LEGAL MEMO

Initiative Integrity: Legality of Banning Pay-Per-Signature

To: FGA Partners

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Key Points

- Though the U.S. Supreme Court has not weighed in directly on the constitutionality of banning pay-per-signature for ballot initiative efforts, a few federal circuit courts have.
- Every federal appeals court that has ruled on this issue has found bans on pay-per-signature to be constitutional. Notably, while the Sixth Circuit did find a law that included a ban on pay-per-signature to be unconstitutional, the law in question was more than a simple ban on pay-per-signature, it was a ban on *all* forms of payment other than per-time basis, and it made a violation of the statute a felony rather than a misdemeanor.
- A state law banning pay-per-signature (while allowing other forms of payment to circulators) will generally be upheld so long as the state's purpose for the ban is to prevent ballot initiative fraud and forgery.

Background

Many states allow parties supporting a ballot initiative effort to pay signature gathers on a per-signature basis. This practice encourages criminal behavior by incentivizing signature gatherers to commit fraud and forgery in order to collect as many signatures as they can to maximize their pay. Banning this practice would promote the important state interest of preventing fraudulently gathered or forged signatures and help ensure that only those issues that the requisite number of voters actually support make it onto the ballot. At issue is the legality of such a ban.

Banning Pay-Per-Signature for Ballot Initiatives is Legal so Long as the Law Bans Only that Form of Payment, and So Long as the State's Purpose for the Ban is to Prevent Ballot Fraud and Forgery

The First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech."[12] The United States Supreme Court has recognized that "[s]tates 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."[3] However, such broad leeway does have its limits. In *Meyer*, the Supreme Court struck down a Colorado law prohibiting all forms of payment for the circulation of ballot-initiative petitions, finding that such a restriction would undoubtedly limit the ability of those behind the initiative to engage in "core political speech."[4]

In determining the legality of any state-imposed restriction tied to a ballot initiative, a court will look to the restriction in question and determine whether it significantly inhibits communication with voters about proposed political change, and if it does, will determine whether the restriction is nevertheless warranted by the state interests alleged to justify the restriction.[5] A reasonable, nondiscriminatory restriction that creates only a minor burden will generally be justified by the state's regulatory interest.[6]

While the U.S. Supreme Court has not weighed in directly on the legality of banning pay-per-signatures, a few federal circuit courts have. Every federal appeals court that has ruled on this issue has found bans on pay-per-signature to be constitutional. Only the Sixth Circuit has found a law that included a ban on pay-per-signature to be unconstitutional, but the law in question included more than a simple ban on pay-per-signature, it was a ban on *all* forms of payment other than per-time basis. In addition, the law there made a violation of the statute a felony rather than a misdemeanor, which raised to an insurmountable height the bar the state needed to meet in order to demonstrate a sufficiently compelling state interest. Where the state's law is narrowly tailored to simply ban pay-per-signature, and where the stated purpose of the ban is to prevent ballot initiative fraud and forgery, the law has been upheld every time.

9th Circuit (AZ, CA, ID, MT, NV, OR, WA):

In *Prete*, the Ninth Circuit upheld an Oregon law prohibiting paying signature gathers on a per-signature basis (the precise reform at issue here). Ultimately, the court found that the Oregon law banning pay-per-signature did not severely burden the First Amendment rights of those circulating the initiative petitions, and that the state had successfully established that the law served the important state regulatory interest in preventing fraud and forgery in the initiative process, actual or perceived.[7]

Moreover, the Ninth Circuit found a clear distinction between the total ban on payments held unconstitutional in *Meyer*, to the much narrower ban by Oregon prohibiting pay-per-signature.[8] The court reasoned that Oregon's pay-per-signature ban is "quite limited in its proscription, barring only payment of petition circulators on the basis of the number of signatures gathered."[9] This is precisely what the measure at issue here is seeking to do. Thus, this reform would probably pass constitutional muster in any state in the Ninth Circuit, and likely others as well.

8th Circuit (AR, IA, MN, MO, ND, NE, SD):

In addition to the Ninth Circuit, the Eighth Circuit too has upheld a law prohibiting circulators from being paid on a per-signature basis. There, the court found that a North Dakota law was constitutional "[i]n light of the State's important interest in preventing signature fraud, the evidence of fraud the State has produced, and the lack of any evidence" demonstrating that the ban burdened their ability to collect signatures.[10]

2nd Circuit (CT, VT, NY)

Following the decisions in the Eighth and Ninth Circuits, the Second Circuit also upheld a ban on pay-per-signature.[11] In *Person*, the court stated, "[w]e join the Eighth and Ninth Circuits in holding that a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments."[12] The court found the alternative methods of payment that the ban left in place, other than pay-per-signature, were sufficient and that any burden the ban placed on petitioner was outweighed by "the state's interest in preventing fraud in gathering signatures."[13]

6th Circuit (KY, MI, OH, TN):

Only in the Sixth Circuit has a court refused to uphold the constitutionality of a law that included a ban on pay-per-signature. There, the court struck down an Ohio law that prohibited payment of petition circulators on *any* basis other than time worked.[14] The Court indicated that while the bans upheld in the Eighth, Ninth, and Second Circuit were indeed constitutionally permissible, the Ohio law was not because it imposed a burden beyond simply banning pay-per-signature.[15] Instead, Ohio's law banned *all* means of payment to circulators except on a per-time basis, while also mandating a much harsher penalty, making a violation of the law a felony rather than a misdemeanor.[16] According to the court, these two differences created a significant burden on the core political speech rights of plaintiff, which in turn, significantly raised the bar on how compelling the state's interest had to be in order to support such a burden.[17] According to the court, Ohio did not meet this threshold.

Bottom Line

Though the U.S. Supreme Court has not weighed in directly on the legality of banning pay-per-signatures related to ballot initiative efforts, several federal circuit courts have. Every federal appeals court that has ruled directly on this issue has found bans on pay-per-signature to be constitutionally permissible.

Notably, only the Sixth Circuit has found a law that included a ban on pay-per-signature to be unconstitutional, but the law in question included more than a simple ban on pay-per-signature, it was a ban on *all* forms of payment other than per-time basis. In addition, the law there made a violation of the statute a felony rather than a misdemeanor, which raised to an insurmountable height the bar the state needed to meet in order to demonstrate a sufficiently compelling state interest. Had Ohio's law merely banned pay-per-signature while making a violation of the statute a misdemeanor rather than a felony, it probably would have been upheld.

In the end, so long as a state's ban is narrowly tailored to simply prohibit pay-per-signature (while allowing other forms of payment for circulators), and where the evidence shows the State's interest in preventing ballot initiative fraud and forgery will be furthered by the ban (which it almost invariably will), the law will withstand judicial scrutiny.

1 Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

2 U.S. Const. amend I.

3 Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

4 Meyer v. Grant, 486 U.S. 414, 422-423 (1988).

5 Ibid.

6 Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

7 Prete v. Bradbury, 438 F.3d 949, 969-971 (9th Cir. 2006).

8 Id. at 962-963.

9 Id. at 968.

10 Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 618 (8th Cir. 2001).

11 Person v. New York State Board of Elections, 467 F.3d 141 (2d Cir. 2006).

12 Id. at 143.

13 Ibid.

14 Citizens for Tax Reform v. Deters, 518 F.3d 375 (6th Cir. 2008).

15 Id. at 385.

16 Id. at 386.

17 Id. at 387.