

SCS-SB909 / HB1763 – Legislation Evaluation
02/24/2008

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Highlights

- The citizen's initiative is an explicit constitutional right deserving of respect and protection.
- A compelling state interest is required before the state can restrict an individual's constitutional right.
- The circulating of a petition is considered “core political speech” and constitutionally protected. This bill will probably be found unconstitutional.
- The bill, as it is written, is a power shift away from the people and toward the General Assembly and Secretary of State.
- The bill will have little affect on large well financed projects but will stop most grassroots efforts.
- Paying someone to help gain ballot access and influence the political process is really no different than paying a lobbyist to influence the political process. Both perform an important service.
- We have an all volunteer army but we recognize we pay them so they can devote all their energy to protecting the country. Some paid petition circulators would do it without pay, but could not afford to devote as much time without the compensation.
- Fraudulent signatures are easily identified at the point of verification in the county clerk's office.
- Market forces affecting the proponent, the petition management company, and the paid circulator provide ample incentive to police their own ranks. Since the bad signatures will be identified at the time of verification and disallowed, the proponent doesn't want to pay for them or let them hurt his percentage of good signatures.
- Volunteers who feel passionately may actually have more incentive to commit fraud and definitely have fewer deterrents than out of state or resident paid circulators.
- Prohibiting paying per signature will not reduce incentive to commit fraud.
- **Paying per signature allows of an initiative to budget, since the total cost can be projected, but paying per hours results in unpredictable costs. This favors the large, well financed projects and creates difficult obstacles to smaller grassroots efforts.**

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I. CONSTITUTIONAL BACKGROUND

A. The state, including the General Assembly, receives its power and authority from the people.

1. *Art. 1, Section 1. That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.*

B. The people have reserved for themselves broad rights in the expression and communication of their opinions and beliefs – especially those political in nature. Time and again the high courts of the land have considered the circulation of a petition “core political speech”.

1. *Art. I, Section 8. That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.*

C. The people have an inherent right to petition the government they established for a redress of grievances.

1. *Art. I, Section 9. That the people have the right peaceably to assemble for their common good, and to apply to those invested with the powers of government for redress of grievances by petition or remonstrance.*

D. The people confer certain powers to the government and reserve others to themselves. Included in the reserved powers are initiative and referendum.

1. *Art. III, Section 49. The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided.*
2. This reserved power is the people's tool to use when government is either unresponsive or oppressive. It is reasonably considered the second to last resort to deal with such government – that is, right before taking up arms. It deserves the same consideration and protection as the right to keep and bear arms.

E. It is not appropriate for the General Assembly to usurp the people's political power.

1. Although it is appropriate to statutorily regulate the ballot initiative in an effort to keep the process open, fair, and relatively free from corruption, to regulate it in such a way as to unreasonably limit the availability of that power to the people runs afoul of the constitution.

F. Restrictions on the ballot initiative have been amply litigated and legislation that in any way restricts the people's rights should be closely scrutinized.

II. OBJECTIONS IN PRINCIPLE: Provisions of SCS-SB 909 effectively strip the people of their inherent power of initiative and those same provisions inhibit rights of free speech.

A. There are three problematic provisions:

1. The prohibition against paying petition circulators on a per signature basis.
2. The prohibiting of contracting with non-resident petition circulators.
3. The prohibition of circulating more than one petition at a time.

Note: The other provisions of this bill are not under consideration here.

B. The above prohibited procedures constitute “core political speech and associated rights”. As such, a “compelling state interest” must be established in order to justify legislation which restricts those rights.

1. It is inappropriate to strip the people of the right to use these procedures without specific evidence that such action is required to solve a specific problem which rises to the level of a “compelling state interest”.
2. In the absence of evidence of such a problem, status quo should be maintained.
3. Without ample evidence that the proposed measures will actually remedy a such a problem, status quo should be maintained.

C. The exercise of the right to the expression of “core political speech” includes that which accomplished through some agency, like:

1. Paying for an ad in a newspaper, radio, or television station.
2. Hiring a copywriter, actor or announcer to express one's ideas.
3. Hiring a lobbyist to represent your interests and ideas before a legislative body.
4. Paying a petition circulator to represent your ideas before your peers.
5. **It would be wrong to require a certain payment method, or impose a residency requirement, or single subject requirement on any of the above.**

D. The true objective of the provisions in question must be considered.

1. It is wholly inappropriate to use any statutory provision to inhibit the people's access to the initiative process. **If one desires to hamstring or eliminate the initiative process, a constitutional amendment should be pursued – it should not be regulated out of existence.**

E. It should be difficult to amend the constitution but not necessarily difficult to allow the people and opportunity to amend the constitution.

1. The ballot initiative is only a means to place an issue before voters.
2. **In order to prevent inordinate or flippant constitutional amendments, a super majority rather than a simple majority of the vote of the people should be required for ultimate passage.**

III. ERROR IN REASONING #1: The assumption that paying per signature results in increased fraud is in error. Market forces balance temptation to forge signatures.

A. It is alleged that paying circulators per signature provides an inordinate incentive to produce fraudulent signatures in a number of ways:

1. Three potential methods of abuse:
 - (a) Making up names and addresses
 - (b) Copying names and addresses from a source such as a phone book and forging signatures.
 - (c) Copying names from a voter registration list and forging signatures.
2. There is no evidence that these practices exist in statistically significant quantities.
 - (a) Under the best of circumstances and intentions at least 20% to 30% of collected signatures will be invalid. Much of this is due to things beyond the circulator's control, such as a voter who moved without updating his voter registration or a name change, or a signer not admitting that he is not a registered voter when asked.
 - (b) With such a built-in rate of invalid signatures, it would take a lot of fraudulent signatures to be statistically significant.
3. The single most important thing to understand is that no matter how statistically significant the number of made up or forged signatures is, **there already exists a mechanism to deal with them**.
 - (a) Once the petition is filed with the secretary of state, that office forwards petition sheets to the voter's county clerk for verification against the voter's registration card. At that time it is determined if the signer is indeed a registered voter and the signature on the petition is compared to that on the voter registration card. This procedure eliminates all but the most skilled forgers from falsifying signatures and even they would have to have examples of the signer's signatures to copy from.
 - (b) Since all of the methods of producing fraudulent signatures ultimately require forging of signatures, **there is a very high likelihood they will be discovered at the county clerk level**.

B. Natural market forces are a strong deterrent to forging signatures.

1. Given the fact that there is a high likelihood that county clerks will ultimately identify and disqualify fraudulent signatures, there is financial incentive for everyone involved with the initiative to collect valid signatures.
2. The **proponent** of the initiative usually pays the **petition management company** on a per signature basis. His goal is to see his petition qualified and that takes the requisite number of good signatures. Bad signatures, whether forged or "innocently" collected do not further his ambition, but rather impede success. For him to countenance fraudulent signatures would be working against his own self interest while resulting in increased costs.
 - (a) There is great incentive for the **proponent** to provide incentive to the **petition management company** to minimize unusable signatures. In other words, the proponent won't pay for too many bad signatures.
 - (b) That results in incentive for the **petition management company** to provide incentive for the **circulators** to minimize unusable signatures. In other words, the petition management company won't pay for too many bad signatures.
 - (c) Since the petition management company won't pay for too many bad signatures, the circulator has incentive to produce good signatures.
 - (1) He won't get paid for an inordinate number of bad signatures.
 - (2) He will lose his contract if he is found to be forging. The petition management

company becomes the best policer of the process.

- (3) **Perhaps the full time professional circulators have the greatest incentive to do things properly, since their very livelihood depends on good performance – performance that can not include forgery.**

C. Paying in a manner other than per signature does not necessarily alleviate incentive to commit fraud.

1. Any incentive to be productive in collecting signatures can result in similar incentive to produce fraudulent signatures.
 - (a) A minimum production quotas.
 - (b) Production bonuses.
 - (c) Threats of loss of a contract for inadequate production.
 - (d) Profit sharing plans.
 - (e) Anticipation of future jobs.
2. Again, all of these incentives to commit forgery are checked by the county clerk's verification process.

IV. ERROR IN REASONING #2: The assumption that volunteer petition circulators do the best job complying with the law and produce the highest percentage of valid signatures is in error.

A. The proponent of an initiative has a degree of control over the paid circulators, whether employees or contract circulators, that he does not have with the volunteers.

1. Without the professional relationship and the attendant financial incentives, managing volunteer circulators can be like "herding cats".
 - (a) Volunteers, since they are donating their resources, are frequently more independent minded and less apt to follow instructions.
 - (b) The proponent is more beholding to and dependent on the volunteers, so he is in a diminished position to be demanding of strict adherence to the rules.

B. Volunteers typically have much less experience then paid circulators and are more prone to make honest errors.

1. To relate to this, just consider the difference between the performance of the typical professional truck driver, whose on the road every day, and the RV owner who pulls his huge travel trailer three or four times per year.

C. Passionate volunteers may actually have the most incentive to commit fraud or otherwise produce bad signatures.

1. Since the financial incentives are absent, the purely passionate, idealistic volunteer may actually have the most incentive to commit fraud.
 - (a) A passionate radical member of a labor union who is willing to do violence for his cause would not flinch at fraudulent signature collecting.
 - (b) A radical pro-life activist who is willing to bomb an abortion clinic would not flinch at fraudulent signatures collecting if he believes the end justifies the means.
2. The volunteer is much less likely to be concerned about being allowed to work on another petition.

V. ERROR IN REASONING #3: The assumption that prohibiting pay per signature or multiple petitions is the appropriate way to deal with “bait and switch” tactics is in error. Market forces balance the temptation circulators might have to lie.

A. It is reasonable to assume that a circulator with more than one petition has greater opportunity to misrepresent a petition to an unsuspecting signer. The question is how best to deal with that problem.

1. The first thing to understand is that no remedy violative of basic constitutional rights should be considered. To limit a circulator to just one petition would be like:

- (a) ...limiting the contents of a newspaper editorial to one subject.
- (b) ...limiting a preacher to mentioning one blessing, responsibility, or sin per sermon.
- (c) ...limiting a legislator to one filed bill at a time.

2. NOTE: Prohibiting multiple petitions is blatantly unconstitutional.

B. “Bait and switch” or otherwise misrepresenting a petition is fraud and should be dealt with directly and not in tangential ways that infringe on the people’s rights.

- 1. If one does not already exist, a law prohibiting lying or purposeful misrepresentation of a petition might be in order, but care must be taken because misunderstanding on the part of the signer can be the problem, rather than misrepresentation of the issue.
- 2. Cases in which a circulator says, “This is the ‘A’ petition.” when it is actually the “B” petition should be easier to deal with statutorily.

C. Problems with circulators misrepresenting the purpose of a petition or engaging in “bait and switch” can also be alleviated with market forces.

- 1. Whether volunteer or paid in any fashion, there could be temptation to mis-represent a petition to potential signers if the issue is unpopular.
- 2. The opponents of a petition currently have the opportunity to dissuade potential signers with their own grassroots informational campaign using either volunteer or professional resources.
 - (a) If there is truly opposition by “the masses” they have the same opportunity to mobilize as the proponents.
- 3. Opponents of a measure can even record fraudulent activity on the part of circulators and take it to a prosecutor.
 - (a) With video cell phones and other devices, it is easier than ever to do this.
- 4. For any law or restriction to work, whether new or old, prosecutors must be willing to take the case.

VI. ERROR IN REASONING #4: The assumption that prohibiting non-residents from circulating a petition (as well as the other prohibitions) keeps an effort “home grown” or otherwise grassroots is false.

A. Neither prohibiting out of state circulators nor the other prohibitions will prevent the super wealthy out of state interests from successful petition drives.

1. With enough money, a proponent can hire a professional who knows how to gather a lot of signatures AND a local resident to help. The resident becomes the official witness and their objective is achieved.
2. Since the real grass roots efforts can't afford to hire the extra people, a residency requirement actually hurts the citizen driven efforts without stopping the big money efforts.

B. As it is, the initiative process works on a tight timetable and includes a steep learning curve. There are many petition submitted to the Secretary of State each year but few ever make it to the ballot.

1. Without a great deal of help – usually by professionals who have learned the process – it would be VERY difficult for a first time grassroots effort to make it all the way to the ballot.

VII. CONCLUSION

A. Three provisions in this bill should be removed.

1. The prohibition against pay per signature.
2. The prohibition against out of state circulators.
3. The prohibition against circulating more than one petition.