

Date of Hearing: May 7, 2013

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING  
Paul Fong, Chair  
AB 141 (Gorell) – As Introduced: January 17, 2013

SUBJECT: Elections: write-in candidates.

SUMMARY: Requires a write-in candidate for a voter-nominated office, as defined, to receive a specified number of votes at the primary election in order for his or her name to appear on the ballot at the general election. Specifically, this bill prohibits a write-in candidate at a primary election who is one of the two candidates who received the highest number of votes cast for that office from having his or her name appear on the ballot at the general election, unless the candidate received votes equal in number to at least one percent of all votes cast for that office at the last preceding general election at which the office was filled, provided that the election is for one of the following offices:

- 1) Governor;
- 2) Lieutenant Governor;
- 3) Secretary of State;
- 4) Controller;
- 5) Treasurer;
- 6) Attorney General;
- 7) Insurance Commissioner;
- 8) Member of the Board of Equalization;
- 9) United States Senator;
- 10) Member of the United States House of Representatives;
- 11) State Senator; or,
- 12) Member of the Assembly.

EXISTING LAW:

- 1) Requires a voter-nomination primary election to be conducted to select the candidates for the following offices:
  - a) Governor;

- b) Lieutenant Governor;
  - c) Secretary of State;
  - d) Controller;
  - e) Treasurer;
  - f) Attorney General;
  - g) Insurance Commissioner;
  - h) Member of the Board of Equalization;
  - i) United States Senator;
  - j) Member of the United States House of Representatives;
  - k) State Senator; and,
  - l) Member of the Assembly.
- 2) Provides that the candidates who are the top two vote-getters in the voter-nomination primary election shall compete in the ensuing general election.
- 3) Provides that a write-in candidate for partisan office at the primary election shall not have his or her name appear on the general election ballot unless the write-in candidate received votes equal in number to at least one percent of all votes cast for the office at the last preceding general election at which the office was filled.

FISCAL EFFECT: This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) Purpose of the Bill: According to the author:

In 2010, public approval of Proposition 14 changed the way Californians choose their candidates for elected office. The new “Top Two” general election format was designed so that the two candidates who received the most votes in the state’s primary election would face each other in a November general election, regardless of their own party registration. The language necessary to maintain a minimum threshold for write-in votes was not included in Prop 14, unintentionally abandoning the longstanding requirement that write-in candidates must receive at least 1% of all votes cast to advance to a general election. AB 141 corrects this oversight by reestablishing that 1% minimum.

- 2) Top Two Primary and Previous Legislation: In February 2009, the Legislature approved SCA 4 (Maldonado), Res. Chapter 2, Statutes of 2009, which was enacted by the voters as Proposition 14 on the June 2010 statewide primary election ballot. Proposition 14

implemented a top two primary election system in California for most elective state and federal offices. At primary elections, voters are able to vote for any candidate, regardless of party, and the two candidates who receive the most votes, regardless of party, advance to the general election.

- 3) 2012 Elections and Write-In Candidates: The 2012 elections marked the first time that the top two primary election system was used at a regularly scheduled election in California. In the June 2012 primary, six write-in candidates finished as one of the top two candidates in the primary election for the offices that they sought, and accordingly moved on to the general election ballot. In each case, the write-in candidates who moved on to the general election were running for an office where only one candidate was listed on the ballot at the primary election. Those write-in candidates, all of whom received less than two percent of the vote in the primary election, received between 13 and 36 percent of the vote at the ensuing general election.

None of those six candidates received a number of write-in votes equal to at least one percent of all the votes cast for the office at the last preceding general election at which the office was filled. As such, had this bill been in effect for the 2012 primary elections (and assuming that the number of votes for each of these write-in candidates did not change), none of these six write in candidates would have moved on to the general election ballot.

- 4) Limited Impact of a Write-In Threshold in a Top Two System: Prior to the adoption of the top two primary system, California had a semi-closed primary election system in which each political party held a primary election to choose its nominee who would appear on the general election ballot. Generally, the candidate who received the most votes in a party's primary election would appear on the general election ballot. In the case of a write-in candidate, however, that candidate not only had to receive the most votes of all the candidates in the party's primary election, but also had to receive a number of write-in votes equal to at least one percent of all the votes cast for the office at the last preceding general election at which the office was filled in order to appear as that party's nominee on the general election ballot. This "write-in threshold" was designed, in part, to prevent a write-in candidate from becoming a party's nominee with a very small number of votes in a situation where a political party did not have any candidates listed on the ballot for an office at the primary election.

Under California's semi-closed primary election system, the write-in threshold played a significant role in regulating the candidates that appeared on the general election ballot. That's because there were a large number of candidate slots on the general election ballot that could be filled. Under the semi-closed primary, each qualified political party was entitled to have its nominee appear on the general election ballot. At the time of the 2010 election—the last regularly scheduled election conducted under the semi-closed primary system—there were six qualified political parties, and there were 153 US House of Representatives and state Legislative seats on the ballot. Since each of those political parties was entitled to have its nominee appear on the general election ballot, there were 918 candidate slots to be filled on the general election ballot for those offices (153 offices times six qualified political parties), not counting any Independent candidates who qualified to appear on the ballot.

However, it was relatively common for many of those candidate slots to go unfilled. In fact, of these 918 candidate slots, only 375 were filled at the 2010 general election. The other 543

slots were unfilled either because a political party did not have any candidates for a seat, or because the only candidates that a political party had for a seat were write-in candidates who failed to meet the write-in threshold. If there had been no write-in threshold, it is likely that there would have been many more write-in candidates, and it is likely that many of those 543 slots would have been filled. In effect, the write-in threshold may have served to prevent hundreds of additional candidates from appearing on the general election ballot.

Under the top two primary system, however, the number of candidate slots to be filled on the general election ballot has been reduced significantly, and most of those slots are likely to be filled by candidates who appear on the primary election ballot. That's because there are only two candidate slots on the general election ballot for each office (except in the rare case where there is a tie at the primary election), and at least two candidates have appeared on the ballot at the primary election for state and federal offices more than 95 percent of the time in the last decade. As a result, making the write-in threshold applicable under the top two system is unlikely to affect more than a few write-in candidates at any election. In fact, as noted above, the write-in threshold proposed by this bill would have kept just six candidates off the ballot at the 2012 general election.

In light of this information, and given the limited impact that this bill is likely to have, the committee may wish to consider whether reinstating the write-in threshold is advisable.

Additionally, it was the intent of the voters in approving Proposition 14 that the two candidates who received the most votes in the primary election would advance to the general election. The committee may wish to consider whether this bill is consistent with the expressed will of the voters.

- 5) Disparate Treatment of Write-In Candidates: While the write-in threshold proposed by this bill could serve to help ensure that write-in candidates at a primary election must have a modicum of support in order to advance to the general election, no such requirement for a minimum number of votes would apply to candidates who appear on the primary election ballot. As a result, a candidate whose name appeared on the primary election ballot would be eligible to have his or her name appear on the general election ballot even if he or she only received one vote, as long as that candidate was one of the top two vote getters in the primary election. On the other hand, a write-in candidate could receive thousands of votes and finish with the second most votes in the primary election, only to fall short of the requirements of this bill, and thus would not be able to have his or her name appear on the general election ballot.

In fact, it is possible (though unlikely) that under this bill, a candidate who was not among the top two vote getters in the primary election could advance to the general election instead of a candidate (or candidates) who received a larger number of votes in the primary election. For instance, in a race where two candidates' names appeared on the primary election ballot, and where there was one write-in candidate who finished second in the primary election, the third placed candidate in the primary election could advance to the general election if the write-in candidate did not meet the write-in threshold under the provisions of this bill.

The committee may wish to consider whether it is equitable and appropriate to treat write-in candidates differently in this respect than candidates whose names appear on the primary

election ballot.

- 6) Companion Measure and Suggested Amendment: ACA 9 (Gorell), which is also being heard in this committee today, is a companion measure to this bill that would make necessary changes to the state constitution to prohibit a write-in candidate at the primary election for a voter-nominated office from appearing on the general election ballot unless that candidate received a specified number of votes. ACA 9 must be approved by the voters in order to take effect. Because the California Constitution provides that the candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall compete in the ensuing general election, it appears that this bill cannot become effective unless and until that constitutional provision is amended. In light of this fact, and in light of the author's companion measure that is being heard in this committee today, if it is the committee's desire to approve this bill, committee staff recommends that this bill be amended so that its provisions will become effective only if ACA 9 is approved by the voters.
- 7) Related Legislation: SCA 12 (Lara) and SB 712 (Lara), which are pending in the Senate Elections & Constitutional Amendments Committee, are companion measures that are substantially similar to this bill and ACA 9.

SCA 14 (Anderson) and SB 148 (Anderson), which are pending in the Senate Elections & Constitutional Amendments Committee, are companion measures that would provide that, if a candidate for State Senator or Member of the Assembly receives at least a majority of the votes cast for the office in a voter-nominated primary election, the candidate would be declared elected, and no general election would be held for that office.

AB 1075 (Olsen) and ACA 10 (Olsen), which are pending in this committee, are companion measures that would provide that, if a candidate for a voter-nominated office receives at least 60 percent of the votes cast for the office in a voter-nominated primary election, the candidate would be declared elected, and no general election would be held for that office. AB 1075 and ACA 10 failed passage in this committee on April 23, 2013, by a 2-4 vote, and were granted reconsideration.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Clerks and Election Officials  
Contra Costa County Board of Supervisors

Opposition

Libertarian Party of California

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