated by Egbert lost the presumption of validity because Egbert committed circulator fraud with respect to signatures on some petitions he had circulated and certified. No party assigns error to that portion of the district court's order, and we have no reason to consider whether *Barkley v. Pool* is still good law with respect to proven circulator fraud. Instead, the issue before us on appeal is whether the district court erred as a matter of law when it did not apply *Barkley v. Pool* to determine that all signatures on petition pages notarized by a notary lose the presumption of validity when it has been shown that the notary improperly notarized one or more petition pages. We conclude that the district court did not err in this respect.

Pursuant to § 32-1409, after receiving initiative petitions, "the Secretary of State, with the aid and assistance of the election commissioner or county clerk, shall determine the validity and sufficiency of signatures on the pages of the filed petition," and thereafter, the "Secretary of State shall total the valid signatures and determine if constitutional and statutory requirements have been met." As part of this process, "[a]ll signatures secured in a manner contrary to [statutes governing initiative petitions] shall not be counted," but "[c]lerical and technical errors in a petition shall be disregarded if the forms prescribed . . . are substantially followed."[40] The focus of the

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[39] *Id*. at 50.

[40] § 32-1409.

Secretary of State's legal sufficiency review under § 32-1409 is determining the validity of signatures of registered voters and whether the petitions contain the constitutionally required number of valid signatures. Kuehn's and the Secretary's claims in this action challenge the determination that the Legalization Petition and the Regulatory Petition had the required number of valid signatures.

Circulators and notaries have different roles in the petition campaign, and the notary, unlike the circulator, is not actively involved in the gathering of signatures and does not see the registered voters who sign the petitions. Under Neb. Rev. Stat. § 32-1401 (Reissue 2016), initiative petitions must comply with the requirements of § 32-628, and § 32-628(3) requires an affidavit signed by the circulator on "[e]very sheet of a petition which contains signatures" in which the circulator swears, among other things, that "each person whose name appears on the petition personally signed the petition in the presence of the affiant[,] . . . that the affiant believes that each signer has written his or her name [and other information] correctly," and that "the affiant believes that each signer was qualified to sign the petition." The form provided in § 32-628(3) requires that the circulator affidavit be subscribed and sworn to before a notary. We have stated in another context that an affidavit includes a "declaration or statement of facts . . . confirmed by the oath or affirmation of the party making it,"[41] but we further stated:

> An affidavit does not, however, require a notary to confirm the truth of the facts stated in the affidavit; rather, the certificate, also known as a jurat, confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.[42]

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[41] *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 691, 747 N.W.2d 924, 927 (2008).

[42] *Id.*

In the context of initiative petitions, the notary, unlike the circulator, is not required to, and generally cannot, attest to the validity of the signatures of registered voters on petitions.

Barkley v. Pool involved proven circulator fraud, and it was shown that circulators had fraudulently written names on the petition. Because the circulators' certificates as to those signatures were proved false, all the circulators' certificates lost evidentiary value regarding the genuineness of the signatures. But because of the different roles of circulators and notaries, improper notarization of one or more petition pages does not have the same bearing on the genuineness of signatures of registered voters as circulator fraud does. While proven circulator fraud may be a proper reason for all signatures collected by a circulator to lose a presumption of validity under *Barkley v. Pool*, it does not necessarily follow that *Barkley v. Pool* requires that signatures on all petition pages notarized by a notary must lose their presumption of validity because the notary improperly notarized one or more petition pages.

We have previously determined that the reasoning of *Barkley v. Pool* did not apply in another circumstance that did not involve circulator fraud. In *State ex rel. Morris v. Marsh*,[43] the Secretary of State had rejected all petitions circulated by one individual because that individual had signed two similar petition forms circulated by others, signing one as a resident of Grand Island, Nebraska, and one as a resident of Omaha, Nebraska. A dissenting judge cited *Barkley v. Pool* and stated that he would "refuse to count the . . . names secured by [that individual] unless and until they were affirmatively proved to be genuine."[44] But the majority rejected the Secretary of State's argument that because the individual had violated the law as a signer of the two other petitions, his sworn statement as a circulator should be regarded as false. The majority stated that "[c]ases indicating that where there has been proven

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[43] *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968).

[44] *Id.* at 541, 162 N.W.2d at 274 (Spencer, J., dissenting).

fraud in the obtaining of one or more petitions by a circulator, all petitions obtained by him should be disqualified are not applicable,"[45] and the majority instead stated:

> Where there is no evidence of fraud or irregularity on the part of the circulator in his circulation of the initiative petitions, evidence that he, as an individual, signed two other petition forms for the same measure does not destroy the presumption of validity of his affidavit as a circulator nor justify the disqualification of concededly valid signatures obtained by him as circulator.[46]

Although the majority did not explicitly cite *Barkley v. Pool*, we read the majority in *State ex rel. Morris v. Marsh* as limiting the reasoning in *Barkley v. Pool* to proven fraud by a circulator as a circulator.

Courts in other states have declined to invalidate signatures included on all pages notarized by a notary who had improperly notarized other petitions. In *Hendrix v. Jaeger*,[47] the "[North Dakota] Secretary of State invalidated every elector signature appearing on petitions gathered by circulators whose affidavits were notarized by" a specific notary after the Secretary of State determined that certain petitions "had not been signed in the presence of [the specific notary] when he notarized them." The Supreme Court of North Dakota concluded that "the Secretary of State misapplied the law by imputing fraud from several inconsistent signatures of circulators on several affidavits sworn to before [the specific notary] and, as a result, disqualify[ied] all . . . signatures on . . . petitions notarized by" the specific notary.[48] The court reasoned that "[a]lthough fraud in one transaction is certainly relevant to a notary's credibility as to another transaction, it is not by

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[45] *Id.* at 529, 162 N.W.2d at 268.

[46] *Id.* at 530, 162 N.W.2d at 268.

[47] *Hendrix v. Jaeger*, 979 N.W.2d 918, 920 (2022).

[48] *Id.* at 927.

itself sufficient to invalidate other acts by the same notary."[49] After reviewing cases from other states, the North Dakota high court stated that it found the cases "persuasive in rejecting wholesale invalidation of signatures for irregularities by the notary."[50] The court in *Hendrix v. Jaeger* determined that when excluding the "signatures directly connected to the signature inconsistencies found by the Secretary of State," the remaining signatures on all other petitions notarized by the notary were sufficient "when added to other signatures found valid by the Secretary of State to qualify the measure for the ballot."[51]

In *United Labor Committee of Mo. v. Kirkpatrick*,[52] one of the cases cited in *Hendrix v. Jaeger*, the Supreme Court of Missouri stated that although it did not condone the improper signing of affidavits by a notary public, the fact that a

> small number of people abused the statutory process provided for the people to exercise their constitutionally reserved right of initiative by presenting the secretary of state with certain improperly notarized petitions . . . should not operate to deny the larger body of honest persons who have done all they can do to place this measure on the . . . ballot the opportunity for its submission to the entire electorate.

We find the reasoning in *Hendrix v. Jaeger* and *United Labor Committee of Mo. v. Kirkpatrick*, and the cases they relied upon, to be persuasive when considering our holding in *Barkley v. Pool*.

In *Barkley v. Pool*, this court held that it was not error when the trial court determined that all signatures on petitions circulated by the circulators who committed fraud lost the presumption of validity. But this court did not mandate a

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[49] *Id.* at 925.

[50] *Id.* at 927.

[51] *Id.*

[52] *United Labor Committee of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 457 (Mo. 1978).

broad rule of invalidation of signatures based on wrongdoing related to one or more petition pages. The district court in this case applied *Barkley v. Pool* in connection with the proven circulator fraud by Egbert. But the district court chose not to apply the rules of *Barkley v. Pool* to improper notarizations, and it instead determined that only the signatures on the specific petition pages shown to have been improperly notarized, whether by direct or circumstantial evidence, would lose the presumption of validity.

Having considered the differing roles of circulators and notaries and the comparative evidentiary value of a circulator's affidavit and a notarization, as well as the extent of the decision in *Barkley v. Pool*, we determine that the district court did not err as a matter of law when it did not find that signatures on all petition pages notarized by a notary lost the presumption of validity based solely on improper notarization of one or more petition pages. We reject Kuehn's and the Secretary's assignment of error in this regard.

(b) Fifth Amendment

Several witnesses who worked on the petition campaign invoked the Fifth Amendment either in pretrial depositions or when called as witnesses at trial. Kuehn and the Secretary urged the district court to draw adverse inferences from the witnesses' invocation of the Fifth Amendment. The trial court declined to do so, reasoning that (1) § 27-513(1) prohibits drawing any inference from a claim of the privilege against self-incrimination under the Fifth Amendment and (2) even if it had discretion to draw an adverse inference, it found that an adverse inference was not appropriate in this case.

Regarding the first reason, Kuehn assigns that the district court erred in determining that an adverse inference cannot be drawn from an individual's invocation of the Fifth Amendment in a civil matter. Kuehn argues that the court erred when it held that § 27-513 prohibits an adverse inference under any circumstances, and he asserts that in a civil case, under the

appropriate circumstances, an inference may be drawn when a party or a nonparty invokes the Fifth Amendment.

Kuehn's and the Secretary's arguments in support of other assignments of error implicate the district court's second reason, that adverse inferences were not appropriate in this case even if the court had discretion to draw adverse inferences. They argue that the district court should have drawn negative inferences regarding specific notaries or to find a general practice of rule-breaking by the campaign's notaries. We address the district court's general determinations regarding Fifth Amendment issues before we turn in the next sections to considering Kuehn's and the Secretary's arguments regarding specific findings.

The district court determined that § 27-513(1) prohibited it from drawing any inference from any witness' invocation of the Fifth Amendment. Kuehn notes that since the enactment of § 27-513 in 1975, this court has recognized that "where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him or her, the trier of fact may draw an adverse inference from the refusal."[53] Recognizing that these cases involved a party invoking the Fifth Amendment, Kuehn cites federal cases to the effect that under certain circumstances, a fact finder may draw adverse inferences when a nonparty witness invokes the Fifth Amendment in a civil case.[54] The district court acknowledged the precedent from this court but noted that none of the cases discussed § 27-513.

We need not decide in this case whether our precedent regarding adverse inferences in civil cases is consistent with § 27-513, or whether and how the holding in those

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[53] *In re Estate of Jeffrey B., supra* note 6, 268 Neb. at 773, 688 N.W.2d at 145 (citing *Wilson v. Misko, supra* note 6). Accord *State ex rel. Schuler v. Dunbar, supra* note 6.

[54] See, *Academy Bank, N.A. v. AmGuard Ins. Co.*, 116 F.4th 768 (8th Cir. 2024); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins.*, 819 F.2d 1471 (8th Cir. 1987).

cases extends to nonparty witnesses who invoke the Fifth Amendment in a civil case. Even if the precedent applies to the witnesses at issue in this case, the cases provide only that a fact finder may, but is not required to, draw an inference. The district court stated that even if § 27-513 did not prohibit an inference and it had discretion to draw adverse inferences, it would not be appropriate to draw adverse inferences from the witnesses' invocation of the Fifth Amendment in this case, considering that criminal charges were being pursued and individuals were being investigated related to their roles in the petition campaign.

Assuming § 27-513(1) does not prohibit drawing an inference and our precedent regarding parties who invoke the Fifth Amendment in civil cases applies to nonparty witnesses, at most, the district court as fact finder had discretion to draw an inference from the witnesses' invocation of the Fifth Amendment. It was not required to do so, and we determine that the district court did not err as a matter of law when it exercised its discretion and declined to draw adverse inferences from the invocation of the Fifth Amendment by the witnesses in this case.

(c) Specific Notaries and Circulators

Having considered the district court's general determinations regarding *Barkley v. Pool* and the Fifth Amendment, we turn to Kuehn's and the Secretary's assignments of error regarding the district court's findings related to specific notaries and circulators. Kuehn asserts that the district court should have invalidated all petition pages notarized or circulated by Eggers, Connely, Todd, Lawlor, Coryell, and Vodehnal. The Secretary asserts that the district court should have invalidated all petition pages notarized by Eggers, Connely, Bowling-Martin, and Petersen. Much of both Kuehn's and the Secretary's arguments regarding these specific notaries relate to *Barkley v. Pool* and the Fifth Amendment.

The Secretary's argument regarding Eggers, Connely, Bowling-Martin, and Petersen is that the "district court incorrectly limited *Barkley* [*v. Pool*] to circulators"[55] and improperly applied its discretion when determining whether improper notarizations on more petition pages should be imputed to other petition pages notarized by that notary. The Secretary asserts that this was an "error of law."[56] However, we concluded above that it was not an error of law when the district court chose not to apply the reasoning in *Barkley v. Pool* to improper notarization and instead determined that only signatures on pages shown by direct or circumstantial evidence to have been improperly notarized would lose a presumption of validity. The Secretary's arguments regarding specific notaries do not persuade us that the district court's determination was improper whether as a general matter or with respect to any specific individual.

Kuehn similarly argues that proven improper notarizations by Eggers, Connely, Todd, Lawlor, and Coryell should have resulted in signatures on all pages notarized by them losing the presumption of validity. We reject these arguments for the reasons we rejected similar arguments by the Secretary.

Kuehn characterizes the actions of Vodehnal, who circulated petitions after they were notarized, as circulator "malfeasance"[57] and argues that signatures on all petitions circulated by Vodehnal should have lost the presumption of validity. The district court treated Vodehnal's actions in the same manner it treated improper notarization and did not apply the reasoning of *Barkley v. Pool*. We agree that the incident involving Vodehnal was more akin to improper notarization than circulator fraud, and we find no error in the district court's findings on claims regarding Vodehnal.

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[55] Brief for appellee the Secretary on cross-appeal at 27.

[56] *Id*.

[57] Brief for appellant at 44.

Kuehn also argues with respect to Eggers, Lawlor, and Coryell that their invocation of the Fifth Amendment supported adverse inferences that should have resulted in signatures on all pages circulated or notarized by them losing their presumption of validity. We determined above that the district court did not err as a matter of law when it exercised its discretion and chose not to draw adverse inferences as a general matter, and Kuehn's arguments regarding specific witnesses do not convince us that the district court erred when it declined to draw adverse inferences to other acts of these persons as notaries or as circulators.

To the extent Kuehn argues that the district court should have found improper notarizations on specific petition pages based on direct evidence, rather than imputing from other pages or drawing negative inferences, we determine that the number of signatures affected by these alleged instances of improper notarizations were relatively small. Assuming the signatures on specific pages urged by Kuehn should have lost a presumption of validity, the exclusion of these signatures would not change the numbers such that the petitions did not contain sufficient signatures. The district court stated in its order that it was possible that it "missed a few petitions that should lose their presumption of validity." But it further stated that its "judgment does not turn on the inclusion or exclusion of a few petitions" and that even if the signatures on all the petition pages specifically challenged as evidencing improper notarization lost the presumption of validity, Kuehn and the Secretary would still fall short of showing that the petitions were legally insufficient. The same reasoning applies to these allegations on appeal. Having reviewed Kuehn's arguments regarding specific petition pages, we find that whether reviewing for clear error or by de novo review, the district court did not err in its findings related to specific pages to an extent that would change the ultimate determination that Kuehn and the Secretary had not shown that the petitions did not contain sufficient valid signatures.

(d) General Practice of Rule-breaking by Notaries

Finally, the Secretary assigns that the district court erred in failing to find a general practice of rule-breaking by notaries in the petition campaigns. The Secretary argues that if the proven instances of improper notarization did not result in enough signatures losing the presumption of validity, then the court should have found a general practice of rule-breaking by notaries in the campaign that would have shifted the burden to the Sponsors to rehabilitate the signatures.

The Secretary's argument in this regard focuses on three campaign workers—Eggers, Connely, and Bowling-Martin—who invoked the Fifth Amendment in depositions or at trial. The Secretary argues that the district court should have drawn adverse inferences from the invocation of the Fifth Amendment by these campaign workers as evidence of a general practice of rule-breaking by notaries on the campaign. The Secretary contends that if the signatures on pages notarized by these campaign workers lost their presumption of validity, the petitions would not have enough valid signatures to be certified and the burden would have shifted to the Sponsors to rehabilitate signatures.

Like our resolution of Kuehn's argument that the district court should have drawn adverse inference from campaign workers' invocation of the Fifth Amendment, we determine that the district court did not err when it did not draw adverse inferences from the invocation of the Fifth Amendment by specific notaries to support finding a general practice of rule-breaking by notaries on the campaign. The Secretary's argument is not clear whether a finding of a general practice of rule-breaking would compromise the presumption of validity only as to signatures on pages notarized by persons who invoked the Fifth Amendment, or as to all petition pages gathered by the campaign. In any event, we find no error in the district court's failure to find a general practice of rule-breaking based on the evidence generally or based

specifically on negative inferences from the invocation of the Fifth Amendment by specific campaign workers.

(e) Finding of Legal Sufficiency

Kuehn further assigns that the district court erred in determining that the petitions had sufficient valid signatures of registered voters to satisfy the 7-percent constitutional requirement to be placed on the ballot. Kuehn's argument in support of this assignment of error generally depends on his argument that when individuals have been shown to have improperly notarized one or more pages, signatures on all pages notarized by those individuals should lose their presumption of validity.

We rejected that argument both as a legal matter and as relevant to specific notaries or circulators. We similarly reject Kuehn's argument that the district court erred in finding that the petitions satisfied the 7-percent threshold necessary to appear on the ballot.

3. Kuehn's Motion to Amend

Kuehn's final assignment of error is that that the district court erred when it overruled his motion to amend his pleadings to conform to the evidence. After the court entered its order, both Kuehn and the Secretary filed motions to amend their pleadings to conform to the evidence under Neb. Ct. R. Pldg. § 6-1115(b). The court denied both motions. The Secretary did not assign error to the overruling of his motion, and therefore, the Secretary's motion is not discussed further herein.

Section 6-1115(b) was amended effective January 1, 2025, but at the time that Kuehn filed his motion, § 6-1115(b) provided, in part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to

> raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

In his motion to amend, Kuehn took issue with the court's statement that he had not adequately pled that any circulator committed fraud. But he argued that even if he did not plead the issue, issues of "circulator fraud and malfeasance" were tried without objection, and he moved to file a second amended complaint to conform to the evidence that was presented at the trial.

In its order overruling Kuehn's motion, the district court disagreed with Kuehn's argument that issues of "'circulator malfeasance'" were tried by consent. The court indicated that what Kuehn referred to as "circulator malfeasance" included acts such as signing a circulator's affidavit outside the presence of a notary or self-notarizing petitions that one had circulated. The court determined that evidence of such acts was also relevant to Kuehn's claims of improper notarization and that therefore, it could not find implied consent to issues of "circulator malfeasance." The court stated that Kuehn might have a stronger argument that there was implied consent that the issue of Egbert's circulator fraud was considered as part of Kuehn's complaint, as well as the Secretary's cross-claim. But the court stated that any amendment to add a claim to Kuehn's complaint regarding Egbert's circulator fraud would be futile because the court "would still dismiss [Kuehn's] complaint because he has not shown that enough signatures lost their presumption of validity."

On appeal, Kuehn argues that the issue of "circulator malfeasance" was made a part of the case when evidence was presented without objection by the Sponsors of acts by Egbert and Vodehnal as circulators and by persons such as Connely, Lawlor, and Coryell, who had acted both as circulators and as notaries. He contends that the district court erred when it overruled his motion to amend his complaint to conform to this evidence.

Evidence regarding the campaign workers named by Kuehn was addressed by the district court in its order. After considering all the evidence presented and arguments made by Kuehn and the Secretary, the court determined that they had not shown that enough signatures lost their validity to render the petitions legally insufficient. The issues Kuehn sought to amend his complaint to include were considered by the court and did not change its ultimate conclusions regarding the legal sufficiency of the petitions.

[7] Because the amendment sought by Kuehn would not have changed the result, we find no abuse of discretion in the overruling of Kuehn's motion to amend the complaint. Our case law provides that a trial court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[58] Kuehn did not move to amend the complaint until after the district court had entered its order and the court found that amendment would be futile with regard to Egbert because it had already considered evidence regarding Egbert. For similar reasons, amendment would also have been futile regarding Kuehn's allegations related to other circulators. Evidence regarding the allegations was also considered by the court in its order, and amending the complaint to add the allegations would not have changed the court's determination that Kuehn had not shown that enough signatures lost their validity. We reject this assignment of error.

VI. CONCLUSION

We conclude that the district court did not err when it did not extend the reasoning of *Barkley v. Pool* to determine that signatures on pages beyond those shown to have been improperly

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[58] *United Gen. Title Ins. Co. v. Malone, supra* note 17.

notarized lost the presumption of validity, or when it declined to draw adverse inferences from the invocation of the Fifth Amendment by campaign workers. We further conclude that the district court did not err in its findings specific to Eggers, Connely, Todd, Lawlor, Coryell, Vodehnal, Bowling-Martin, and Petersen in its findings regarding general rule-breaking by notaries in the campaign, or in its ultimate finding regarding the sufficiency of valid signatures on the petitions. In addition, we find no abuse of discretion in the court's denial of Kuehn's motion to amend the complaint. We therefore affirm the district court's order.

AFFIRMED.

CASSEL, J., concurring.

I write separately to emphasize a point that might otherwise be overlooked. The authorities cited in the court's opinion implicitly presume that each notary public is independent and disinterested. But where proof demonstrates otherwise, that presumption fails.

If a notary becomes personally invested in the success of a petition drive, notarial failure becomes much more likely. And if sufficient proof establishes widespread and pervasive notarial failure or, worse yet, participation in a scheme to defraud, then a court should require proof of the affected signatures' validity. If the sponsor then fails to provide such proof, the signatures should be disqualified.

Here, however, the majority correctly gives weight to the district court's findings that the notarial failure did not reach that level. With that understanding, I join the court's opinion.

FREUDENBERG, J., joins in this concurrence.

STACY, J., concurring.

I concur with the judgment on appeal but write separately to suggest that in a future case, we should revisit our case law permitting the practice of joining a preelection challenge to the

legal sufficiency of an initiative petition under Neb. Rev. Stat. § 32-1412 (Cum. Supp. 2024) with a declaratory judgment action seeking a declaration of legal insufficiency under the Uniform Declaratory Judgments Act (UDJA).[1] We endorsed this practice in *Duggan v. Beermann* (*Duggan I*),[2] decided in 1994, and in *Duggan v. Beerman* (*Duggan II*),[3] decided in 1996, and the district court in this case expressly relied on that precedent to conclude that the legal sufficiency of the initiative petition remained justiciable postelection through the declaratory judgment action. Despite Nebraska's permissive joinder rules,[4] I question whether our reasoning in *Duggan I* and *Duggan II* was sound.

Here, relying on the decisions in *Duggan I* and *Duggan II*, John Kuehn filed a preelection challenge to the medical cannabis petitions, seeking both injunctive and declaratory relief. More specifically, he sought (1) a finding that the initiative petitions were not legally sufficient and an injunction preventing the measures from being placed on the ballot[5] and (2) a declaratory judgment[6] holding that the initiative petitions were not legally sufficient and the measures proposed therein were invalid. The Secretary of State of Nebraska (the Secretary) filed a cross-claim seeking similar declaratory relief. On appeal, all parties agree that the occurrence of the election rendered moot all requests for injunctive relief based

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[1] See Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016).

[2] See *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

[3] See *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996).

[4] See Neb. Rev. Stat. §§ 25-701 to 25-705 (Reissue 2016).

[5] See § 32-1412(2) ("[o]n a showing that an initiative or referendum petition is not legally sufficient, the court, on the application of any resident, may enjoin the Secretary of State" from certifying the measure for the official ballot).

[6] See §§ 25-21,149 to 25-21,164.

on the alleged legal insufficiency of the petitions,[7] but they disagree whether the election rendered the requested declaratory relief moot.

I understand the majority opinion to avoid a lengthy discussion of mootness by assuming without deciding that under our reasoning in *Duggan I* and *Duggan II*, the occurrence of the election did not render the declaratory relief moot and the legal sufficiency of the initiative petition remains justiciable. I respectfully suggest that before we rely on this precedent again, we should reexamine its reasoning.

Duggan I involved a preelection challenge to an initiative petition proposing a measure that would impose term limits on several federal and state elective offices. A citizen and registered voter filed an action alleging the initiative petition was legally insufficient for several reasons, including an insufficient number of signatures. The action requested (1) an injunction to prevent the Secretary from placing the measure on the ballot pursuant to the predecessor statute to § 32-1412[8] and (2) a declaratory judgment pursuant to the UDJA finding that the number of petition signatures did not meet the constitutional threshold for placement on the ballot and thus the measure was invalid. The district court denied all relief and dismissed the action prior to the election. The measure was subsequently submitted to and approved by the voters.

On appeal after the election, we held in *Duggan I* that although the request for injunctive relief was "moot, as

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[7] See, *Common Cause v. Evnen*, 321 Neb. 682, 36 N.W.3d 490 (2026) (explaining issue becomes moot when it no longer rests upon existing facts); *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018) (explaining injunctive relief is preventive or protective and injunction will not issue after act complained of has occurred); *Duggan I, supra* note 2. See, also, Neb. Rev. Stat. § 32-1407(2) (Cum. Supp. 2024) ("[a]ll signed initiative petitions shall become invalid on the date of the first general election occurring at least four months after the date on which the copy of the form is filed with the Secretary of State").

[8] See Neb. Rev. Stat. § 32-706 (Reissue 1993).

that remedy can no longer provide [the appellant] with the relief he requested, the requested declaratory judgment as to the number of signatures is not [moot]."[9] We proceeded to consider the merits of the requested declaratory relief and ultimately determined that the number of petition signatures failed to meet the constitutional threshold by "at least 30,000" signatures.[10] Concluding there had not been "substantial compliance" with the procedural limitations placed on the initiative power by the Nebraska Constitution, we held that the measure was "not properly placed on the ballot and therefore must be declared void, despite . . . approval by the voters."[11]

Duggan II was another preelection challenge to an initiative petition proposing a measure to impose term limits. After the Secretary certified the measure for placement on the ballot, four "citizens and registered voters" filed an action alleging the "initiative petition was defective in fatal ways."[12] Specifically, the citizens alleged the petition had an insufficient number of valid signatures, the proposed measure was unconstitutional, the form of the petition failed to comply with certain statutory requirements, and submission of the measure proposed by the petition would violate the resubmission clause of Neb. Const. art. III, § 2. The action sought (1) an injunction under the applicable statute[13] to prevent the Secretary from placing the measure on the ballot and (2) a declaratory judgment under the UDJA finding the "entirety of the initiative measure was invalid in form, lacking in sufficient signatures, and unconstitutional."[14]

The district court considered only the request for injunctive relief, reasoning that its jurisdiction to determine legal

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[9] *Duggan I, supra* note 2, 245 Neb. at 911, 515 N.W.2d at 791.

[10] *Id*. at 916, 515 N.W.2d at 794.

[11] *Id*.

[12] *Duggan II, supra* note 3, 249 Neb. at 418, 544 N.W.2d at 74.

[13] See § 32-706 (Reissue 1993).

[14] *Duggan II, supra* note 3, 249 Neb. at 419, 544 N.W.2d at 74.

sufficiency was limited to the relief expressly authorized by § 32-706. After the district court denied injunctive relief, the measure was placed on the ballot and was subsequently approved by Nebraska voters. Postelection, the citizens filed a motion for new trial, arguing that because the measure had been approved, their request for declaratory relief had become justiciable. The district court overruled the motion.

On appeal, *Duggan II* held as a threshold matter that the district court erred in concluding that preelection challenges under § 32-706 (the predecessor of § 32-1412) could not be joined with declaratory judgment actions. *Duggan II* reasoned that "[t]here is nothing within § 32-706 itself which precludes it from being joined with a prayer for declaratory relief"[15] and noted that it was a common practice to "combine a prayer for injunctive relief with a prayer for declaratory relief."[16] The opinion then proceeded to address the denial of declaratory relief, focusing primarily on the substantive constitutional challenge to the measure but also addressing several of the legal insufficiencies in the petition. *Duggan II* ultimately held that certain portions of the measure were unconstitutional and were so intertwined that the entire measure had to be declared void.

Both *Duggan I* and *Duggan II* can be read to endorse the practice of joining a preelection legal sufficiency challenge under § 32-1412 with a declaratory judgment action seeking a similar determination of legal insufficiency. But neither opinion analyzed the propriety of using the UDJA to determine the legal sufficiency of an initiative petition, and I see several issues that deserve more analysis.

First, the scope of the UDJA is not unlimited; it authorizes any person "interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other relations are affected by a statute, municipal

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[15] *Id*. at 422, 544 N.W.2d at 76.

[16] *Id*. at 423, 544 N.W.2d at 76.

ordinance, contract or franchise" to seek a declaratory judgment on "any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."[17] An initiative petition is none of these things, and I question whether the text of the UDJA can be read to empower courts of record to issue declaratory judgments regarding the legal sufficiency of initiative petitions. Our cases have not explained how such preelection challenges might fit within the subject matter jurisdiction conferred by the UDJA, and I am not convinced they do.

Relatedly, I do not read either *Duggan I* or *Duggan II* to have separately considered the jurisdictional question of the plaintiffs' standing to bring a declaratory judgment action challenging the legal sufficiency of an initiative petition. Instead, both cases seemed to assume that because the plaintiffs were authorized to challenge the petition's legal sufficiency under the predecessor to § 32-1412, they also had standing to bring a declaratory judgment action challenging legal sufficiency. Based on that precedent, which no one has challenged in this appeal, I understand the majority opinion to assume without deciding that Kuehn had standing to challenge the legal sufficiency of the petition in a declaratory judgment action. That may be a fair assumption under *Duggan I* and *Duggan II*, but standing to bring a declaratory judgment action usually requires more.

Under Nebraska law, it is a jurisdictional prerequisite for obtaining declaratory relief that the party must have a legally protectible interest or right in the controversy at issue.[18] Sometimes referred to as a "litigable" interest, we have described this as an issue of standing, and standing is a

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[17] § 25-21,150.

[18] See, e.g., *Nebraska Firearms Owners Assn. v. City of Lincoln*, 319 Neb. 723, 24 N.W.3d 891 (2025); *State ex rel. Hilgers v. Evnen*, 318 Neb. 803, 19 N.W.3d 244 (2025).

jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.[19] To show standing, "it is generally insufficient for a plaintiff to have merely a general interest common to all members of the public."[20] I see no principled reason why these settled standing principles would not apply to declaratory judgment actions challenging the legal sufficiency of initiative petitions, assuming such actions are permissible in the first instance.

Beyond these jurisdictional concerns, other rules limiting the availability of declaratory judgments cause me to question our case law permitting the use of declaratory judgment actions to challenge the legal sufficiency of initiative petitions. It is a settled principle that declaratory relief will not lie when another equally serviceable remedy is available.[21] When a declaratory judgment action is used to raise the same legal sufficiency questions presented in an action for mandamus or injunctive relief under § 32-1412, this rule is implicated. Our opinions in *Duggan I* and *Duggan II* did not discuss this rule or attempt to explain why joining a declaratory judgment action challenging the legal sufficiency of an initiative petition with a nearly identical preelection challenge under § 32-1412 would not run afoul of that rule. And it is notable that in *State ex rel. Wagner v. Evnen*,[22] we applied the rule to preclude declaratory relief under similar circumstances.

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[19] See *id.*

[20] *Nebraska Firearms Owners Assn., supra* note 18, 319 Neb. at 730, 24 N.W.3d at 898.

[21] See, *N'Da v. Golden*, 318 Neb. 680, 694, 18 N.W.3d 570, 582 (2025) ("a declaratory judgment will generally not lie where another equally serviceable remedy is available"); *Mueller v. Peetz*, 313 Neb. 173, 181, 983 N.W.2d 503, 509 (2023) ("an action for a declaratory judgment will not lie where another equally serviceable remedy is available"). Accord, *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 162, 948 N.W.2d 244, 260 (2020) ("a declaratory judgment will generally not lie where another equally serviceable remedy is available").

[22] *State ex rel. Wagner, supra* note 21.

In that case, a Nebraska resident filed an original action in this court seeking both a declaratory judgment that a measure proposed by an initiative petition violated the single subject rule of Neb. Const. art. III, § 2, and a writ of mandamus directing the Secretary of State to withhold the measure from the ballot because it violated the single subject rule. We expressly held that the petitioner was not entitled to "relief in the form of both a declaratory judgment and a writ of mandamus."[23] *State ex rel. Wagner* applied the rule that "a declaratory judgment will generally not lie where an equally serviceable remedy is available"[24] and concluded that because mandamus afforded an "adequate and equally serviceable"[25] remedy for the alleged single subject violation, the petitioner could not also seek declaratory relief.

We often say that the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of the spirit and letter of the law.[26] To ensure that our case law advances this goal, I think we should reexamine our reasoning in *Duggan I* and *Duggan II* to more thoroughly analyze whether declaratory judgment actions can be used to raise preelection challenges to the legal sufficiency of initiative petitions and, if so, to clarify who has standing to bring such actions and to analyze whether challenges to the legal sufficiency of an initiative petition remain justiciable postelection.

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[23] *Id*. at 162, 948 N.W.2d at 260.

[24] *Id*.

[25] *Id*. at 163, 948 N.W.2d at 260.

[26] See, e.g., *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016); *Stewart v. Advanced Gaming Tech*., 272 Neb. 471, 723 N.W.2d 65 (2006).