LEGAL MEMO

Initiative Integrity: Sixty Percent Supermajority Requirement

To: FGA Partners

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Date: June 3, 2021

Key Points

- While the U.S. Supreme Court has not weighed in directly on the legality of requiring at least 60 percent of the total number of voters in the last gubernatorial election to vote in favor of an initiative before it may become law, several federal circuit courts have weighed in on similar reforms. In every case, those reforms have been upheld.

- States wishing to pass a supermajority reform should do so with complete confidence that the measure will withstand judicial scrutiny.

Background

Currently, about half of all states allow some form of ballot initiative or referendum process wherein proponents of a specific measure are able to bypass their state legislature by bringing a measure directly to the people for a vote.[1] Wherever initiatives are allowed there exists a serious risk that unusually low voter turnout during the election in which the initiative is being considered, or an unwillingness on the part of voters to vote either for or against an initiative for whatever reason, could lead to the passage of an initiative supported by only a few but applicable to all.[2] In some cases, an initiative that slips through the approval process might even cause a significant change to the state's constitution.

To mitigate this risk states could pass ballot initiative reforms that require a 60 percent supermajority of the total number of voters in the last gubernatorial election to vote yes for a reform in order for it to become law. This requirement would raise the bar for passing initiatives and stop bare majorities of 50 percent plus one in any given election from amending the state's constitution or making other major changes.

At issue is the legality of such a reform.

Requiring a 60 Percent Supermajority of the Total Number of Voters in the Last Gubernatorial Election to Vote Yes for an Initiative in Order for it to Become Law is Constitutionally Permissible

The United States Supreme Court has long held that "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process."[3] With such broad leeway, however, comes certain limits. The First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech."[4] [5]

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."[6]

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.[7] A reasonable, nondiscriminatory restriction that creates only a minor burden will generally be justified by the state's regulatory interest.[8]

Notably, the Supreme Court has drawn an important distinction between laws that reduce speech by restricting or regulating it, and those that reduce speech by making it less likely to succeed.[9] In the context of ballot initiatives, laws that simply regulate the initiative process rather than reducing or regulating the speech tied to that initiative do not implicate the First Amendment at all.[10]

Here, the proposed reform would do nothing to inhibit communication with voters regarding the initiative and the political arguments for and against it, rather, this proposed reform would simply raise the standard the initiative must reach in order to become law. Therefore, the First Amendment would not be implicated at all by this proposed reform because speech would not be inhibited.[11]

While the U.S. Supreme Court has not weighed in directly on the legality of requiring at least 60 percent of the total number of voters in the last gubernatorial election to vote in favor of an initiative before it may become law, several federal circuits have weighed in on similar reforms involving a supermajority requirement for passage of a ballot initiative.

For instance, in an analogous Tenth Circuit ruling upheld by the U.S. Supreme Court, the Court affirmed the lower court's ruling supporting the invalidation of an initiative even though it received a majority of the votes cast for or against it.[12] The initiative was invalidated because it failed to receive a favorable vote from 50-percent or more of all those who voted in the election, in accordance with state law.[13] The court reasoned that if a state "wants to make it 'harder,' rather than 'easier,' to make laws by the initiative process, such is its prerogative," adding that a "state understandably wants to minimize abuse of the initiative process and make it difficult for a relatively small special interest group to enact its views into law through an initiated measure."[14]

In another similar case, the Tenth Circuit held that even a provision imposing a supermajority requirement for enactment of initiatives only on specific topics rather than for all ballot initiatives, did not implicate the First Amendment because a supermajority requirement for passage does not affect speech.[15] The court explained that "[a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise…The distinction is between laws that regulate or restrict communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not."[16]

In other words, "there is a crucial difference between a law that has the "inevitable effect" of reducing speech because it restricts or regulates speech, and a law that has the "inevitable effect"

of reducing speech because it makes particular speech less likely to succeed."[17] The latter is not afforded the same level of constitutional protection as the first.

Several other federal appeals courts across the country have noted the same distinction as the Tenth Circuit when presented with ballot initiative procedures that neither limit nor control speech, but instead, simply regulate the initiative process.[18] [19] [20] Thus, a ballot initiative reform that raises the bar for passage, without inhibiting speech at all, will pass constitutional scrutiny.

Bottom Line

While the U.S. Supreme Court has not weighed in directly on the legality of requiring at least 60 percent of the total number of voters in the last gubernatorial election to vote in favor of an initiative before it may become law, several federal circuits courts have weighed in on similar reforms. In every case, those reforms have been upheld.

States wishing to pass a supermajority reform for ballot initiatives should do so with complete confidence that the measure will withstand judicial scrutiny.

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[1] David Crary, "U.S. States Split on Allowing Citizen Ballot Initiatives," PBS NewsHour (2018), https://www.pbs.org/newshour/politics/u-s-states-split-on-allowing-citizen-ballot-initiatives.
[2] Brady v. Ohman, 1998 U.S. App. LEXIS 16206, 1998 Colo. J. C.A.R. 3828.
[3] Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).
[4] Thornhill v. Alabama, 310 U.S. 88, 95 (1940).
[5] U.S. Const. amend I.
[6] Meyer v. Grant, 486 U.S. 414, 422-423 (1988).
[7] Ibid.
[8] Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).
[9] See e.g., Riley v. National Federation of Blind, Inc., 487 U.S. 781, 790 n. 5 (1988) (stressing the difference between "a statute regulating how a speaker may speak" and a statute with a "completely incidental impact" on speech, which does not implicate the First Amendment).
[10] Ibid.
[11] Meyer v. Grant, 486 U.S. 414, 421 (1988).
[12] Brady v. Ohman, 1998 U.S. App. LEXIS 16206, 1998 Colo. J. C.A.R. 3828.
[13] Ibid.
[14] Ibid.
[15] Initiative & Referendum Inst. V. Walker, 450 F.3d 1082 (10th Cir. 2006).
[16] Id. at 1099-1100.
[17] Ibid.
[18] See e.g., Dobrovolny v. Moore, 126 F.3d 1111 (8th Cir. 1997).
[19] See e.g., Schmitt v. LaRose, 933 F.3d 628 (6th Cir. 2019).
[20] See e.g., Biddulph v. Mortham, 89 F.3d 1491 (11th Cir. 1996).