

Date of Hearing: June 16, 2021

ASSEMBLY COMMITTEE ON ELECTIONS
Marc Berman, Chair
SB 660 (Newman) – As Introduced February 19, 2021

SENATE VOTE: 28-11

SUBJECT: Initiative, referendum, and recall petitions: compensation for signatures.

SUMMARY: Prohibits a person who is paid to gather signatures on an initiative, referendum, or recall petition from being paid on a per-signature basis. Specifically, **this bill:**

- 1) Makes it unlawful for a person to pay money or to provide any other thing of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition. Provides that a violation of this provision is punishable by a civil penalty equal to the greater of \$25,000 or \$50 times the number of signatures gathered in exchange for compensation.
- 2) Permits the Attorney General (AG) or any other person to bring a civil action against a person for a violation of this provision. Provides that a person other than the AG who brings such an action shall be referred to as the “qui tam plaintiff.”
- 3) Makes an action brought by a qui tam plaintiff subject to the following provisions:
 - a) Requires the qui tam plaintiff to serve the AG with a copy of the complaint on the same day that it is filed, along with a written disclosure of substantially all material evidence and information the person possesses. Permits the AG to elect to intervene and proceed with the action within 60 days after receiving this information from the qui tam plaintiff.
 - b) Prohibits an action brought by a qui tam plaintiff from being dismissed except with the written consent of the court and the AG, as specified. Prohibits a claim for a violation of the prohibition on per-signature payment from being waived or released by any private person, except as part of a court-approved settlement of a civil action brought pursuant to this bill.
 - c) Prohibits any other person from bringing a related action based on the facts underlying the action brought by the qui tam plaintiff.
- 4) Requires the proceeds of an action brought under this bill, or of a settlement of such an action, to be distributed as follows:
 - a) If the AG initiates the action or assumes control of an action originally brought by a qui tam plaintiff, as specified, the AG receives 33 percent of the proceeds, with those moneys deposited in the newly created Petition Signature Fraud Account (Account). Provides that the funds in that account are available upon appropriation by the Legislature to support the AG’s investigation and prosecution of fraud.
 - b) If a qui tam plaintiff initiates the action, the qui tam plaintiff receives between 17 and 50 percent of the proceeds of the action or settlement of the claim, depending on the extent

to which the qui tam plaintiff substantially contributed to the prosecution of the action.

- c) The portion of the recovery not distributed to the AG or the qui tam plaintiff, as specified above, is deposited in the newly created Petition Signature Fraud Voter Education Subaccount (Subaccount), which is established within the Account. Provides that funds in the Subaccount are available upon appropriation by the Legislature for use by the Secretary of State (SOS) to support voter registration and education efforts.
- 5) Requires a court to award reasonable expenses, costs, and attorneys' fees to a qui tam plaintiff for any successful action originally brought by the qui tam plaintiff under this bill, as specified, even if the AG subsequently assumed control of the action. Requires all expenses, costs, and fees to be awarded against the defendant, and provides that they are not the responsibility of the state.
- 6) Permits a court to award reasonable attorneys' fees and expenses in an action to a prevailing defendant against the qui tam plaintiff who conducts the action, as specified, if the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.
- 7) Provides that a qui tam plaintiff is entitled to all relief necessary to make themselves whole, if the plaintiff is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment because of lawful acts done by the plaintiff, or associated others, in furtherance of an action under this bill or other efforts to stop one or more violations of this bill.
- 8) Specifies that this bill does not prohibit the payment for signature gathering not based, either directly or indirectly, on the number of signatures obtained on a state or local initiative, referendum, or recall petition.
- 9) Contains the following findings and declarations:
 - a) The communication of accurate information by signature gatherers is important to the integrity of the electoral process.
 - b) Signature gatherers frequently communicate inaccurate information to voters in order to obtain their signatures on petitions, and that deception undermines the integrity of the electoral process.
- 10) Declares the intent of the Legislature to do both of the following:
 - a) Prohibit the compensation of signature gatherers in a manner that gives signature gatherers an incentive to deceive voters in order to obtain their signatures.
 - b) Provide an enforcement mechanism that is applicable to anyone who in violation of this prohibition pays individual signature gatherers or pays, directly or indirectly, for signatures obtained from such individual signature gatherers in order to ensure compliance.

EXISTING LAW:

- 1) Permits voters to propose statutes or amendments to the state Constitution by initiative.
- 2) Permits voters to approve or reject statutes or parts of statutes approved by the Legislature, except as specified, by referendum.
- 3) Permits voters to remove an elective officer from state or local office before the end of the term of office, as specified, by recall.
- 4) Permits any person who is 18 years of age or older to circulate a state or local initiative, referendum, or recall petition.
- 5) Requires a state or local initiative petition to contain a notice to the public that the petition may be circulated by a paid signature gatherer or a volunteer, and that a person has a right to ask.
- 6) 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, or of a specified disclosure on the 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.
- 7) 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.
- 8) Provides that upon conviction of any of the conduct described above in 6) or 7), 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: According to the Senate Appropriations Committee:

- This bill would not have a fiscal impact to the SOS.

- The Department of Justice (DOJ) indicates that it would incur General Fund costs of \$341,000 in 2021-22, and \$588,000 annually thereafter, to implement the provisions of the bill (General Fund).
- The bill would impose a civil penalty for violations of the prohibition on paid signature gathering. Penalty revenues would flow, in part, to DOJ and SOS. The magnitude of the penalty revenue is unknown and would depend on future actions.
- Unknown, potentially-significant workload cost pressures to the courts to adjudicate alleged violations of this measure. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations. For illustrative purposes, the Governor's proposed 2021-2022 budget would appropriate \$118.3 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations. (General Fund*)

*Trial Court Trust Fund

COMMENTS:

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

California's constitutional provisions for the initiative, referendum, and recall processes can and should play an essential role in our state's politics and governance. Under the current system, which is driven by per-signature payments to qualify measures for the ballot, there are scant prospects for deterring bad actors who would willfully mislead voters at the expense of the public good.

To the original framers' way of thinking, the initiative, referendum, and recall represented a way for "the little guy" to achieve direct, reformist actions that elected officials and other vested interests might otherwise thwart. Over the years, though, and especially in recent decades, something very different has transpired: these ostensible tools of direct democracy have been co-opted by the very special interests they were originally intended to offset.

These coordinated and well-financed groups have become increasingly adept at using the initiative, referendum, and recall processes for their benefit, and an "arms race" of sorts has ensued around the tactics employed to place an issue on the ballot. In response, a highly sophisticated mini-economy has grown up around signature gathering. At its center, a small number of specialized firms with expertise in signature gathering dominate, offering their services to proponents seeking to place a measure on the ballot.

One of the principal tactics used by these specialized signature-gathering firms is the deployment of well-trained, professional signature gatherers. Typically, these signature gatherers are paid on a per-signature or commission basis, also known as a bounty, at a rate determined by the market as it is assessed at the time. Depending on the nature of the initiative, the characteristics of the district, the time of year, or competition with other initiatives at the same time, the costs per

signature can vary widely, from as low as \$2 per signature gathered to as high as \$20.

Against this backdrop, the determining factor for getting a particular measure on the ballot too often has less to do with its merits and more to do with the depth of the pockets of its proponents. By virtue of the compensation structure under which they work, professional signature gatherers have powerful incentives to traffic in misleading information and outright falsehoods in order to induce as many voters as possible to sign in the minimum amount of time.

This collision, between economic self-interest and the public interest, has a direct and damaging impact on the integrity of direct democracy in our state. Other US states have recently examined the issues surrounding petitions and paid signature gatherers and adopted legislation prohibiting per-signature bounties, instead requiring that payment for signature gathering may be made only on an hourly or salaried basis... California should do the same. Our democracy and governance will be the better for it.

- 2) **Initiative, Referendum, and Recall & Other States:** According to information from the National Conference on State Legislatures, California is one of 24 states (along with the United States Virgin Islands) that allows voters through the initiative to propose laws, constitutional amendments, or both through a petition process. California is one of 23 states (along with the United States Virgin Islands) that allows voters through the referendum process to petition to demand a popular vote on a new law passed by the Legislature. Nineteen states (including California) and the District of Columbia permit state officers to be removed from office before the end of the term of office through the recall process.

At least six states (Arizona, Florida, Montana, North Dakota, Oregon, and South Dakota) limit the ability of initiative or referendum proponents to pay signature gatherers on a per-signature basis. Nebraska repealed a state law in 2015 that prohibited petition circulators from being paid on a per-signature basis. Wyoming repealed a state law that restricted *initiative* proponents from paying signature gatherers on a per-signature basis in 2015, and repealed a law prohibiting payments on a per-signature basis for *referendum* petitions in 2018. 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.

- 3) **Payment for Signature Gathering and Constitutional Issues:** 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 right 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. The *Meyer* court, however, 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. 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 the circulator's 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 this bill, if enacted, would be upheld in a court challenge.

- 4) **Petition Fraud:** According to information from the SOS, between 1994 and May 2021, the office opened 292 cases investigating potential petition fraud, of which 55 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.
- 5) **Suggested Technical Amendments:** Committee staff recommends the following technical amendments to this bill:

On page 3, line 22, strike out “fraud.” and insert “fraud related to the initiative, referendum, or recall process, including violations of this section or of Chapter 7 (commencing with Section 18600) of Division 18.”

On page 3, line 35, strike out “General,” and insert “General after assuming control from the qui tam plaintiff pursuant to paragraph (3),”.

On page 3, line 36, strike out “plaintiff,” and insert “plaintiff”.

On page 3, line 36, strike out “section,” and insert “subdivision,”.

On page 3, line 39, strike out “attorney’s” and insert “attorneys”.

6) **Arguments in Support:** In support of this bill, California Professional Firefighters writes:

Initiatives, referendums, petitions, and other items that are placed on the ballot by means of citizen signatures are an integral part of California’s electoral process and provide access to direct democracy to millions. These measures can also have outsized, lasting impacts on our state’s government, and because of this it is important to ensure that each measure for which signatures are gathered is conducted in a fair, transparent, and honest manner. While it is currently a misdemeanor action to compensate someone directly for their signature on a petition, loopholes exist in current law that allow groups to compensate their employees, contractors, or volunteers in a manner that is directly related to the number of signatures that they obtain. This provides explicit incentive to those individuals to obtain as many signatures in their time working as possible, encouraging potentially dishonest or otherwise fraudulent methods to ensure a higher payout. California’s referendum system is too important to allow for financial motivation to influence what measures are placed before the voters, and for these reasons, we urge your support of this important measure.

7) **Arguments in Opposition:** In opposition to this bill, the League of Women Voters of California (League) writes:

The League believes that impeding compensation for signatures gathered for initiative, referendum, or recall petitions could interfere with and have a chilling effect on citizens’ right of direct legislation through the initiative and referendum process. We are concerned that it would promote inequity by driving up costs of the initiative process in a manner that favors wealthy interests. Finally, we support a system of registration and training for signature gatherers and compensation for time and dedication to civic service. This bill dramatically changes a long-established democratic process with the rationale that it is necessary to protect against fraud. There is, however, no compelling evidence of significant fraud resulting from a per-signature payment system.

Also in opposition, the California Chamber of Commerce writes:

SB 660 will have negative impact on California’s ballot process. SB 660 also creates a private right of action, which would have a chilling effect on California’s ballot process by mixing ballot measures with the risk of frivolous

lawsuits. The very real threat of predatory litigation will suppress public participation, erode trust in the process, and increase the likelihood that predatory lawyers gain control of our elections...

SB 660 is premature because this issue is being litigated. SB 660 denies businesses the right to accept piece-rate payment for signatures under the guise of election integrity but ignores that there is pending litigation related to this issue. (*Wilson v. The La Jolla Group*, 2021 WL 940283 (3/12/2021)). The legislature should take no action on this simplistic approach of denying citizens an entire method of accepting payment for services and defer to the courts on this complex issue. It makes more sense to wait until the issue is judicially resolved before moving to legislate.

The litigation in *Wilson v. The La Jolla Group* that is referenced in the opposition letter from the California Chamber of Commerce involves a question of whether a specific petition drive management firm—The La Jolla Group—misclassified the signature gatherers that worked for the firm as independent contractors, rather than classifying them as employees. The litigation does not seek to address the question of whether state labor laws prohibit signature gatherers from being paid on a per-signature basis *in all circumstances*. Furthermore, the litigation does not touch on issues other than state labor laws that may be relevant when evaluating the propriety of signature gatherers being paid on a per-signature basis.

- 8) **Previous Legislation:** Several bills introduced in the last 15 years have sought to prohibit paying signature gatherers on a per-signature basis, as described in more detail below. Those bills, however, generally provided that a violation of the prohibition would be subject to misdemeanor penalties, while a violation of this bill would be subject to civil, but not criminal, penalties. Furthermore, some of the prior efforts to prohibit payment for signature gathering on a per-signature basis would have made a signature gatherer subject to penalties for being paid on a per-signature basis. The civil penalties imposed by this bill would apply only to a person who *pays* signature gatherers on a per-signature basis, and would not apply to the signature gatherers themselves. These previous efforts to prohibit per-signature payments include the following bills:

AB 1451 (Low) of 2019 would have made 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, among various other provisions. AB 1451 was vetoed by Governor Newsom. In his veto message, the Governor expressed his concern that the bill “could make the qualification of many initiatives cost-prohibitive,” and said that he was “reluctant to sign any bill that erects barriers to citizen participation in the electoral process.”

AB 1947 (Low) of 2018 would have made 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. AB 1947 was vetoed by Governor Brown, who expressed concerns that the bill would increase the costs of circulating ballot measures.

SB 1394 (Newman) of 2018 was similar to this bill, except that SB 1394 would have made it a misdemeanor for a person to pay a signature gatherer on a per-signature basis, in addition

to such conduct being subject to civil penalties. SB 1394 was approved by the Senate, but was not set for a hearing in the Assembly Elections & Redistricting Committee.

SB 168 (Corbett) of 2011, which was vetoed by Governor Brown, would have made it a misdemeanor to pay another person or to be paid based on the number of signatures obtained on an initiative, referendum, or recall petition. In his veto message, the Governor stated that “per-signature payment is often the most cost-effective method for collecting the hundreds of thousands of signatures needed to qualify a ballot measure,” and that “[e]liminating this option will drive up the cost of circulating ballot measures, thereby further favoring the wealthiest interests.”

SB 34 (Corbett) of 2009, which was vetoed by Governor Schwarzenegger, was identical to SB 168. In his veto message, the Governor stated that “prohibitions on per-signature payments will make it more difficult for grassroots organizations to gather the necessary signatures and qualify measures for the ballot.”

AB 2946 (Leno) of 2006 also would have prohibited paying petition circulators on per-signature basis, among other provisions. AB 2946 was vetoed by Governor Schwarzenegger.

9) **Double-Referral:** This bill has been double-referred to the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Professional Firefighters

Opposition

California Chamber of Commerce
League of Women Voters of California
1 individual

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