

Date of Hearing: April 10, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 1451 (Low) – As Introduced February 22, 2019

SUBJECT: Petition circulators.

SUMMARY: Prohibits a person or organization that pays circulators to collect signatures on an initiative, referendum, or recall petition from paying those circulators on a per-signature basis, as specified. Makes numerous significant changes to provisions of state law governing state initiatives, as specified. Specifically, **this bill:**

- 1) Makes it a misdemeanor for a person or organization to pay money or any other thing of value to another person based on the number of signatures obtained on a state or local initiative, referendum, or recall petition. Provides that a violation is punishable by a fine of up to \$25,000, imprisonment in a county jail for up to a year, or by both the fine and imprisonment.
- 2) Specifies that this bill does not prohibit the payment for signature gathering that is not based, either directly or indirectly, on the number of signatures obtained on a state or local initiative, referendum, or recall petition.
- 3) Requires at least 10 percent of the signatures collected to qualify a proposed state initiative measure for the ballot to be collected by individuals who did not receive money or other valuable consideration exclusively or primarily for the specific purpose of soliciting signatures of electors on the petition, as specified ("10 percent requirement").
 - a) Provides that signatures on a petition qualify toward meeting the 10 percent requirement if they are collected by a person who is an employee or member of a non-profit organization, other than an organization with the primary purpose of soliciting signatures on initiative petitions, who receives money or other valuable consideration from the organization and as part of that employment or membership solicits signatures for the qualification of an initiative measure, unless a primary purpose of that employment or membership is to solicit signatures on an initiative petition. Defines "member" for the purposes of this provision.
 - b) Provides that signatures solicited by registered voters or employees of a political party who receive money or other valuable consideration from the political party for soliciting signatures on an initiative petition do not qualify toward meeting the 10 percent requirement.
 - c) Provides that signatures solicited through direct mail do not count towards the 10 percent requirement unless the person soliciting the signatures through direct mail, and any other person who organizes, pays, or arranges for the direct mail, is eligible to solicit signatures that qualify toward meeting the 10 percent requirement, as described above. Provides that this provision shall not preclude an organization that has a primary purpose other than soliciting signatures on initiative petitions from soliciting signatures from its members through direct mail and relying on those signatures for the purposes of

satisfying the 10 percent requirement.

- d) Provides that nothing in this bill shall be construed to preclude signatures that are solicited by a person who receives nominal, non-monetary benefits, including food, transportation, or lodging, from qualifying toward meeting the 10 percent requirement.
 - e) Requires verification of a petition that contains a declaration pursuant to the provisions of this bill to be prima facie evidence that the signatures satisfy the 10 percent requirement.
 - f) Specifies that if a qualified voter signs a petition for an initiative both on the petition section that qualifies for the 10 percent requirement and on a petition section that does not qualify for that requirement, the voter's signature on the petition that meets the 10 percent requirement shall count, and the other signature shall not.
 - g) Prohibits a person who receives money or other valuable consideration for the specific purpose of soliciting signatures on a state initiative petition from circulating a petition to collect signatures that qualify towards the 10 percent requirement for the same initiative measure.
- 4) Requires a petition for a proposed state initiative measure that is circulated by a person such that it will qualify toward meeting the 10 percent requirement to be printed on white paper in a contrasting color ink and to include the following notice printed in 12-point boldface type immediately prior to the portion of the petition for voters' signatures:
- "NOTICE TO THE PUBLIC: THIS PETITION IS BEING CIRCULATED BY A VOLUNTEER OR AN EMPLOYEE OF A NONPROFIT ORGANIZATION. YOU ARE ENCOURAGED TO READ THE CONTENTS OF THIS PETITION BEFORE SIGNING."**
- 5) Requires a petition for a proposed state initiative measure that is circulated by a person such that it will not qualify toward meeting the 10 percent requirement to be printed on paper of a color other than white in a contrasting color ink and to include the following notice printed in 12-point boldface type immediately prior to the portion of the petition for voters' signatures:
- "NOTICE TO THE PUBLIC: THIS PETITION IS BEING CIRCULATED BY A PERSON PAID TO OBTAIN YOUR SIGNATURE. YOU ARE ENCOURAGED TO READ THE CONTENTS OF THIS PETITION BEFORE SIGNING."**
- 6) Requires the circulating title and summary prepared by the Attorney General (AG) to be placed on the first page of each section of the petition in the one-inch space across the top of the page in 18-point roman boldface type.
- 7) Requires a person who solicits signatures on a petition that qualify toward meeting the 10 percent requirement to sign an affidavit that declares all of the following:

- a) That the person did not receive money or other valuable consideration for the specific purpose of soliciting signatures of electors pursuant to the requirements of this bill; and,
 - b) That to the best of their knowledge, the signatures on the petition sections circulated by them should be counted towards the 10 percent requirement.
- 8) Makes corresponding changes to the process for elections officials to verify signatures submitted on a state initiative petition. Increases the number of days that elections officials have to count and verify signatures on state initiative petitions, as specified. Requires the Secretary of State (SOS) to adopt regulations consistent with these provisions and permits the initial regulations to be adopted as emergency regulations.
 - 9) Provides that the signatures on a state initiative petition section are invalid if they are solicited and submitted by a person who engages in intentional fraud, misrepresentation, or other illegal conduct concerning the circulation of the petition, as specified. Provides that the SOS, the AG, any district attorney, or any city attorney of a city having a population in excess of 750,000, may enforce this provision by a civil action in which the plaintiff has the burden of showing a violation by clear and convincing evidence. Prohibits a petition section from being invalidated after the SOS has certified that the measure has qualified for the ballot. Requires the local elections official, if he or she is notified of or discovers any conduct described above, to promptly notify the SOS. Provides that a local elections official who is notified of or discovers any conduct described above is not permitted to refuse to examine or to stop the examination of the petition or petition sections.
 - 10) Provides that the provisions of this bill do not apply to any initiative measure for which the AG issues a circulating title and summary before January 1, 2020.
 - 11) Makes various findings and declarations about the initiative process and the influence that special interests and paid circulators have on that process.
 - 12) Makes other clarifying, corresponding, and technical changes.

EXISTING LAW:

- 1) Allows electors to propose statutes and amendments to the Constitution and to adopt or reject them through the initiative process.
- 2) Requires that a state initiative petition contain a notice alerting voters that the petition may be circulated by a paid signature gatherer or a volunteer, and that voters have the right to ask if a petition circulator is a paid gatherer or volunteer.
- 3) Establishes penalties for fraudulent activity related to signature gathering.
- 4) Permits voters to propose statutes or amendments to the state Constitution by initiative.
- 5) Permits voters to approve or reject statutes or parts of statutes approved by the Legislature, except as specified, by referendum.

- 6) Permits voters to remove an elective officer from state or local office before the end of the term of office, as specified, by recall.
- 7) Permits any person who is 18 years of age or older to circulate a state or local initiative, referendum, or recall petition.
- 8) Requires a state or local initiative petition to contain the following notice in 12-point type before the portion of the petition for voters' signatures:

NOTICE TO THE PUBLIC

THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.

- 9) Makes it a misdemeanor for a person to do any of the following:
 - a) While circulating a state or local initiative, referendum, or recall petition, intentionally misrepresent or intentionally make a false statement concerning the contents, purport, or effect of the petition to any person who signs or is requested to sign the petition.
 - b) Willfully and knowingly circulate, publish, or exhibit any false statement or misrepresentation concerning the contents, purport, or effect of a state or local initiative, referendum, or recall petition for the purpose of obtaining any signature to, or persuading or influencing any person to sign, that petition.
 - c) While circulating a state or local initiative petition, intentionally make a false statement in response to an inquiry by a voter as to whether the circulator is paid or a volunteer.
- 10) Provides that a person, company, organization, company official, or other organizational officer in charge of a person who circulates an initiative, referendum, or recall petition who knowingly directs an affiant to make a false affidavit or who knows or reasonably should know that an affiant has made a false affidavit concerning an initiative, referendum, or recall petition or the signatures appended thereto is punishable by a fine not exceeding \$5,000, by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.
- 11) Provides that upon conviction of any of the conduct described above in 9) or 10), among other conduct, a court may order as a condition of probation that the convicted person be prohibited from receiving money or other valuable consideration for gathering signatures on an initiative, referendum, or recall petition.

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer; contains reimbursement direction.

COMMENTS:

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

AB 1451 helps maintain the integrity of the initiative process by eliminating the incentive for paid signature gatherers to obtain signatures by whatever means necessary. In addition, AB 1451 will require that 10% of the signatures gathered

for an initiative are gathered by unpaid activists, or those whose primary job duty is not to collect signatures. By ensuring that a fraction of signatures are gathered by those who truly believe in the policy behind an initiative petition, AB 1451 will help curb abuses of the initiative process by special interests.

- 2) **10 Percent Signature Requirement:** Under the provisions of this bill, in order for a state initiative measure to qualify for the ballot, at least 10 percent of the signatures gathered on the petition for that measure would have to be collected on petition sections that were circulated by a person who does not receive money or other valuable consideration exclusively or primarily for the specific purpose of soliciting signatures of electors on the petition, as specified. This "10 percent requirement" does not apply to state referendum or recall petitions, nor does it apply to local initiatives, referenda, or recalls.

While signatures collected by volunteers will count toward meeting this 10 percent requirement, the language of the bill does not require the signatures to be gathered by volunteers in order to qualify to meet the 10 percent requirement. Instead, in certain circumstances, signatures collected by individuals who were paid for their time *could* count toward meeting the 10 percent requirement provided that the person wasn't paid *exclusively or primarily* for the specific purpose of soliciting signatures. This bill provides that signatures will count toward the 10 percent requirement if they are collected by employees and members of nonprofit organizations who receive compensation from that organization and solicit signatures as a part of their employment or membership, as long as the nonprofit organization is not primarily focused on soliciting signatures on petitions. In the case of signatures solicited by direct mail, those signatures would apply toward the 10 percent requirement if the person soliciting the signatures through direct mail and all persons that organize, pay for, and arrange the direct mail are persons who were eligible to solicit signatures that counted toward the 10 percent requirement. Additionally, signatures solicited by direct mail would count toward the 10 percent requirement if they are collected by an organization that is soliciting signatures through direct mail from its members, as long as the organization has a primary purpose other than collecting signatures.

In 1988, the United States Supreme Court ruled that a Colorado prohibition against the use of paid circulators for initiative petitions violated the First Amendment's guarantee of free speech. Writing for a unanimous court, Justice Stevens noted that "[t]he State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns." *Meyer v. Grant* (1988), 486 U.S. 414. It could be argued that the 10 percent requirement imposed by this bill could be susceptible to a court challenge in light of the United States Supreme Court's ruling in *Meyer*. However, the 10 percent requirement in this bill is distinguishable from the law struck down in *Meyer*. Unlike the law considered by the court in *Meyer*, the 10 percent requirement in this bill does not apply to all signatures gathered to qualify a measure for the ballot, but only a small portion of the signatures. Furthermore, the signatures that are gathered to meet that 10 percent requirement do not necessarily have to be collected by individuals who are unpaid if they are gathered by members and employees of a nonprofit organization in furtherance of that nonprofit's objectives.

- 3) **Invalidation of Signatures:** Existing law generally is silent on the issue of whether violations of state law prohibiting improper signature-gathering tactics will result in the

signatures on those petitions being invalidated. In at least one case, however, a court invalidated signatures gathered to qualify an initiative for the ballot due to improper signature-gathering tactics by the proponents of the measure. In *San Francisco Forty-Niners v. Nishioka* (1999), 75 Cal.App.4th 637, the California Court of Appeals for the First District, Division One, prohibited an initiative measure from appearing on the ballot because the initiative petition included false statements intended to mislead voters, in violation of Section 18600 of the Elections Code. In this case, the false statements appeared on the text of the petition itself. As a result, every person who was asked to sign the petition was exposed to these false statements that were intended to mislead voters.

In a case where petition circulators make false or misleading statements about a proposed ballot measure, or engage in other illegal signature-gathering tactics in an attempt to get voters to sign a petition, it is unclear whether that misconduct can result in signatures being invalidated. Committee staff is not aware of any court cases that have addressed this issue.

This bill explicitly provides that signatures on a petition section are invalid if the signatures were solicited and submitted by a person who intentionally engages in fraud, misrepresentation, or other improper signature-gathering tactics, as specified. In order for signatures to be invalidated under this provision, the SOS, the AG, a district attorney, or a city attorney would have to file a civil action, and would have the burden of showing a violation by clear and convincing evidence, as specified.

- 4) **Signature Verification:** This bill makes corresponding changes to the process for elections officials to count and verify signatures submitted on a state initiative petition to reflect the 10 percent requirement. Under current law, elections officials are required to count and verify signatures on petitions within certain timeframes. While this bill increases the number of days elections officials have to count and verify signatures on state initiative petitions, as specified, will the increase be sufficient? Last November, voters considered 12 state ballot measures. At the time of writing this analysis, currently there is one state ballot measure qualified for the November 2020 general election, two initiatives eligible for the November 2020 general election, and five initiatives and referenda cleared for circulation.
- 5) **Initiative, Referendum, and Recall & Other States:** According to information from the National Conference on State Legislatures (NCSL), 24 states, including California, allow voters through the initiative to propose laws, constitutional amendments, or both through a petition process. Twenty-three states, including California, allow voters through the referendum process to petition to demand a popular vote on a new law passed by the Legislature. Nineteen states, including California, permit state officers to be removed from office before the end of the term of office through the recall process.

At least five states (Arizona, Montana, North Dakota, Oregon, and South Dakota) limit the ability of initiative or referendum proponents to pay signature gatherers on a per-signature basis. In 2015, one state (Nebraska) repealed a state law that prohibited petition circulators from being paid on a per-signature basis, while another state (Wyoming) recently repealed a state law that restricted *initiative* proponents from paying signature gatherers on a per-signature basis while continuing to ban payments on a per-signature basis for *referendum* petitions. Laws to ban per-signature payments in at least six other states (Colorado, Idaho, Maine, Mississippi, Ohio, and Washington) have been invalidated by courts (additional

details are available below). Alaska does not ban payments that are made on a per-signature basis, but prohibits any such payment that is greater than \$1 per signature.

- 6) **Payment for Signature Gathering and Constitutional Issues:** While the US Supreme Court in *Meyer* invalidated a prohibition against the use of paid circulators for initiative petitions, it did not address the issue of whether a state may regulate the manner in which circulators are paid.

In 1999, the United States Supreme Court examined a Colorado law that provided a number of other restrictions on the signature collection process for ballot initiatives. In that case the court ruled that there must be a compelling state interest to justify any restrictions on initiative petition circulation. *Buckley v. American Constitutional Law Foundation* (1999), 525 U.S. 182.

In *Buckley*, the court invalidated Colorado's requirement that paid petition circulators wear a badge identifying themselves and identifying that they are paid circulators. The court stated that the requirement to wear badges inhibits participation in the petitioning process.

Although the United States Supreme Court has not ruled on the constitutionality of prohibiting payment for signature collection on a per-signature basis, a number of federal courts have considered challenges to such laws, with the courts reaching different conclusions about the constitutionality of per-signature payment bans.

In February 2001, the Eighth Circuit Court of Appeals ruled that a North Dakota law prohibiting payment for signature collection on a per-signature basis was consistent with the United States Constitution and with the Supreme Court's rulings in *Buckley* and *Meyer*. In reaching this decision, the court noted that the state "produced sufficient evidence that the regulation is necessary to insure the integrity of the initiative process," and also noted that no evidence was presented "that payment by the hour, rather than on commission, would in any way burden [the] ability to collect signatures." *Initiative & Referendum Institute v. Jaeger* (2001), 241 F.3d 614.

In February 2006, the Ninth Circuit Court of Appeals ruled that an Oregon law that prohibited payment to electoral petition signature gatherers on a piece-work or per-signature basis did not impose a severe burden under the First Amendment, and therefore did not unconstitutionally burden core political speech. The court found that Oregon had an "important regulatory interest in preventing fraud and its appearances in its electoral processes," and that prohibiting the payment of signature gatherers on a per-signature basis was reasonably related to that interest. *Prete v. Bradbury* (2006), 438 F.3d 949.

In October 2006, the Second Circuit Court of Appeals upheld a New York law that prohibited payment of any compensation to individuals hired to circulate electoral petitions if that compensation is contingent on the number of signatures obtained. Because New York does not have the initiative process, the law applies only to nomination petitions for candidates and to petitions to qualify a new political party. In its decision upholding the law, the Court referenced the decisions in the Eighth and Ninth Circuits, and noted that "[l]ike our sister circuits, we find the record presented to us provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the

alternative methods of payment it leaves available are insufficient." *Person v. New York State Board of Elections* (2006), 467 F.3d 141.

On the other hand, the Sixth Circuit Court of Appeals struck down an Ohio law that made it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than time worked. In its decision, the Court noted that while Ohio's interest in eliminating election fraud is a compelling state interest, "there is no evidence in the record that most, many, or even more than a de minimis number of circulators who were paid by signature engaged in fraud in the past." The court further noted that "[t]here is little dispute that operating under a per-time-only system will increase the costs of both proposing an initiative and qualifying it for the ballot," and cited evidence presented that professional coordinators and circulators were less interested in working under a per-time-only system. At the same time, however, the Court discussed the rulings in the Second, Eighth, and Ninth Circuits, noting that unlike the laws that were upheld in North Dakota, Oregon, and New York, the Ohio law was more restrictive and had harsher criminal sanctions for violations.

Specifically, the court noted that the laws in North Dakota, Oregon, and New York banned payments made on a per-signature basis, while Ohio banned all payment to circulators except on a per-time basis. The court noted that unlike the laws considered by appellate courts in other circuits, the Ohio law would prohibit bonuses to circulators based on productivity or longevity, would prohibit a person employing circulators from setting a minimum signature requirement, and could even prohibit a person employing circulators from terminating a circulator who consistently did not collect enough signatures. Additionally, the court noted that a violation of the Ohio law was a felony, compared to misdemeanor penalties for violations in North Dakota, Oregon, and New York. Although the court recognized these distinctions between the Ohio law and the laws upheld by three other appellate circuits, the court refused to discuss whether it would uphold an Ohio law that was similar to Oregon's, North Dakota's, or New York's. *Citizens for Tax Reform et al. v. Deters et al.* (2008), 518 F.3d 375.

A number of federal district courts have struck down bans on per-signature payments in other states, however. In 1994, a federal district court struck down a Washington law that made it illegal to pay gatherers of signatures on initiative and referendum petitions on a per-signature basis, noting in its decision that the state had failed to provide any "proof of fraud stemming specifically from the payment per signature method of collection." *Limit v. Maleng* (1994), 874 F.Supp. 1138. In 1997, a district court struck down a similar Mississippi law, citing evidence presented that the "payment of a flat daily rate to Mississippi circulators had yielded poor results," and concluding that the state had failed to prove "actual fraud or threat to citizens' confidence in government posed by...circulators who were paid per signature." *Term Limits Leadership Council, Inc. v. Clark* (1997), 984 F.Supp. 470. Federal district courts also struck down similar laws in Maine (*On Our Terms '97 PAC v. Secretary of State of State of Maine* (1999), 101 F.Supp.2d 19) and in Idaho (*Idaho Coalition United for Bears v. Cenarrusa* (2001), 234 F.Supp.2d 1159). More recently, a Colorado court issued a permanent injunction against a Colorado law that prohibited a petition circulator from being paid more than twenty percent of their compensation on a per-signature basis (*Independence Institute v. Gessler* (2013), 936 F.Supp.2d 1256).

In light of the differing opinions reached by various federal courts on the constitutionality of laws that prohibit payments on a per-signature basis for signature gathering on petitions, it is unclear whether the provisions of this bill that prohibit petition circulators from being paid on a per-signature basis, if enacted, would be upheld in a court challenge.

- 7) **Petition Fraud:** According to information from the Secretary of State's office, between 1994 and 2015, the office opened 273 cases investigating potential petition fraud, of which 50 cases were referred for prosecution. These figures do not include petition fraud investigations that may have been conducted by other law enforcement agencies around the state.
- 8) **Increased Costs:** Individuals or groups paying signature collectors may be required to provide certain benefits such as unemployment insurance and workers compensation insurance. This may result in higher costs to those groups that pay individuals to circulate petitions. In addition, prohibiting payment of individuals on a per-signature basis could increase costs because it may become more difficult to measure the work product of petition circulators. Potential increased costs may be partially offset if, by reducing the incentive to submit fraudulently-obtained signatures, this legislation results in paid circulators submitting fewer such signatures.
- 9) **Arguments in Support:** In support, the California Labor Federation writes:

AB 1451 (Low) will require that 10% of all signatures submitted to qualify statewide ballot measures be gathered by volunteer or activist circulators. Paid circulators may still be used, but ballot measures will only qualify if at least 10% of all valid signatures collected were submitted by those who were not paid solely for their signature gathering efforts. This reform will help certify that a measure truly enjoys significant grassroots support. Also, by reducing the incentive for fraud and deception generated by compensating all circulators a fixed amount per signature, the 10% threshold will help protect the integrity of the signature gathering process.

With this standard enacted into law, at least a small percentage of signatures will be collected by someone with a genuine connection to the issue at hand and a real drive to see the measure become law.

The bill also prohibits paying professional circulators based on the number of signatures gathered. This reform will further achieve the broader goal of improving our initiative system by helping eliminate the existing incentive to misrepresent measures just to gain a signature. Prohibiting per-signature payment will also hopefully encourage paid circulators to engage in longer, more substantive discussions with voters, helping inform voters rather than hurrying them through the process towards the goal of a signature at any cost.

The protective measures taken in this bill will, we believe, significantly strengthen the integrity of the process, weaken existing incentives for fraud and deceit, promote transparency, and improve the overall quality of voter-approved public policy.

10) **Arguments in Opposition:** In opposition, the League of Women Voters of California writes:

The League believes that California should have a system of registration and training for signature gatherers and supports a compensation system for time and dedication to civic service. This bill dramatically changes a long-established democratic process and could result in unintended consequences. Such consequences may be significantly worse than the abuses the bill aims to prevent.

11) **Previous Legislation:** AB 1947 (Low) of 2018, would have prohibited a person or organization that pays circulators to collect signatures on an initiative, referendum, or recall petition from paying those circulators on a per-signature basis, similar to this bill. Governor Brown vetoed this bill stating, “As I stated in my veto message of an almost identical bill—SB 168 of 2011—‘per signature payment is often the most cost-effective method for collecting the hundreds of thousands of signatures needed to qualify a ballot measure. Eliminating this option will drive up the cost of circulating ballot measures, thereby further favoring the wealthiest interests.’ While I understand the potential abuses of the current per-signature payment system, my perspective has not changed since 2011.”

SB 1094 (Hernandez) of 2016, would have made numerous significant changes to provisions of state law governing state initiatives, similar to this bill. SB 1094 was vetoed by Governor Brown, stating “This bill is virtually identical to AB 857, which I vetoed in 2013. Lowering the percentage from 10 percent to 5 percent does not change my view that this measure will not keep out special interests or favor volunteer signature gathering.”

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation

Opposition

California Business Roundtable
 California Chamber of Commerce
 California Taxpayers Association
 Howard Jarvis Taxpayers Association
 League of Women Voters of California
 Lodi District Chamber of Commerce
 North Orange County Chamber
 Oxnard Chamber of Commerce
 Rancho Cordova Chamber of Commerce
 Santa Maria Valley Chamber of Commerce
 Torrance Area Chamber of Commerce

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