SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 660 (Newman)
Version: February 19, 2021
Hearing Date: April 20, 2021
Fiscal: Yes
Urgency: No
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SUBJECT

Initiative, referendum, and recall petitions: compensation for signatures

DIGEST

This bill makes it unlawful for a person to pay money or provide any other thing of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition.

EXECUTIVE SUMMARY

Twenty-four states have an initiative process by which citizens can place proposed laws, or in some circumstances proposed amendments to their constitutions, on the ballot. A popular referendum is substantially similar to an initiative, and similarly requires petitions to change the law. Bringing these processes to the ballot generally requires an initial filing with the relevant authority and the circulation of a petition to obtain the required number of signatures from qualified, registered voters.

Proponents of these processes assert that they are vehicles for direct democracy on a wide range of issues, involving the people in a more direct way on issues that would not otherwise be addressed in a public forum. However, there are strong criticisms of these processes that often point to the undue influence of well-financed interests. Relevant here, one particular practice relating to the gathering of signatures that is identified as problematic is the payment-per-signature method. This practice involves initiative/recall sponsors paying circulators on a per-signature basis. The critique is that such a practice encourages fraud, essentially incentivizing the forging of signatures or misrepresenting the content of the petition or basis for the recall to increase profit.

This bill responds to this concern by making it unlawful to pay anything of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition. Individuals in violation are subject to hefty civil penalties in a civil action brought by the Attorney General or a private, "qui tam" plaintiff. This bill is author-

sponsored. It is opposed by the California Chamber of Commerce and the League of Women Voters of California. This bill passed out of the Senate Elections and Constitutional Amendments Committee on a 3 to 2 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that notwithstanding any other provision of law, whenever an initiative, referendum, recall, nominating petition or paper, or any other petition or paper, is required to be signed by voters of a county, city, school district, or special district subject to petitioning, only a person who is an eligible registered voter at the time of signing the petition or paper is entitled to sign the petition or paper. Existing law provides that a signer shall at the time of signing a petition or paper personally affix their signature, printed name, and place of residence, as specified. (Elec. Code § 100.)

2) Prohibits a person from circulating a state or local initiative, referendum, or recall petition or nominating paper unless the person is 18 years of age or older. (Elec. Code § 102.)

3) Requires that wherever any petition or paper is submitted to the elections official, each section of the petition or paper have attached to it a declaration signed by the circulator of the petition or paper under penalty of perjury, setting forth, in the circulator's own hand, the following:
    a) the printed name of the circulator;
    b) the residence address of the circulator, as specified;
    c) the dates between which all the signatures to the petition or paper were obtained;
    d) that the circulator circulated that section and witnessed the appended signatures being written;
    e) that according to the best information and belief of the circulator, each signature is the genuine signature of the person whose name it purports to be;
    f) that the circulator is 18 years of age or older; and
    g) that the circulator showed each signer an "Official Top Funders" sheet, as provided. (Elec. Code § 104.)

4) Provides that, notwithstanding any other law, a state or local initiative petition required to be signed by voters shall contain in 11-point type, before that portion of the petition for voters' signatures, printed names, and residence addresses, the following language: "NOTICE TO THE PUBLIC - THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK." (Elec. Code § 101(a).)

5) Provides that every person is guilty of a misdemeanor who does the following in connection with an initiative, referendum, or recall petition:
    a) intentionally misrepresents or intentionally makes any false statement concerning the contents, purport or effect of a petition the person is circulating or obtaining signatures to, as specified;
    b) willfully and knowingly circulates, publishes, or exhibits any false statement or misrepresentation concerning the contents, purport or effect of the petition for the purpose of obtaining any signature to, or persuading or influencing any person to sign, that petition;
    c) circulating, as principal or agent, or having charge or control of the circulation of, or obtaining signatures to, any state or local initiative, intentionally makes any false statement in response to any inquiry by any voter as to whether the person is a paid signature gatherer or a volunteer;
    d) refuses to allow a prospective signer to read the measure or petition if working for the proponent or proponents of an initiative or referendum measure or recall petition;
    e) covers or otherwise obscures the summary of the measure prepared by the Attorney General from the view of a prospective signer if working for the proponent or proponents of a statewide initiative or referendum measure;
    f) offers or gives money or other valuable consideration to another in exchange for that person's signature on a state, county, municipal, or district initiative, referendum, or recall petition;
    g) knowingly or willfully permits the list of signatures on an initiative, referendum, or recall petition to be used for any purpose other than qualification of the initiative or referendum measure or recall question for the ballot, except as provided;
    h) solicits any circulator to affix to any initiative, referendum, or recall petition any false or forged signature, or to cause or permit a false or forged signature to be affixed; or
    i) knowingly signs their own name more than once to any initiative, referendum, or recall petition, or signs their name to that petition knowing themself at the time of signing not to be qualified to sign it. (Elec. Code §§ 18600-18603, 18610, 18612, 18650.)

6) Makes the following conduct in connection any initiative, referendum, or recall petition punishable by a fine and/or imprisonment:
    a) filing in the office of the elections official, a signature which the person filing the petition knows to be false or fraudulent or not the genuine signature of the person whose name it purports to be (Elec. Code § 18614);
    b) knowingly making any false return, certification or affidavit by a public official or employee (Elec. Code § 18661);
    c) making, or participating in the making of, any false affidavit (Elec. Code § 18660); and

d) offering to buy or buying from a circulator any referendum, initiative, or recall petition on which one or more persons have affixed their signatures (Elec. Code § 18622).

This bill:

1) Makes it unlawful for a person to pay money or provide any other thing of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition. The bill subjects violators to a civil penalty equal to the greater of $25,000 or $50 for every signature gathered in exchange for compensation.

2) Authorizes the Attorney General or an individual to bring a civil action to enforce this prohibition and to recover the civil penalty. A person bringing such an action shall be referred to as the qui tam plaintiff.

3) Provides that an action brought by a qui tam plaintiff shall not be dismissed except with the written consent of the court and the Attorney General, taking into account the best interests of the parties involved and the public purposes behind this section. A claim for a violation shall not be waived or released by any private person, except if the action is part of a court-approved settlement of a civil action brought under this section.

4) Requires the qui tam plaintiff to serve the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses, as specified. The Attorney General may elect to intervene and proceed with the action within 60 days of receipt.

5) Provides that the Attorney General shall receive a fixed 33 percent of the proceeds of any action or settlement of the claim they are involved in. These funds are to be deposited in the Petition Signature Fraud Account, which the bill establishes in the General Fund. Moneys in the account shall be available, upon appropriation by the Legislature, for use by the Attorney General to support the Attorney General's investigation and prosecution of fraud.

6) Provides that a qui tam plaintiff shall receive at least 17 percent, but not more than 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, and reasonable costs and attorney's fees. A qui tam plaintiff shall also be entitled to all relief necessary to make the plaintiff whole if any retaliation for initiating or proceeding with an action pursuant to this bill takes place.

7) Requires the remainder of the funds to be deposited in the Petition Signature Fraud Voter Education Subaccount, which is established by the bill in the Petition Signature Fraud Account. Funds in the subaccount shall be available, upon appropriation by the Legislature, for use by the Secretary of State to support voter registration and education efforts.

8) Authorizes an award of reasonable attorneys' fees and expenses for the defendant and against the qui tam plaintiff that proceeded with the action if the defendant prevails in the action, the attorney general does not intervene, and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

9) Clarifies that it 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.

COMMENTS

1. Stated need for 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.
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> 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.
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> 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. These states include Colorado, Montana, North Dakota, Oregon, and South Dakota. California should do the same. Our democracy and governance will be the better for it.

2. Constitutional analysis of laws governing petition circulators

The paid gathering of signatures for initiative politics has a long history in California, dating back over 100 years. However, a trend began across the nation that prohibited the payment of signature gatherers. States began to outlaw the practice to stop what they saw as the undue influence of wealthy interests on the process. These bans continued to be passed and upheld by the courts until 1988.

In *Meyer v. Grant* (1988) 486 U.S. 414, 415, the United States Supreme Court was faced with the question of whether a Colorado state law that made it a felony to pay petition circulators was unconstitutional. The Court rejected the state's asserted justification for the ban that it was necessary to prevent fraud, to protect the public, or to ensure that

there was in fact broad public support for the initiative being proposed for the ballot.[1] The Court found that the case involved "a limitation on political expression subject to exacting scrutiny."[2] The Court further found that "the statute trenches upon an area in which the importance of First Amendment protections is at its zenith."[3] It concluded that the statute prohibiting payment of petition circulators "impose[d] a burden on political expression that the State ha[d] failed to justify."[4]

With this avenue closed, many initiative reformers turned their attention to a particular practice that they found incentivized fraud and deception, payment per signature. A number of states have since passed laws that allow persons or entities to pay petition circulators but prohibit payment based on the number of signatures collected. These laws have been challenged in court to varying results.

A statute was enacted in Maine that prohibited payment for the collection of signatures if that payment is based on the number of signatures collected. The law was challenged and found to be in violation of the First Amendment. The federal district court found: "The circulation of an initiative or referendum petition 'involves the type of interactive communication concerning political change that is appropriately described as core political speech.' A state may not, consistent with the First Amendment, severely burden such speech unless the regulation at issue is 'narrowly tailored to serve a compelling state interest.'"[5] At least four other states have had similar laws overturned.[6]

Despite these challenges, the Supreme Court has made clear that "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."[7] The Ninth Circuit has outlined the relevant analysis:

> For purposes of determining whether a state election law violates an individual's First Amendment rights, we "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger

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[1] *Id.* at 419-420.
[2] *Id.*, citing *Buckley v. Valeo* (1976) 424 U.S. 1.
[3] *Id.* at 425, quotation marks omitted.
[4] *Id.* at 428.
[5] *On Our Terms '97 Pac v. Secretary of Me.* (D.Me. 1999) 101 F.Supp.2d 19, 25, quoting *Meyer v. Grant*, 486 U.S. at 421-22 & *Buckley v. American Constitutional Law Found.*, Inc. (1999) 525 U.S. 182.
[6] *See e.g., Citizens for Tax Reform v. Deters* (6th Cir. 2008) 518 F.3d 375, 388, overturning Ohio's ban on payment-per-signature.
[7] *Buckley v. Am. Constitutional Law Found.* (1999) 525 U.S. 182, 191.

> less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[8]

This clearly leaves states ample authority to regulate these processes where there is sufficient reason to do so. In fact, according to the National Conference of State Legislatures, several states have active bans on payment-per-signature practices.

North Dakota law requires all those who circulate petitions to be state residents and prohibits the payment of petition circulators on a "per signature" or commission basis. The law was challenged, but the Eighth Circuit Court of Appeals upheld the law. It found that "the State ha[d] produced sufficient evidence that the regulation is necessary to insure the integrity of the initiative process."[9] It relied on the "State's important interest in preventing signature fraud, the evidence of fraud the State has produced, and the lack of any evidence from the [challengers] showing that the ban on commissioned payment burdens their ability to collect signatures."[10]

The Ninth Circuit has also addressed the issue in a challenge to an Oregon law, Ballot Measure 26, which prohibited payment to electoral petition signature gatherers on a piece-work or per signature basis. The defendant state asserted similar arguments to those put forth in support of this bill, that payment per signature increases the incidence of fraud. The court found the state had "asserted an important regulatory interest in preventing fraud and forgery in the initiative process" and "supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery."[11]

The *Prete* court reasoned: "This court's duty is not to determine whether the state's chosen method for prevention of fraud is the best imaginable. Once the burden is found to be of the 'lesser' variety, our inquiry is limited to whether the chosen method is reasonably related to the important regulatory interest."[12] The court agreed with the lower court that the challengers did not make a sufficient showing that the law would otherwise burden their ability to collect signatures."[13] The Ninth Circuit concluded:

> [B]ecause plaintiffs failed to prove the district court erred in determining that Measure 26 does not severely burden their First Amendment rights in circulating initiative petitions, and defendant has established that Measure 26 serves the important regulatory interest in preventing fraud

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[8] *Prete v. Bradbury* (9th Cir. 2006) 438 F.3d 949, 961, quoting *Ariz. Right to Life PAC v. Bayless* (9th Cir. 2003) 320 F.3d 1002, 1007.
[9] *Initiative & Referendum Inst. v. Jaeger* (8th Cir. 2001) 241 F.3d 614, 618.
[10] *Ibid.*
[11] *Prete v. Bradbury* (9th Cir. 2006) 438 F.3d 949, 970-971.
[12] *Ibid.*
[13] *Ibid.*

> and forgery in the initiative process, we hold that Measure 26 does not violate the First Amendment, as applied . . . .[14]

3. Previous attempts to address payment-per-signature

Similar to this bill, AB 2946 (Leno, 2006) would have made it unlawful for any person to pay or to receive money or any other thing of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition. Any violation would have been a misdemeanor. The bill passed out of the Legislature but was vetoed by Governor Schwarzenegger.

In 2009, SB 34 (Corbett, 2009) was introduced and would have also prohibited the payment-per-signature practice, making it a misdemeanor and subjecting violators to fines of up to $25,000. SB 34 also passed the Legislature and was vetoed by Governor Schwarzenegger. In his veto message, the Governor stated:

> The California Constitution provides an important system of checks and balance by giving the people direct control over their government through initiative, referendum and recall. This bill would limit the initiative process by prohibiting a person from paying or receiving money or anything of value based on the number of signatures obtained on such petitions.
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> As I have stated when vetoing similar legislation, prohibitions on per-signature payments will make it more difficult for grassroots organizations to gather the necessary signatures and qualify measures for the ballot. Therefore, I am unable to sign this bill.

After Governor Brown took office, Senator Corbett tried again, introducing SB 168 (Corbett, 2011), which was identical to SB 34. The bill met a similar fate when Governor Brown vetoed the bill, providing this message:

> This bill makes it a crime for a person to pay or receive money (or any other thing of value) based-directly or indirectly--on the number of signatures obtained on a state or local initiative, referendum, or recall petition.
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> While I understand the potential abuses of the current per-signature payment system, I believe this bill is flawed for two reasons.
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> First, this bill would effectively prohibit organizations from even setting targets or quotas for those they hire to gather signatures. It doesn't seem

[14] *Ibid.*

> very practical to me to create a system that makes productivity goals a crime.
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> Second, 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.
>
> This is a dramatic change to a long established democratic process in California. After reviewing the materials submitted in support of this bill, I am not persuaded that the unintended consequences won't be worse than the abuses the bill aims to prevent.

SB 1394 (Newman, 2018) was nearly identical to this bill. It died in the Assembly Elections and Redistricting Committee. AB 1947 (Low, 2018) would have also prohibited the payment-per-signature practice, making it a misdemeanor and subjecting violators to fines of up to $25,000. It was vetoed. Governor Brown cross-referenced his veto of SB 168 and added: "While I understand the potential abuses of the current per-signature payment system, my perspective has not changed since 2011. I cannot sign this bill."

Finally, AB 1451 (Low, 2019) would have prohibited paying initiative, referendum, or recall petition circulators on a per-signature basis, and required 10 percent of signatures on a state initiative petition to be collected by either unpaid circulators or employees or members of nonprofit organizations, as specified. A third governor, Governor Newsom, vetoed the bill, stating in his veto message: "While I appreciate the intent of this legislation to incentivize grassroots support for the initiative process, I believe this measure could make the qualification of many initiatives cost-prohibitive, thereby having the opposite effect. I am a strong supporter of California's system of direct democracy and am reluctant to sign any bill that erects barriers to citizen participation in the electoral process."

4. Civil penalties enforcement

This bill provides a unique mechanism for imposing civil penalties against persons who violate the prohibition on paying circulators per signature. The bill allows for the Attorney General to bring an action, but also provides a right of action for anyone, without any need for standing or a nexus to the unlawful conduct. The bill refers to these private persons as "qui tam" plaintiffs.

This model does exist in other contexts. Generally, a qui tam plaintiff is standing in the shoes of another by bringing suit and usually shares in the recovery as a result. The basis for providing for such suits is to ensure the enforcement of important public policy. By essentially deputizing private persons and incentivizing them to bring suit to

enforce the law, the laws are more effectively enforced and violations are thereby deterred. Qui tam schemes also reduce the pressure on government entities to be solely responsible for rooting out violations of the law.

Two examples of this sort of mechanism in California law are in the Labor and Government Codes. The Private Attorneys General Act allows any provision of the Labor Code that provides for the collection of a civil penalty to be enforced through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.[15]

The other context is much more analogous and appears to serve as the template for the enforcement provisions of this bill. California's False Claims Act provides qui tam plaintiffs incentives to blow the whistle on fraud being perpetrated against the government.[16] In short, private parties can bring suit against entities that are defrauding the government or otherwise misusing government funds. The plaintiff must have information not publicly accessible in order to bring such an action, which is not required under this bill, but otherwise there is no standing requirement. The qui tam plaintiff is incentivized to "blow the whistle" on such conduct and bring a claim through the sharing of some percentage of the ultimate recovery.

This bill provides a private, "qui tam" plaintiff the right to bring an action for civil penalties of at least $25,000, but potentially more based on a $50 per improper signature penalty option. These are arguably extremely hefty penalties, especially in relation to most of the previous iterations of the bill that set the cap at $25,000 rather than the minimum there.

Under this bill, the plaintiff needs to notify the Attorney General who is then given the opportunity to intervene and take control of the action. The qui tam plaintiff is entitled to between 17 and 50 percent of the proceeds of the action or settlement, based on the plaintiff's contributions to securing such proceeds. However, if the Attorney General does not intervene and the defendant prevails, the qui tam plaintiff can be placed on the hook for the defendant's fees and costs if the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

5. Opposition to the bill

The California Chamber of Commerce writes in opposition: "While we appreciate that SB 660 is intended to address election integrity, the consequences of this bill would limit the public's role in the ballot process by making it prohibitively expensive to circulate an initiative or a recall, and next to impossible to propose a referendum." It argues there is not compelling evidence there is fraud abounding under current law, citing to data

[15] Lab. Code § 2698 et seq.
[16] Gov. Code § 12650 et seq.

from the Heritage Foundation that indicates there were only eight convictions for ballot related voter fraud in 2020.

Writing in opposition, the League of Women Voters of California states:

> 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.

SUPPORT

None known

OPPOSITION

California Chamber of Commerce
League of Women Voters of California

RELATED LEGISLATION

Pending Legislation: SB 663 (Newman, 2021) permits the target of a recall petition, if there are 50,000 or more registered voters eligible to vote in the recall election, to request a redacted copy of the petition for the purposes of communicating with signers to determine whether they signed and understood the petition or to assist them with withdrawing their signature from the petition, as specified. The bill also increases the length of time a voter has to withdraw their signature from a petition and adds new language to the top of each page of a petition, as specified. SB 663 will be heard by the Senate Judiciary Committee on the same day as this bill.

Prior Legislation:

AB 1451 (Low, 2019) *See* Comment 3.

SB 1394 (Newman, 2018) *See* Comment 3.

AB 1947 (Low, 2018) *See* Comment 3.

SB 168 (Corbett, 2011) *See* Comment 3.

SB 34 (Corbett, 2009) *See* Comment 3.

AB 2946 (Leno, 2006) *See* Comment 3.

PRIOR VOTES:

Senate Elections and Constitutional Amendments Committee (Ayes 3, Noes 2)

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