Initiative & Referendum Institute

IRI Report

PAID PETITIONERS AFTER *PRETE*

By Andrew M. Gloger

Report 2006-1
May 2006

USC University of Southern California

Reform of Initiative Signature Gathering Process Gathering Momentum

It is a familiar sight in the weeks leading up to a ballot initiative deadline — people at grocery stores and shopping malls toting clipboards in search of signatures from registered voters to place petitions on the ballot. What some voters may not know is that these petition circulators are often paid for each signature they collect — sometimes up to $10 per signature. Proponents of paid signature collection argue that reliance on volunteers would make it inordinately difficult to qualify propositions for the ballot, especially in a large state like California, where currently almost 600,000 signatures must be collected in a 150-day period to place a constitutional amendment on the ballot. But paid signature collection has been criticized for allowing wealthy groups and individuals that are able to afford the high price tag (in the $2 to $3 million range in California) to buy their way onto the ballot, and some believe it gives the "bounty hunters" who collect signatures an incentive to commit fraud. As a result, some states have sought to restrict the use of paid petition circulators, or tried to require them to be paid by the hour instead of by signature. A recent ruling by the U. S. Court of Appeals for the 9th Circuit appears to have opened up new avenues for such restrictions.

Background

Paid petition circulation has long been a part of initiative process. Paid petitioners collected signatures for Oregon's direct primary law of 1904, the first state-level initiative in the United States.[1] For almost as long, states have tried to restrict paid signature collection. Ohio, South Dakota, and Washington passed laws banning the payment of petition circulators in 1913 and 1914; Oregon followed suit in 1935; Colorado in 1941; and Idaho and Nebraska in 1988. Initially, these bans were upheld by courts. That changed in 1988 when the U. S. Supreme Court, in *Meyer v. Grant*, struck down Colorado's law that made it a felony to pay petition circulators.

The Court in *Meyer* held that the Colorado ban violated the First Amendment. Under the First Amendment, a law that severely burdens protected speech is only allowed if the government can show that the law is narrowly tailored to meet a compelling government interest. If a law does not place a direct or severe burden on speech, then the government only has to show that the law is reasonably related to an important government interest. According to the Court, circulating petitions involves "core political speech" and prohibiting the payment of petition circulators severely burdens this speech in two ways:

> First, it limits the number of voices who will convey [the petition sponsors'] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [the petition sponsors] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

The Court agreed that Colorado had a compelling interest in protecting the integrity of the initiative process, but it rejected Colorado's argument that the prohibition was necessary to

meet this interest, noting that the state presented no evidence that paid petition circulators were more likely to engage in fraud than volunteer petition circulators. Because the state had not justified the law's substantial burden on protected speech, the law was unconstitutional under the First Amendment.

Prete v. Bradbury

In November 2002, Oregon voters approved Measure 26, the "Initiative Integrity Act," which made it unlawful "to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition." Measure 26 was promoted by a coalition of public and private sector labor unions and approved by the voters, 75 percent to 25 percent. The ban applies to initiative and referendum petitions at the state, county, city, and district level, but does not apply to petitions for nominating political candidates.

On February 22, 2006, the 9th Circuit, in *Prete v. Bradbury*, upheld Measure 26 against First Amendment challenge. The parties challenging the measure argued that it imposes a burden like the one struck down in *Meyer*. They argued that the measure decreases the pool of petition circulators, increases the costs of signature gathering, and results in more signatures being invalidated. The court rejected this argument, holding that the measure creates only a "lesser burden" on First Amendment rights. According to the court, Measure 26 is clearly distinguishable from the Colorado ban because it does not completely prohibit the payment of petition circulators, but only prohibits one method of payment — namely, payment per signature. In the court's view, *Meyer* was inapplicable, and Measure 26 was analyzed under *Initiative & Referendum Institute v. Jaeger* (2001), in which the 8th Circuit Court of Appeals found an identical North Dakota ban on payment per signature to be constitutional.

Based on *Jaeger*, the court in *Prete* held that Oregon "has an important regulatory interest in preventing fraud and its appearances in the electoral process," and that Oregon "supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery." The conclusion that signature collection actually promoted fraud was based on testimony from a criminal investigator in the Oregon Department of Justice. The investigator testified that petition circulators paid per signature had:

- forged signatures on petitions;
- purchased signature sheets filled with signatures; and
- attended signature parties where circulators met to sign each other's petitions.

Oregon did not present evidence that petition circulators paid per signature were more likely to engage in fraud than petition circulators paid by some other method (including not being paid at all). However, because the court held that the law created only a "lesser burden" on speech, its inquiry was "limited to whether the chosen method is reasonably related to the important regulatory interest." The court held that the law was in fact reasonably related to an important regulatory interest, and therefore Measure 26 did not violate the First Amendment.

Petition Restrictions in Other States

In a footnote in *Prete*, the court noted that district courts in Idaho (*Idaho Coalition United for Bears v. Cenarrusa* [2001]), Maine (*On Our Terms '97 PAC v. Secretary of State of Maine* [1999]), Mississippi (*Terms Limits Leadership Council, Inc. v. Clark* [1997]), and Washington (*LIMIT v. Maleng* [1994]) had struck down bans identical to those upheld in *Prete* and *Jaeger*.[2] The court in *Prete* distinguished these cases on the grounds that the states had failed to present any evidence that payment per signature increased fraud. However, the critical distinguishing factor is not whether the state presented sufficient evidence of fraud — for, as indicated above, Oregon did not present particularly impressive evidence on this point — but instead whether the burden imposed on core political speech is deemed to be severe. Unlike the appellate courts in *Prete* and *Jaeger*, the district courts each held that a ban on payment per signature, like the total ban on payment struck down in *Meyer*, imposes a severe burden on political expression. As such, each state was required to justify the ban by showing that it was narrowly tailored to serve a compelling state interest — a much higher standard to meet than the one applied in *Prete* and *Jaeger*.

If a similar ban were to come before another court in the near future, it is uncertain whether the court would follow the district court view that a ban on paid signature collection creates a severe burden on speech, or the appellate court view that it is only a "lesser burden," although the appellate court might be expected to have greater weight.[3] Regardless, it seems clear that unless petition circulators are able to show that a ban on payment per signature directly and substantially burdens their freedom of speech — for example, by showing that payment by the hour would significantly affect their ability to gather signatures — then the state will not be required to provide much by the way of empirical evidence on the issue of fraud and the ban will likely be upheld as constitutional under the First Amendment.

Going Forward

Only three of the 24 states that allow initiatives, Oregon, North Dakota, and Wyoming, currently prohibit paying petition circulators per signature. This list may soon expand. In light of *Prete*, many states are now looking to enact bans modeled on Oregon's Measure 26. In California, State Senator Debra Bowen (D-Redondo Beach), currently running for Secretary of State, has already introduced such a bill. In Maine, Secretary of State Matthew Dunlap (D) earlier this year announced that the state is considering enacting such a ban for a second time, despite the fact that the first ban was held unconstitutional in the 1999 district court case noted above. In Missouri, State Senator Delbert Scott (R-Lowry City), chairman of the Senate Election Committee, stated that the legislature may soon take up such a bill. And in Michigan, Secretary of State Terri Lynn Land (R) recently issued a 10-point list for reforming the state's initiative and referendum process that included a ban on paying petitioners by signature.

While these developments are taking place, petition sponsors and circulators in Oregon are busy adapting to the new law. To the extent that petition circulators are being paid, most are being paid by the hour, with set productivity levels and bonuses for exceeding these thresholds. The use of the mail, as well as the Internet, to gather signatures has also increased.[4]

Following the *Prete* decision, Oregon Secretary of State Bill Bradbury (D) proclaimed, "[t]his decision strongly supports Oregon voters' judgment that we need to restore public confidence in our initiative and referendum system, and protect elections against fraud." Whether Measure 26 has its intended effect remains to be seen. According to an official in the Secretary of State's Elections Division, the state continues to receive complaints of signature fraud, and the state does not yet have data on whether there has been an overall decrease in complaints.

Notes.

1. See chapter VI in James D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon, New York: The Macmillan Company,* 1915.
2. Although not mentioned by the court in *Prete*, in 2005 the U. S. District Court for the Southern District of Ohio (*Citizens for Tax Reform v. Deters*) issued a preliminary injunction temporarily staying an Ohio ban on paying petition circulators per signature. The case is currently pending, and motions were recently filed by both parties for summary judgment. The state's motion cites *Prete* approvingly.
3. Following the *Prete* decision, a petition for rehearing was filed with the 9th Circuit. As of May 19, 2006, the court has yet to respond, and a response may be several months away. If the petition is granted, then either the same three-judge panel or the entire court will re-hear the case. If the petition is denied, then the decision will possibly be appealed. For now, however, the 9th Circuit opinion is controlling. Thus, if another state in the 9th Circuit passed a ban similar to Measure 26, and if that ban was subsequently challenged in court, then the *Prete* decision would be binding precedent *to the extent that the facts of the cases were not dissimilar*. The *Prete* decision would not be binding precedent, however, in states outside of the 9th Circuit, although it would likely be persuasive. The same holds true with respect to the 8th Circuit opinion.
4. The process works thus: a copy of the cover sheet (which consists of the measure title, the summary of the measure, the text of the measure if there is enough space, the contact information of the chief petitioner, and the instructions) and the signature sheet are sent to individuals through the mail or over the Internet (if sent over the Internet, the document must be downloaded and printed). Once a hard copy is in hand, the recipient must sign both the signature line and the circulator line, effectively becoming both a circulator and a signee. The signed hard copy is then mailed to the chief petitioner who usually conducts a verification check to ensure compliance. Although it seems like this process would be susceptible to signature fraud, it actually results in a high percentage of valid signatures. This high validity rate is due to the fact that mailings are often based on mailing lists obtained by the chief petitioner from parties whose interests are aligned with the success of the proposed ballot measure. For instance, the chief petitioner for a pro-union measure might obtain mailing lists from various unions, thus guaranteeing a favorable pool of potential signees.

Andrew M. Gloger is a law student at the USC School of Law and a research associate of the Initiative & Referendum Institute. For state-by-state information on petition requirements, see the Initiative and Referendum Almanac *(Carolina Academic Press, 2003).*

IRI
Initiative & Referendum Institute

USC Law School
Los Angeles CA 90089-0071
Phone: 213.740.9690

www.iandrinstitute.org

USC UNIVERSITY OF SOUTHERN CALIFORNIA