




STATE OF OREGON
Legislative Counsel Committee

November 8, 2006

To: Marjorie Taylor, Administrator, Public Commission on the Oregon Legislature

From: Ted W. Reutlinger, Senior Deputy Legislative Counsel 
Jennifer Squires, Law Clerk

Subject: LC 1585—Citizen Initiatives

You asked for a bill making several changes to the initiative petition process. LC 1585 incorporates these changes. Please consider the following:

1. Section 3 of the draft directs the Secretary of State to determine how many signatures on a petition were obtained in each county, the percentage of the total number of signatures on a petition that were obtained in each county and the percentage of electors in each county that signed the petition. The secretary is directed to include this information in the voters' pamphlet with the text of the measure. This section applies to both state initiative and referendum measures and to *all* signatures obtained on a petition. It does not apply only to *valid* signatures.
2. Section 3 also directs the Secretary of State to determine the names and addresses of the five persons or political committees that contributed the most to obtain signatures on the petition. The secretary is directed to include this information in the voters' pamphlet with the text of the measure. This section applies to both state initiative and referendum measures and to the persons or political committees whose contributions are reflected on statements filed by chief petitioners under ORS 260.118. Section 3 covers only contributions made during the signature gathering phase. It does not apply to contributions made in support of the petition after it qualifies for the ballot and becomes a measure.
3. Section 5 of the draft amends ORS 251.026 to require the Secretary of State to include information in the voters' pamphlet about filing complaints related to initiative and referendum petitions and the penalties that apply to the violations. This limited language does not cover all alleged election law violations.
4. Section 1 of the draft amends ORS 250.045 to require that chief petitioners of state initiative or referendum measures be registered to vote in Oregon. As we explain in our analysis below, this requirement may raise issues under the Oregon and United States Constitutions. These issues might be addressed by amending the Oregon Constitution instead of ORS 250.045, and by requiring chief petitioners to be Oregon residents instead of registered voters.

First, a statutory requirement that chief petitioners be registered voters might be challenged as being inconsistent with the initiative rights guaranteed under section 1, Article IV

of the Oregon Constitution, because it imposes a requirement on petitioners that is not contained in the Oregon Constitution. Section 1, Article IV, reserves the initiative and referendum powers to the people and provides that initiative and referendum measures shall be submitted to the people as provided in the Constitution and by law "not inconsistent therewith." A court might conclude that the voter registration requirement is inconsistent with section 1, Article IV, because it imposes too great a burden or has an impermissible chilling effect on the use of the initiative process. See *Salem Committee to Stop Food Irradiation v. Secretary of State*, 109 Or. App. 364, 819 P.2d 752 (1991), review denied, 313 Or. 210, 830 P.2d 596 (1992), citing *State of Oregon v. Campbell/Camp/Collins*, 265 Or. 82, 90, 506 P.2d 163,166 (1973). This issue can be addressed by amending section 1, Article IV, to add the requirement that chief petitioners be registered to vote in Oregon or that chief petitioners be Oregon residents.

Second, a requirement that chief petitioners be registered to vote in Oregon may raise issues under the First Amendment to the United States Constitution. Again, less risky legal approach may be to require that chief petitioners be Oregon residents.

We did not find any cases that directly address voter registration or residency requirements for *chief petitioners* of state initiative or referendum measures. However, several cases described below have addressed voter registration and residency requirements for *initiative petition circulators*.

In *Myer v. Grant*, the United States Supreme Court held that petition circulation is "core political speech" because it involves "interactive communication concerning political change."¹

In *Buckley v. American Constitutional Law Foundation, Inc.*, the United States Supreme Court invalidated a Colorado law that required initiative petition circulators be registered to vote in Colorado.² The law at issue was enacted to prevent petition circulation fraud, inform voters and aid in administrative efficiency.³ The court determined the Colorado law drastically reduced the number of people available to circulate petitions because such a high number of eligible residents were not registered voters.⁴ This disproportion could effectively limit the petition proponents' opportunities to inform the public about their initiative. The court held the voter registration requirement was not narrowly tailored to fit the state's interest because the state already had alternative policing methods in place.⁵

In *Buckley*, the court referred to, but did not directly address, Colorado's law that required petition circulators be residents of Colorado.⁶ As a result, several courts have interpreted *Buckley* to allow residency requirements for petition circulators.⁷ In *Initiative and Referendum Institute v. Jaeger*, the United States Court of Appeals for the Eighth Circuit upheld a North Dakota law that prohibited out-of-state residents from collecting and verifying petition

¹ 486 U.S. 414, 421-422 (1988). In *Myer*, the court invalidated a Colorado law that criminalized the payment of initiative petition circulators.

² 525 U.S. 182 (1999).

³ *Id.* at 192.

⁴ *Id.* at 193.

⁵ *Id.* at 196.

⁶ *Id.* at 197.

⁷ Some decisions that predate *Buckley* but upheld local residency requirements include *Browne v. Russell*, 27 Cal. App. 4th 1116, 1125 (2d Dist. 1994) (holding that an ordinance requiring petition circulators be residents and registered voters of the city that would be affected by the petition initiative was not unconstitutional) and *Hart v. Secretary of State*, 715 A.2d 165, 168 (Super. Ct. ME 1998), cert. denied, *Hart v. Gwadosky*, 525 U.S. 1139 (1999) (holding that the portion of Maine's Constitution that required petition circulators be residents of Maine was narrowly tailored to serve the state's interest in protecting the integrity of the initiative process).

signatures.⁸ The court noted that the requirement did not unduly burden nonresidents' ability to engage in political speech because they could still speak with voters about the measure, train residents about the initiative issue and accompany circulators.⁹

Likewise, in *Kean v. Clark*, a United States District Court in Mississippi held that a proposed constitutional amendment that required petition circulators be state residents was narrowly tailored to prevent campaign fraud.¹⁰ The court conceded that the restriction limited the number of people who could circulate petitions, but it then noted that this restriction did not limit any individual's ability to convey the petition's message or exercise free speech rights.¹¹ The *Kean* court briefly addressed initiative sponsors, who were also subject to residency requirements. The court noted that initiative sponsors and circulators enjoy the right to petition because they are Mississippi citizens subject to the Mississippi Constitution.¹² Because the Mississippi Constitution does not apply to nonresidents, they never had a right to petition in Mississippi that could be violated by residency requirements.¹³

On the other hand, the United States Courts of Appeals for the Second, Seventh and Tenth Circuits have struck down residency requirements for petition circulators. In *Lerman v. Board of Elections in City of New York*, the Second Circuit Court of Appeals found a statute that imposed residency requirements on petition circulators for political candidates to be a severe burden on political speech and association rights.¹⁴

The Seventh Circuit Court of Appeals invalidated an Illinois law imposing a residency requirement on candidate petition circulators that was meant to prevent invalid signature collection and the influence of out-of-state residents on Illinois elections.¹⁵ The court stated, "Because circulating nomination petitions necessarily entails political speech, it follows that the First and Fourteenth Amendments compel States to allow their candidates to associate with non-residents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions."¹⁶

Similarly, in *Chandler v. City of Arvada*, the Tenth Circuit Court of Appeals applied strict scrutiny to an Arvada city ordinance that prohibited nonresidents of Arvada from circulating initiative, referendum or recall petitions.¹⁷ The city's interests included preventing fraud, malfeasance and corruption in municipal elections.¹⁸ The court determined the ordinance was similar to the voter registration requirement in *Buckley* and had the effect of limiting political conversation and association.¹⁹

We did not find any cases distinguishing between petition circulators and chief petitioners for purposes of voter registration or residency requirements. Presumably, courts that prohibit residency requirements for circulators would also prohibit them for chief petitioners on

⁸ 241 F.3d 614, 617 (8th Cir. 2001).

⁹ *Id.*

¹⁰ 56 F. Supp.2d 719, 733 (S.D. Miss. 1999).

¹¹ *Id.* at 731.

¹² *Id.* at 725.

¹³ *Id.*

¹⁴ 232 F.3d 135, 139 (2d Cir. 2000), *cert. denied*, *New York State Bd. of Elections v. Lerman*, 533 U.S. 915 (2001).

The court noted that no distinction can be made between the regulation of petition circulators for candidates and those for ballot initiatives. *Id.* at 148.

¹⁵ *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000), *cert. denied*, *McGuffage v. Krislov*, 531 U.S. 1147 (2001).

¹⁶ *Id.*

¹⁷ 292 F.3d 1236, 1241 (10th Cir. 2002).

¹⁸ *Id.* at 1242.

¹⁹ *Id.* at 1243.

the theory that without chief petitioners, there would be no need for circulators. Further, a court that has allowed a residency requirement for circulators might invalidate a similar requirement for chief petitioners because a voter registration or residency requirement might completely stifle a person's ability to *introduce* an idea and is more of a burden than preventing someone from supporting the idea by gathering signatures. That position might be countered by the argument that nonresidents interested in proposing an idea would not be precluded from sharing the idea with an Oregon resident who could propose the initiative. The nonresident could still hold and attend meetings about the initiative, inform the public about it and train circulators.

Finally, in *Swett v. Bradbury*, the Oregon Supreme Court invalidated, on procedural grounds, a proposed constitutional amendment that would have required persons gathering signatures on initiative and referendum petitions be registered voters.²⁰ In discussing the amendment's relation to another proposed amendment at issue, the court said:

Even if a residency requirement were related to the [amendment proponents' desire to limit out-of-state influence], voter registration is not synonymous with residency. [The proposed amendment] precludes Oregonians who are not registered to vote from gathering signatures, just as it precludes those who live in other states from doing so. Put differently, the scope of the measure exceeds even defendants' proffered rationale for it.²¹

This language indicates that the Oregon Supreme Court has already identified residency requirements as different from voter registration requirements as applied to persons gathering signatures on petitions.

In sum, a requirement that chief petitioners be Oregon residents seems more likely to survive judicial scrutiny than a requirement that chief petitioners be registered voters. The outcome of a First Amendment challenge would likely depend on: 1) whether residency requirements or voter registration requirements only indirectly affect political speech or whether they impose a severe burden on political speech; 2) whether residency requirements differ from voter registration requirements and whether they should receive different levels of scrutiny; and 3) whether chief petitioners are distinguishable from petition circulators.

Encl.

²⁰ *Swett v. Bradbury*, 333 Or. 597, 608 (2002).

²¹ *Id.* at 609.