

MEMORANDUM ON SB 5356 & HB 1087

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SB 5356 and HB 1087 would outlaw the per-signature payment of initiative and referendum petition signature gatherers in Washington State. SB 5356 and HB 1087 are most likely unconstitutional under the First Amendment to the U.S. Constitution.

LAWS REDUCING PETITION CIRCULATION AND SIGNATURES ARE LIMITS ON CORE POLITICAL SPEECH, SUBJECT TO SCRUTINY

In the cases of *Meyer v. Grant* (1988) and *Buckley v. American Constitutional Law Foundation* (1999), the U.S. Supreme Court has ruled that laws limiting the ability of initiative and referendum petition signature gatherers to circulate petitions are laws that limit core political speech. Laws curtailing the manner by which signature gatherers collect petition signatures reduce the number of signature gatherers and reduce the audience of persons they can reach. Laws proscribing how signature gatherers obtain signatures reduce the likelihood that the requisite number of signatures needed to place a measure on the ballot will be achieved.

Thus, in *Meyer*, the U.S. Supreme Court held that a state ban on paying signature gatherers by any method was a limitation on core political speech. In *Buckley*, the U.S. Supreme Court struck down state laws requiring: (1) that the signature gatherers be registered voters; (2) that they wear ID badges; and (3) that they disclose the amount of money they were paid were all provisions limiting political speech.

Some lower federal courts have similarly analyzed Washington State statutes that imposed requirements and limitations on how signature gatherers collect petition signatures. In *Washington Initiatives Now (WIN) v. Rippie* (9th Cir. 2000), the Ninth Circuit Court of appeals ruled unconstitutional a law requiring signature gatherers disclose their names, addresses and the amount of money they were paid for gathering signatures. Significantly, in *LIMIT v. Maleng* (W.D.Wash. 1994), a federal district court held that the Washington statute (former RCW 29.79.490(2)) violated political free speech protections found in the First Amendment.

COURTS DEMAND ACTUAL EVIDENCE LINKING LIMITS ON SIGNATURE GATHERING TO ASSERTED STATE INTERESTS; BARE ASSERTIONS AND FORMAL LEGISLATIVE FINDINGS ARE NOT ENOUGH

While states have asserted that laws curtailing signature gatherers for gaining petition signatures are supported by a state interest in preventing fraud, courts have demanded more than just a formal assertion by legislatures. The U.S. Supreme Court in *Meyer* and

Buckley, as well lower courts have demanded that states provide actual evidence to justify such laws. The courts have insisted that there must be real evidence that the method of obtaining signatures that the law would prohibit is a method that specifically leads to an increase in fraudulent signatures. The courts have insisted that a few isolated convictions for fraudulent petition signatures is not enough to establish the required link.

The Ninth Circuit upheld an Oregon ban on per-signature payment to signature gatherers in *Prete v. Bradbury* (9th Cir. 2006) because the trial judge stated that there was actual evidence linking problems of fraudulent signatures with per-signature payments, while no evidence was presented that the law was limiting the number of signature gatherers or valid petition signatures. However, in *Prete* the Ninth Circuit did not overrule the Ninth Circuit decision in *Ripple*. Nor did it overrule *LIMIT*, which held Washington State's law banning per-signature payment of signature gatherers unconstitutional.

Lessened Risk of Corruption in Signature Gathering Places Greater Burden in Justifying Limits on Petition Circulation and Signature Gathering

Rulings by the U.S. Supreme Court in both *Meyer* and *Buckley* emphasize that the petition signature gathering process should be given political free speech protections because the risk of corruption is more remote at the signature stage than at the ballot-casting stage for public offices.

Courts Are Skeptical of Laws Further Limiting Petition Circulation and Signature Gathering When Other, Existing Laws Address State Concerns

Moreover, the U.S. Supreme Court and lower courts have been hesitant to uphold limits on the manner by which signature gatherers obtain petition signatures where there are existing laws that adequately combat the threat of fraudulent signatures. In *Buckley*, for instance, the U.S. Supreme struck down laws concerning the signature-gathering process, observing there were other state laws that dealt with the harm to be avoided. As the Court observed: fraudulent signatures were outlawed, a rule required a number equaling at least 5 percent of the electorate from the previous general election to place a measure on the ballot, a single subject rule limited the scope of initiatives, sponsors of initiatives were required to disclose their identities and the amount of money they spent in support of the initiative, petitions contained warning disclaimers about the initiative process and laws, and the state maintained a signature verification process.

SB 5356 & HB 1087 ARE LIKELY UNCONSTITUTIONAL UNDER COURTS' FIRST AMENDMENT RULINGS

SB 5356 and HB 1087 both reduce the ability of initiative supporters to commission signature gatherers to obtain signatures for initiative and referendum petitions. Both bills limit core political speech protected by the First Amendment, and would be subject to constitutional scrutiny.

SB 5356 and HB 1087 Limit Payment Involving Political Speech; Such Speech is Protected by the First Amendment

Significant are SB 5356 and HB 1087's limitations on payment to signature gatherers. The use of money to promote political speech has long been the subject of scrutiny by the U.S. Supreme Court. Prohibitions on payment for signature gathering were found unconstitutional in *Meyer* and in *LIMIT*. Requirements relating to payment for signature gathering were also held to be impermissible restrictions on political speech in *WIN*. These decisions weigh heavily against the constitutionality of SB 5356 and HB 1087.

Proponents of Ban on Per-Signature Payment Must Overcome High Burden

- Proponents of the Ban Must Offer Actual Evidence

The reduction of political speech places a heavy burden upon proponents of an outright ban on per-signature payment of signature gatherers in order to justify the constitutionality of those bills. It is highly questionable whether actual evidence could be mustered showing that per-signature payment of signature gatherers is directly linked to the proliferation of fraudulent signatures. Supporters of both bills will have to demonstrate that per-signature payment creates unique and greater threat of corruption than other forms of payment to signature gathers. Supporters of both bills will also have to provide actual evidence suggesting such a threat when the U.S. Supreme Court in *Meyer* and *Buckley* has already noted that threat of corruption is far less likely in the signature-gathering phase of a petition than in an election for particular office holders. The later situation countenances concerns of quid-pro-quo exchange, whereas the former situation does not.

- Limited Number of Convictions & Prosecutions is Not Enough

The ruling in *Buckley* suggests that proponents of an outright ban on per-signature payment of signature gatherers will have to show that more than a few instances of signature fraud relating to the signature-gathering methods targeted by SB 5356 and HB 1087 will have to be demonstrated. *WIN* also indicates that the presence of more than a small handful of prosecutions for signature fraud due to per-signature payment will have to be shown if the bill is to withstand scrutiny.

- Proponents of Ban on Per-Signature Payment Must Overcome any Evidence Offered by Initiative Supporters

Moreover, proponents of an outright ban on per-signature payment of signature gatherers will likely have difficulty establishing the constitutionality of such a ban if initiative supporters provide any evidence of their own to demonstrate the chilling effects of such a ban. Initiative supporters will likely be able to provide evidence that an outright ban on per-signature payment to signature gatherers will hamper efforts to hire petition signature-gatherers. Initiative supporters may also be able to provide evidence undermining any supposed link between per-signature payment itself and fraud.

Apparently, there is also recent evidence indicating that Washington State has a far lower rate of invalid petition signatures in comparison to Oregon. Likewise, there is indication that rates of invalid signatures has risen since Oregon passed its own ban on per-signature payment to signature gatherers.

- Washington State Bans on Per-Signature Payment Has a Prior Record, Devoid of Actual Evidence Linking Such Payment Directly to Signature Fraud

The generation of actual evidence to support an outright ban on per-signature payment in this case is rendered even more problematic in light of the federal district court's ruling in *LIMIT*. SB 5356 and HB 1087 have not been introduced in a vacuum. Rather, there is a paper trail behind these bills. Both bills would exhume a prohibition on paying signature gatherers that a prior court laid to rest. Specifically, the federal district court in *LIMIT* found that there was no actual evidence suggesting that the previous ban on per-signature payment of signature gatherers was tied to unique instances of signature fraud. The court held that formal declarations by the Legislature did not suffice to support such a ban on political speech activity.

- Existing Laws that Adequately Address Signature Fraud Concerns

Washington has several laws in effect that address petition signature fraud. First and foremost, RCW 29A.84 sets out requirements for circulators and signers of initiative and referendum petitions, with accompanying penalties. Specifically, RCW 29A.84.250(2)

makes it a gross misdemeanor if a person: “Provides or receives consideration for soliciting or procuring signatures on an initiative or referendum petition if any part of the consideration is based upon the number of signatures solicited or procured, or offers to provide or agrees to receive such consideration any of which is based on the number of signatures solicited or procured.”

Other existing laws include: a single subject rule that Washington Courts have applied to initiatives, RCW 29A.72.140’s requirement that a warning disclaimer be printed on the reverse side of circulated petitions, RCW 29A.72.150’s eight percent rule for placing proposed initiatives on the ballot, and RCW 29A.72.230’s provisions for the verification and canvass of signatures on petitions.

Proponents of an outright ban on per-signature payment will have to demonstrate how such a ban will further state interests in combating fraud that are not already adequately served by the many existing provisions and limits on the initiative process in Washington State.

- Additional Hurdles Facing Proponents of an Outright Ban on Per-Signature Payment to Signature Gatherers

As noted above, proponents of an outright ban on per-signature payment will have to show that signature gatherers paid on a per-signature basis are more prone to fraud than other paid signature gatherers and more prone to fraud than volunteer signature gatherers who might have an overzealous desire to see a measure placed on a ballot. Proponents of such a ban will likely have to overcome or minimize the disincentive that professional signature gatherers have to obtain valid signatures in the interests of the signature gatherers own future employment.

CONCLUSION

For the above reasons, both SB 5356 and HB 1087—which call for an outright ban on per-signature payments to initiative and referendum signature gatherers—are constitutionally dubious. A court deciding on the constitutional permissibility of such a ban would likely strike down either bill as a violation of the First Amendment’s protection of political speech.