

## **The Future of ‘Direct Democracy’ in Arizona: Petition Circulators, Election Officials and the Law**

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The Legislature continues to grapple with election reform and strike a balance of how much binding authority should remain in the hands of voters in terms of initiative, referendum and recall, but Arizona’s penchant for people power has been demonstrated since before statehood.

In the midst of his campaign for Congress in 1911, for example, Arizona’s Carl Hayden noted that everywhere he went he found voters eager to take control. “The people want their own kind of government,” Hayden told reporters. “They want to be the dictators.”<sup>1</sup> The delegates to Arizona’s 1910 constitutional convention made it so. They created a “people’s constitution” containing three powerful populist instruments: the initiative, referendum and recall.

Today, more than a century later, many Arizonans still pride themselves on being the “dictators” of their own governance. But the proper use of these three procedures – and their legal and financial mechanics – have become issues in a fierce ongoing debate that involves accusations of favoritism and fraud, millions in campaign expenditures and questions concerning Arizonans’ continued access to their constitutional rights.

### **Signatures**

At the heart of the dispute is the process of collecting enough voter signatures to qualify a proposal for a place on the ballot. This paper focuses on problems concerning the collection, verification, and invalidation of signatures gathered in state-wide initiative campaigns. However, many of the same issues also apply to the far less-frequently used veto referendum and recall processes, and to the use of all three devices of “direct democracy” at the local level.

The initiative enables the people to get around legislatures that refuse to take a certain course of action; voters may use it to create a simple new law or to amend the state constitution. The veto referendum (AKA, the citizen’s, popular, or protest referendum) empowers voters to challenge

something the legislature has done. The recall allows voters to remove elected officials from office prior to the expiration of their terms.

But none is easy to do. In Arizona, as elsewhere, a major obstacle to successfully using these considerable powers has been getting enough valid signatures on a petition supporting such action. To change a law through the initiative process, gatherers must collect a number of petition signatures equal to at least 10 percent of the voters who participated in the last gubernatorial election. For a constitutional initiative, the required percentage rises to 15. In 2012, for example, 172,808 signatures were necessary for to put a proposed law on the ballot, and 259,212 to bring a proposed constitutional amendment to the attention of the voters. Organizers have up to 20 months to collect signatures (the Constitution sets the deadline at "not less than four months preceding the date of the election)."

Groups using the veto referendum must collect a number of signatures equal to 5 percent of the vote in the last gubernatorial election. This currently amounts to 86,405 signatures. This is far fewer signatures than the number needed to qualify an initiative. But referendum backers have only 90 days to do their work – and much of it during the hot summer months. For the recall, the state constitution requires sponsors to collect of a number of signatures equal to at least 25 percent of those who voted at the last election for the office in question.

## **Rejection**

In recent years, there has been considerable debate in the state over how signatures should be collected, who should collect them, which ones should count, and which ones should be thrown out. Though available information suggests that signature-invalidation rates in Arizona are comparable to those in other states, the rate in Arizona has increased in recent years.

Election officials review all petition signatures, and may invalidate individual ones for a variety of reasons. The most common is finding that a signer was not a registered voter; but officials may also toss signatures because the signer did not provide full and accurate information concerning his or her address or the date in which he or she signed the petition. In addition, there are more than 20 reasons why entire petition sheets with up to 15 names each may be thrown out, even though many – if not all – of the signatures are from genuine qualified signers.<sup>2</sup>

In expectation of errors and challenges, Arizonans who use the initiative strive to collect far more signatures than required by law, up to 40 percent more just to feel relatively safe. In practice, they gather as many as they can, usually hiring petition-gatherers to do the job. In fact signature-gathering is likely to be the most expensive part of an initiative or veto referendum campaign. As a result, the cost can be a deterrent to those who would otherwise use the process.

When signatures are rejected, qualified voters may suffer. They may have their signatures thrown out because of a technical error, whether made by them or by those circulating the petitions. This can preclude bona fide registered voters from having their voices heard.

Many would argue that the underlying problem of signature-rejection rests with signature gatherers, especially ones paid per signature, and with the companies that hire them. Others point

to overzealous election officials at the state and county level. One might also point to laws that are either overly restrictive or inadequate.

## **The Process**

Sponsors of a statewide initiative measure must first file an application with the Secretary of State to circulate a petition. They must identify themselves, provide a summary of the proposed statute or constitutional amendment, and file the title and full text of the proposed measure.

Once the Secretary of State gives the go-ahead, sponsors proceed to collect signatures using volunteers, paid circulators or both. While collecting signatures, petition-circulators also commonly register unregistered voters.

Relying on volunteers has been the traditional method of collection. But given the large number of signatures needed today, sponsors have found it virtually impossible to get by without the help of petition companies and their paid gatherers. Historically, there have been few companies offering gathering and related services in Arizona, with one or two capturing the lion's share of the business. Most firms do not use employees, but rely on independent contractors.

Circulators are not required by law to be Arizona residents but must, like circulators who are residents, meet the state's voter-registration qualifications. This means he or she must be at least 18 years old, a United States citizen and not a convicted felon whose civil rights have yet to be restored. If not a resident of Arizona, a circulator must register with the Secretary of State before commencing work.

Petition circulators must also meet other legal requirements. In some cases, failure to do so may result in the invalidation of entire petition sheets. Circulators must, for example, disclose whether they are paid or volunteer workers, must personally witness each signing, must sign an affidavit that they had done so and must swear before a notary that the information they have provided is correct to the best of their knowledge. In addition, signature sheets must be attached to a full and correct copy of the measure being considered; the title and text of the measure must be in at least eight-point type.<sup>3</sup>

Each petition sheet must also contain information about the circulator, such as his or her printed name, signature and address. Similar information is required of the notary, along with notary stamp and expiration date. Failure to comply with these requirements may invalidate a petition sheet.

Like most states, Arizona also has a variety of measures to combat fraud and other questionable practices in the gathering process, whether committed by an individual signer or a signature gatherer. Arizona is one of 10 states, for example, to prohibit giving anything of value to sign or not to sign a petition. Since 2010, circulation companies in Arizona have been liable for fines and even jail time if an employee or contractor is found guilty of fraud. Some instances of signature fraud – signing an invented name or the name of someone else, or misleading someone as to the nature of the petition – could result in criminal charges. However, such cases have been given low priority by the state Attorney General's Office and by county attorneys.<sup>4</sup>

Once sponsors have finished collecting signatures, they submit the petitions to the Secretary of State. Officials there take a first look, checking out petition sheets as well as individual signatures. At this point, signatures and sheets may be eliminated because of relatively obvious errors – for example, a missing signature, insufficient or incorrect information concerning the date of a signature or the signer’s address, or a failure to indicate whether the gatherer is a paid or a volunteer worker.

<b>Initiative/Referendum Petitions – Things to Check (Secretary of State’s Office)</b>
<b>Remove the following Petitions:</b>
Those sheets not bearing the petition serial number or correct serial number in lower right hand corner on <b>each</b> side
Circulator’s affidavit that is not completed or signed
The affidavit of the circulator is not notarized
The notary’s signature is missing
The notary’s commission has expired
The notary’s seal is not affixed
The signatures of the circulator or notary are dated earlier than the dates which the electors signed
The Volunteer or Paid Circulator information is not checked
<b>Remove the following signatures that are not eligible for verification:</b>
If the signature of the qualified elector is missing
If the residence address or the description of residence is missing or if a PO Box is listed (Check County)
If the date on which the petitioner signed is missing
If there are more than 15 signatures on one sheet (petition)
(If) Signatures are withdrawn pursuant to Article 19-113.
If the date on front of petition sheet is before the date of application
If it is apparent the circulator has printed the elector’s first and last names or other information in violation of Article 19-112.

Next, the office sends out a random sample of 5 percent of the remaining signatures (these are officially considered signatures eligible for verification) to county recorders in the counties where they were collected for voter registration verification and other checks. The objective here is to determine if the signer was indeed qualified to sign, and if the required information has been provided by the signer concerning such matters as address and date; there is thus some overlap between what the state and county officials check.

As it happens, the Maricopa County Recorder does most of the county work because this is where most signatures are gathered (the law does not require that signatures be geographically dispersed throughout the state).

<b>Recorders determine if a signature should be disqualified for the reasons below:</b>
No residence address or description of residence location is provided.
No date of signing is provided.
The signature is illegible and the signer is otherwise unidentifiable.
The address provided is illegible or nonexistent.
The individual was not a qualified voter on the date of signing the petition.
The individual was a registered voter but was not at least eighteen years of age on the date of signing the petition.
The signature was disqualified after comparison with the signature on the affidavit of registration.
If a petitioner signed more than once, all but one valid signature shall be disqualified.
For the same reasons any signatures or entire petition sheets could have been removed by the Secretary of State pursuant to A.R.S. #19-121.01(A)(3).

A recent statutory change has made securing the number of needed signatures more difficult. Under a 2011 law, the estimated number of valid signatures must equal 100 percent or more of the minimum number required. Before this, a measure qualified for the ballot if the sample indicated enough signatures to reach 95 percent of the required number.

Many issues involving the validity of signatures wind up in court. Proponents or opponents of a measure may challenge whatever election officials decide to do or not to do. Various parties may also ask judges to decide issues bearing on signature validity that election officials do not address.

The Secretary of State and county recorders sometimes find their decisions reversed by the courts. However, the questions at hand are less likely to concern whether a law was violated in the collection process than whether the violation is serious enough to merit throwing out a signature or entire petition sheet.

State and county election officials, especially in Maricopa County where it counts the most, have been inclined to insist on strict compliance with the letter of the law regarding the initiative process. Arizona courts, on the other hand, like courts in several other states, have generally employed a more flexible standard to overlook relatively minor technical errors that do not mislead the signers of the petitions.<sup>5</sup>

However, the courts have been stricter in handling veto referenda cases. Though the rationale for doing so has been in question, Arizona courts since the early 1980s have required absolute compliance with all constitutional and statutory requirements in veto referenda cases, rather than settling for the less severe “substantial compliance” standard.<sup>6</sup>

### **Fighting Over Signatures**

In the early years, laws governing the gathering of signatures in Arizona do not appear to have been much of a barrier to getting on the ballot. Some observers complained, however, that this was because the laws were not well enforced. The editor of the *Arizona Republican*, for example, took issue in 1912 with many of the signatures turned into the Secretary of State’s office and verified by the people who circulated the petitions. In one instance, the circulator hung a petition on the wall of a saloon where anyone who wanted to could come by and sign it. Many of those who did were not registered voters or even residents of the state, and some of the names were fictitious.<sup>7</sup>

In 1915, Secretary of State Sidney Osborn raised the possibility of widespread fraud. He noted that the election code, as amended in 1913, did not require eligible voters to register and made it virtually impossible to fully check the validity of the signatures.<sup>8</sup> Two years later, several issues flared up over the effort of a business group to refer to the ballot a legislative act calling for a minimum wage for women. A prominent businessperson involved in the referendum campaign was convicted at trial of signing the petition twice and fined. Meanwhile, Osborn was not only checking the validity of signatures but considering requests from hundreds of people who wanted their names taken off the petitions. Supporters had turned in 3,680 names, 700 more than needed. But more than 800 of these people claimed that their names had been used without their

consent. An attorney for a business group behind the referendum later admitted in court that many of the signatures were fraudulent; the campaign folded.<sup>9</sup>

Until recently, groups sponsoring initiatives – be they labor, business, or citizens’ groups – undertook the task of gathering the necessary signatures themselves. However, Arizonans had been warned even before statehood about the use of paid professionals. In 1910, a former governor of Oregon – where the initiative was being experimented with – was invited to Arizona by opponents of these devices to persuade residents not to include them in the state’s constitution. Speaking in Mesa, he warned that inclusion of the initiative and referendum would bring an “army of professional petition circulators,” who can pester and deceive enough people to get anything on ballot, “no matter how crazy it may be.”<sup>10</sup>

This was hardly an isolated concern. Many observers around the country feared that the use of paid petitioners would benefit only the wealthy groups that could afford them, as well as lead to fraud and corruption in the gathering process.<sup>11</sup> Professional gatherers did become popular in large states such as California where the law required the collection of large numbers of signatures. Still, until the early 1980s, most signature-gathering around the country was done by volunteers. Some states, such as Oregon and Colorado, banned paid petitioners altogether. Oregon had tried to do so as early as 1909 and finally succeeded in 1935. Such bans, however, were invalidated by the U.S. Supreme Court in 1988.<sup>12</sup>

### **Clashes in Arizona**

In Arizona as in other medium-sized states, problems associated with the growing dependence on paid circulators surfaced in the late 1990s and early 2000s. In 2000, Governor Jane Hull, Phoenix Mayor Skip Rimsza and several county recorders expressed concern over paid gatherers, claiming they had hijacked the political process and had turned in large percentages of invalid signatures in various campaigns. Much of the attention focused on Lee Petition Management, which enjoyed a virtual monopoly on the business in the state since its establishment in 1997.<sup>13</sup>

By 2003, another firm, Arizona Petition Partners, came in for criticism for how it collected signatures – a large number of which were ruled invalid in various campaigns.<sup>14</sup> In fact, the skyrocketing use of the initiative process in Arizona and elsewhere during this period convinced many observers that signature collectors and the firms that employed them were abusing the system.<sup>15</sup>

In Arizona, matters came to a head in 2008, when elections officials voided 40 percent of all the signatures found on petitions. Three of the nine proposed initiatives failed to make the ballot that year because of a lack of valid signatures. Just two years earlier, the overall rejection rate was only 24 percent and all 10 proposed initiatives made the ballot. Petition Partners circulated many of the petitions in 2008, including the three measures that failed to make the ballot.<sup>16</sup>

One measure kept off the ballot that year was the so-called TIME initiative, which sought a 1-cent sales tax hike to raise more than \$40 billion over 30 years for infrastructure needs. TIME stood for “Transportation and Infrastructure Moving Arizona's Economy.” Sponsors needed 153,365 signatures. Organizers submitted 260,696 but Jan Brewer, at the time secretary

of state, declared that only 238,874 were eligible for verification; county recorders then found that only 138,451 of these were valid – a combined rejection rate of 47 percent, the highest Brewer could recall hearing of.<sup>17</sup>

The rejection rate was especially high, 55 percent, in Maricopa County, where more than 80 percent of the signatures were collected. Some blamed Petition Partners for not checking adequately the signatures earlier in the process. Andrew Chavez, co-owner of the firm, declared that he had done his job. The real problem, he charged was in the verification process as conducted by the Secretary of State and the Maricopa County Recorder.<sup>18</sup>

Attorneys and supporters of some of the other rejected propositions also blamed an overzealous Secretary of State and targeted election officials in Maricopa County because of the unusually high rejection rates. They claimed the high rate of invalidity found by the Maricopa County Recorder did not match their own more favorable validation checks, and accused the recorder of making errors in checking voter registrations. They also accused the Secretary of State of throwing out valid petitions.

Maricopa County Elections Director Karen Osborne defended the county results on the TIME and other initiatives, also noting with pride that, “We have a very strict standard of review.”<sup>19</sup> Brewer too defended the work of her office in rejecting petition sheets. She and Osborne placed much of the blame on the petition-gathering companies, especially, their practice of paying gatherers on a per-signature basis. This system, they argued, encouraged the introduction of errors and even fraud into the process.<sup>20</sup> Maricopa County election officials also said their records showed that invalidity rates were lower where only volunteers collected signatures.<sup>21</sup>

Independent investigations by news reporters in 2008 produced other charges against circulators. Among these were lying to voters about what they were signing, falsely verifying that they had witnessed each petition signature, and perhaps worst of all, failing to turn in petitions and voter registration cards, leaving residents believing they were registered when they were not.<sup>22</sup>

TIME backers turned to the courts, but Maricopa County Superior Court Judge Mark Aceto ruled they had waited too long to challenge the Secretary of State’s rejection of thousands of signatures. The Arizona Supreme Court agreed. While Aceto’s ruling did not rescue TIME supporters, he did help those behind the medical-choice initiative being floated that year – one that guaranteed the right of Arizonans to choose their own health care plans – get on the ballot. He did this by validating 22 signatures that the Maricopa County Recorder had rejected, just enough to qualify the measure for the ballot under the 95-percent standard then in effect. Judge Aceto ruled that “substantial compliance was good enough.” The ruling was something of a victory for Petition Partners.<sup>23</sup>

The 2008 brouhaha prompted a thus-far unsuccessful drive to ban the pay-per-signature practice. It also motivated petition-gathering companies to further assure clients that they were doing everything possible to guard against signature disqualification. Petition Partners reported taking several steps in this direction.<sup>24</sup>

Since 2008, the number of petitions subject to signature review has been down a bit – there was but one initiative in 2010, two in 2012, and thus far one, a referendum, that appears headed for the 2014 election ballot. Still, serious disputes have continued.

In 2012, the Secretary of State declared there were not enough valid signatures collected by Petition Partners to put a top-two primary proposal on the ballot. Validation rates varied greatly by county, but were far lower in Maricopa County (67 percent) than the state average (79 percent). The Open Government Committee that sponsored the measure argued in court that many of the signatures that the Recorder’s Office termed forgeries were actually valid. Relying on a “substantial compliance” standard, the court restored enough signatures, 577, to qualify the measure for the ballot.

In gathering evidence for their appeal, the measure’s backers secured affidavits from many petition-signers that their signatures were indeed valid. The Open Government Committee also verified signatures through voter rolls and research. It found that signatures that turned out to be valid had been thrown out because of a mistake in the date of signing or in the signer’s address (the signature of a 90-year old woman was tossed because the number 1 in her address looked like a 7). Other signatures of qualified voters were lost because their signatures were determined not to match those on file.

The committee further found that the Recorder’s Office had tossed the signatures of 345 people because they were not registered to vote, when in fact they were. Some observers, including a committee spokesperson, argued that the errors were due largely to the limited time – 20 days – county officials had to check three initiatives, and to the fact that the top-two proposition happened to be the last checked.<sup>25</sup>

Another 2012 dispute involved Secretary of State Ken Bennett’s rejection of petitions submitted for an initiative calling for a 1-cent sales tax for education, transportation, health care and social programs. Bennett rejected petitions containing some 290,000 signatures because of a clerical error – the sponsoring committee mistakenly submitted two different versions of its measure to his office. One was a paper copy of a draft version that organizers inadvertently turned in. The other was an updated final version that the committee used when collecting signatures and submitted electronically. Bennett declared the paper version to be the official one and concluded that organizers had failed to comply with state law because the petition sheets were not attached to a “full and correct” copy of the initiative. He threw out the petitions but later lost the battle in court, which concluded that – despite minor technical errors – initiative sponsors had substantially complied with statutory requirements.

### **Rejection Rates: Causes, Trends, Patterns**

Overall, in the past four general-election years, gatherers in Arizona tuned in more than 6 million signatures for 22 initiatives. Of these, state and county officials have rejected close to 2 million, or about a third of the total.

The Secretary of State rejected about 15 percent of the total, largely because of errors on petition sheets. Ultimately, after some court reversals, the office from 2000 to 2012 rejected sheets

containing 278,270 signatures; it tossed out nearly half, 137,553, in 2008 alone (see Table 1 in Appendix). During this period, the average proposition lost 7,520 signatures because of circulator errors. Officials said that, from 2002 to 2010, they rejected petitions chiefly because circulators:

- failed to file a complete affidavit or any affidavit at all,
- turned in petitions with signatures gathered after the petition had been notarized, and
- turned in a petition not properly notarized. (see Table 2 in appendix)

<b>Signature Rejection on Initiative Petitions, 2006-2012</b>
Number of signatures turned in (22 initiatives) = 6,038,645
Number of valid signatures = 4,057,021
Number of invalid signatures = 1,981,624
Number invalidated by Secretary of State's initial screening = 303,918
Number invalidated at the county level = 1,677,706
Percent of signatures turned in found invalid = 32.8
Percent of invalid signatures found by Secretary of State = 15.3
Percent of invalid signatures found by county officials = 84.6

County recorders have ordered varying rates of rejection. As Table 3 in the Appendix indicates, what stands out in the period 1998-2012 is the exceptionally high rejection average of 36% for the nine 2008 petitions. Before that, the percent was often in the low 20s, with an occasional increase to the mid or high 20s. Since 2008, the rate has averaged above 30 percent. And these percentages do not include signatures rejected by the Secretary of State prior to sending samples to the counties. When these are added, available information from the Secretary of State shows the total rate to be 24 percent in 2006, 40 percent in 2008 and 34 percent in 2010 and 2012, a trend similar to that of the counties alone.

Further analysis of Secretary of State records shows that the rejection rate for Maricopa County has been exceptionally high over the past several years (see Table 4 in the Appendix). It exceeded the general county rate on all 37 initiative measures considered from 2000 to 2012 (2000 is the earliest year for which information is available). During this period, the average proposition lost around 30 percent of its signatures in Maricopa County; the rate for all counties, including Maricopa, was around 27 percent.

The Maricopa County Recorder most often rejects signatures because it does not find the signer to be a registered voter. Some people sign without realizing that they are not registered; others may register when they sign but later find that officials have rejected their registration because the circulator failed to process it properly. In some cases, as noted earlier, circulators have not even turned in registration forms.

Recorders also find a wide variety of other reasons to reject signatures. Some are unidentifiable, illegible or do not match the signer's voter-registration signature. Whether a current signature is the same as the previous one, often made years earlier, is one of most subjective decisions made by recorders and among the most hotly disputed. Recorders also encounter petitions where it appears that the same person has written several or all of the signatures. And even though they

work with only a 5 percent sample, recorders sometimes find that a person has signed for a measure more than once.

Signatures have also been tossed because the signer did not supply all required information, however minor. For example, a signature will not count if the signer writes the correct date – e.g., August 1 – but does not include the correct year. Errors concerning a residential address or description can also be costly.

The overall signature-rejection rate in Arizona, about one in three, is not out of line with information gathered from official and unofficial sources concerning rates in other Western states such as Oregon and Colorado; it is a bit higher than that found in Washington.<sup>26</sup> Arizona’s reasons for rejecting signatures are also comparable to those given in other states.<sup>27</sup>

Still, the rate of invalid signatures has been increasing in Arizona, and the fact remains that many rejected signatures are those of qualified voters. In addition, the rate is likely to escalate somewhat if an omnibus election bill, HR2305, adopted by the Legislature in 2013, goes into effect. It is currently on hold because of a referendum drive heading toward the 2014 ballot.<sup>28</sup> An especially important provision would make it more difficult to use the initiative process by requiring “strict compliance” rather than “substantial compliance” with the constitution and laws regarding its use. This in effect would reject judicial application of a standard that allowed such measures as the top-two primary to go on the ballot.

### **Looking for solutions**

Suggestions for changes to help reduce the rate of invalidity have focused on improving the gathering process, adjusting how officials check signatures, and adjusting the laws that condition the gathering and verification processes.

<b>Proposed/Possible Actions to Help Reduce the Rate of Invalid Signatures</b>
Increase circulator training in the law
Adopt a “cure period” for adding valid signatures
Encourage the use of volunteer collectors
Ban compensating paid collectors per signature collected
Retain the judicial standard of substantial compliance
Reduce the possibility that minor technical legal errors in regard to such matters as dates or addresses will not automatically invalidate signatures at the administrative level
Lower the number of required signatures
Set the number of required signatures at a specific reasonable figure rather than a percentage
Conduct signature gathering over the internet.
End or reduce gathering signatures and find another type of threshold qualification.

In the end, however, much of what happens in regard to the rejection of signatures will depend on the people who gather them and the companies that employ them. Following the lead of other states, Arizona might require collection companies to do criminal background checks on their employees, require paid circulators to take state-administered training classes before they begin collecting, and tighten laws regarding fraud or inappropriate behavior by collectors. The Legislature might also join a few other states in allowing sponsoring committees to submit signatures in batches prior to the final deadline, and to use a short “cure period” to collect additional signatures before the deadline if the preliminary count shows a need.

Legislators in Arizona and elsewhere have proposed requiring a percentage of signature gatherers to be volunteers, arguing that volunteers are less likely than paid professionals to commit acts of fraud and dishonesty. Another way to encourage the use of volunteers would be to give more weight to signatures collected by them than those gathered by paid professionals (for example, counting each signature gathered by a volunteer twice). Such proposals, however, could bias use of the initiative and referendum in favor of groups with large membership bases, and make it difficult for other groups to use the systems.

Some studies and courts have questioned the effectiveness of moving from paid circulators to volunteers in reducing invalidation rates.<sup>29</sup> But the evidence is not conclusive and, as noted above, there has been some indication of a link between volunteer activity and lower rates of invalidation in Maricopa County. Reliance on volunteers may have other advantages as well, such as reducing the role of money in campaigns, furthering citizen participation and getting citizens better educated about proposals.

Rather than – or in addition to – discouraging the hiring of paid professions, the Legislature might join a half-dozen other states in banning the practice of paying gatherers per signature. Governors Janet Napolitano and Jan Brewer, along with many state and county election officials, have pushed for such a ban. The Legislature has not yet responded, due in part to the opposition of the petition-gathering companies.

Supporters of a ban argue that the monetary incentive makes gatherers more likely to misrepresent the contents of a petition, forge signatures and engage in other forms of fraud and dishonesty. Studies in other states question whether the method of payment – or the use of volunteers – actually makes much difference in the overall rate of invalid signatures. Still, problems caused by this practice may be particularly pronounced in Arizona.<sup>30</sup>

In Arizona, as in most other states, election officials operate on the presumption that signatures may be false and that the required number to get on the ballot must be verified with certainty.<sup>31</sup> Maricopa County election officials appear to have been especially serious about their by-the-book law enforcement responsibility. In addition, they have had more work to do than officials in other counties and only a limited amount of time to do it.

About the only challenges to signature-rejecting decisions by the Secretary of State and county recorders have been those by groups promoting propositions that fall short because of these decisions. Going to court, these groups have often benefited by judicial application of the “substantial compliance” rule. However, getting to court requires raising thousands of dollars for legal fees and doing considerable legwork to gather evidence to prove signatures are genuine – tasks that not all groups are able to perform. The courts may or may not choose to get involved.

Still, court employment of the “substantial compliance” rule is an essential safeguard against the invalidation of legitimate signatures. Without it, more valid signatures will be lost because the signer fails to provide perfectly detailed information, and more petition sheets with valid names will be thrown out because of an error made by the collector.

If the assumptions behind the “substantial compliance” rule are valid, administrators, with legislative support, should loosen up and follow the same rule as closely as possible. Officials’ chief focus would then be on whether a signature is that of registered voter and on whether the circulator secured the signature without deceiving the signer.

Using this approach, an error as to a date or an address would not automatically invalidate a signature, and an error on the part of a circulator would not be cause for disqualifying valid signatures on petition sheets. Moreover, penalties for violating requirements concerning signatures or circulators would be borne by the circulator or the people who hired the circulator, not by the signer.<sup>32</sup>

### **Broader remedies**

There are several other possible changes that could minimize the problem of invalid signatures. For example, a constitutional amendment reducing the number of required signatures could provide considerable relief. The higher the requirement, the greater the pressure on gatherers to secure as many signatures as possible as quickly as possible, with less care about how they do so.<sup>33</sup> A large signature requirement may also compound the problem of invalidity by virtually necessitating the use of paid gatherers.

Lawmakers and/or voters might also consider a constitutional amendment setting the number of required signatures at a reasonable fixed figure – the best indicator of how much work is going to be required – rather than as a percentage of past voters. In a fast-growing state like Arizona, the required number of signatures has steadily and sometimes dramatically risen, making the task of gathering signatures increasingly difficult.

Alternatively, the state could retain or even increase signature requirements, but allow at least some to be collected by direct mail or electronically, thus reducing the need for signature gatherers. Some states have reduced the rate of failure by using direct mail – committees simply send petitions to persons on select mailing lists who sign and return them to the committees. The recipient signs both the signee and circulator line, becoming, in effect, both signee and circulator. Because the people contacted are generally favorable to the cause, validity rates are likely to be far higher than when using sidewalk petitioners. On the down side, however, using direct mail is costly.<sup>34</sup>

The process could also be conducted via e-mail. Groups could collect signatures directly by using social- networking sites or by developing their own websites that allow people to sign the petition on line. Using electronic or e-signatures could greatly reduce costs – there would be no more need to pay petition circulators – and level the playing field for groups with limited budgets.

Arizona requires that signatures for initiative petitions be collected in person. However, the state has been a national leader in using the Internet in voting-related matters. It was first in the country to have online voter registration – a practice since followed by several states – which has made millions of transactions without a hitch since its 2002 origin. In 2012, moreover, the state began a two-year pilot program (E-QUAL) that allows candidates for statewide office and the

Legislature to gather half of the signatures they need on nominating petitions through an on-line registration system. There is currently a move to make this permanent.

Going one step further, the signature requirement could be eliminated altogether. The major justification for the signature requirement is that it provides evidence of public support for placing a proposal on the ballot. But while many agree on the need for a minimum threshold of public support, there has been room for debate over whether signature requirements are a good or the best way of doing this.<sup>35</sup>

Indeed, getting on the ballot via the signature system may well have less to do with popular support than with the ability of a group to raise funds and hire a professional company to gather signatures.<sup>36</sup> These by themselves are not necessarily a reliable indicator of broad public support, given that all or much of the money may come from a single wealthy backer or some out-of-state committee funded by “dark” money from unidentified sources.

Given such concerns, some have suggested that the level and intensity of public support for putting a proposition on the ballot be determined by a state-sponsored public opinion poll.<sup>37</sup> This would entail asking a random sample of potential voters what issues they wish to consider, rather than navigating a cumbersome signature-gathering process that may, in fact, reflect little about public support. Change in this direction might also help counter the lack of widespread public understanding of what certain propositions are about. The energy and resources consumed in the signature-gathering process – or in trying to obstruct the process – would instead be freed up to allow proposition supporters and opponents to conduct campaigns focusing on the issues involved. However, the devil may as usual be in the details – for example, in determining how and how many proposed ideas make it into the poll.

### **The Bottom Line**

Many of the problems leading to signature invalidity might ease if the petition-gathering business became more competitive. The few companies offering services in Arizona have been in the driver’s seat in dealing with the sponsoring committees needing their services. More competition could give committees more choice and a greater ability to hold the collectors financially responsible for their errors. Much of the cure could be in the contracts.

There is, however, also room for legislative action; several steps may be at least worthy of further exploration. Among these are:

- encouraging or requiring more circulator training
- encouraging the use of volunteer workers
- prohibiting the practice of payment per signature and
- establishing a “cure” period to allow additional signatures.

To further the goal of saving valid signatures, lawmakers, as noted above, should also accept the “substantial compliance” standard and encourage administrators to avoid automatically tossing signatures because of minor mistakes by signers or circulators. Also potentially useful would be constitutional changes lowering the number of signature requirements and passage of laws allowing signings for ballot measures by direct or e-mail. Finally, lawmakers might seek ways

other than collecting signatures to determine if a proposal meets the threshold of public support worthy of a place on the ballot.

What if anything should be done will continue to be disputed among the principal stakeholders. Centrally involved are legislators, many of whom do not see much value in direct democracy; groups who feel they must preserve these devices in order to circumvent or challenge unresponsive legislatures; petition-gathering companies out for profit and election officials charged with implementing the laws.

From a public-policy perspective, the core issue is how to safeguard the integrity of the signature-gathering process while also ensuring that qualified signers have their signatures counted and thus have their constitutional rights preserved.

## Notes

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<sup>1</sup> "Candidates Return to Phoenix," *Arizona Democrat*, November 23, 1911.

<sup>2</sup> Petition Partners Website, <http://www.petitionpartners.com/About.html>

<sup>3</sup> Arizona Revised Statutes, Title 19, Initiative, Referendum and Recall, Section 19-112.

<sup>4</sup> Under the law, the names of signature gatherers found guilty of "a pattern of petition signature fraud" and who, because of this, are barred from participating in any initiative, referendum or recall campaign for five years, are to be posted on the Secretary of State's website. Currently no names are on the website.

<sup>5</sup> In California, for example, courts have declared that the following technical violations of statutory requirements regarding the title of an initiative were not sufficient grounds for throwing out the petitions: "(1) the use of twelve point boldface type instead of eighteen point Gothic type, and (2) using twenty-four words instead of the maximum of twenty." General reference: Scott L. Kafker and David A Russcol, "The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions," *Michigan State Law Review* (2012): 1279. The Arizona Supreme Court reaffirmed its use of the long-standing rule of substantial compliance in *Wilhelm v. Brewer*, 192 P.3<sup>rd</sup> 404, 405 (Ariz. 2008).

<sup>6</sup> For commentary see: Lisa T. Hauser, "The Power of Initiative and Referendum: Keeping the Arizona Constitution's Promise of Direct Democracy," *Arizona State Law Journal* 44: (2012): 567; David Potts, "Strict Compliance, Substantial Compliance, and Referendum Petitions in Arizona," *Arizona Law Review* (54, 2012): 329.

<sup>7</sup> "Look into the Signatures," *Arizona Republican*, July 10, 1912.

<sup>8</sup> *Report of the Secretary of State of the State of Arizona*, January 2, 1915: 19.

<sup>9</sup> See: "Signing Twice Causes Arrest of Two People," *Arizona Republican*, June 14, 1917;

"Minimum Wage Law Sustained In Court Here," *Arizona Republican*, July 17, 1917; "Signed Referendum Petition Twice; Under Arrest," *Tombstone Epitaph* June 17,, 1917; and "Minimum Wage Bill For Women Still in Doubt," *Tombstone Epitaph*, June 17, 1917.

<sup>10</sup> "Governor Geer on Oregon Plan," *Arizona Republican*, September 7, 1910.

<sup>11</sup> Thomas Goebel, *A Government By The People: Direct Democracy in America, 1890-1940* (Chapel Hill, N.C.: The University of North Carolina Press. 2002): 144-147.

<sup>12</sup> *Meyer v. Grant* 486 U.S. 414 (1988). See also: Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence, Kansas: University Press of Kansas, 2002): 47.

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<sup>13</sup> See Chris Fiscus, "Critics: Pay for Names 'Hijacks' Petition Process," *Arizona Republic*, October 16, 2000; A.1; Kirsten Searer and Mark Flatten, "[The petition industry operates with few rules and many controversies](#)," *East Valley Tribune*, October 15, 2003.)

<sup>14</sup> "Smoldering Questions Concerns Over Petitions Focus on Paid Gatherers," *Arizona Republic* January 16, 2003; Alia Beard Rau, "Smoking Ban Foes, Backers Take Petition Fight to Court," *Arizona Republic*, May 2003.

<sup>15</sup> Jennie Drage Bowser, "Battle for ballot: outdated laws governing the initiative process allow abuse," *State Legislatures*, January 1, 2009.

<sup>16</sup> Mary Jo Pitzl, " 'Flawed' Petitions Face Review," *Arizona Republic* September 13, 2008.

<sup>17</sup> Christian Palmer, "TIME Initiative disqualified for lack of valid signatures," *Arizona Capitol Times*, August 11, 2008.

<sup>18</sup> Christian Palmer and Jim Small, "Arizona transit, trust land proposals expire," *Arizona Capitol Times*, August 29, 2008.

<sup>19</sup> Palmer, "TIME Initiative disqualified."

<sup>20</sup> Matthew Benson, "Bill pushes change in initiative process," *The Arizona Republic* March 4, 2009

<sup>21</sup> Christian Palmer, "Is Arizona's state trust land reform initiative in trouble?" *Arizona Capitol Times*, August 15, 2008.

<sup>22</sup> Sarah Fenske, "Citizen initiatives have been kicked off the ballot this year in record numbers, and the problems could go much deeper than invalid signatures," *Phoenix New Times* August 21 2008.

<sup>23</sup> Christian Palmer, "Medical Choice for Arizona appears to have squeaked by," *Arizona Capitol Times*, August 15, 2008.

<sup>24</sup> See Petition Partners Website: <http://www.petitionpartners.com/About.html>

<sup>25</sup> Luige del Puerto, "Court says 'Top Two' should be on November ballot," *Arizona Capitol Times* August 31, 2012.

<sup>26</sup> The Secretary of State in the state of Washington, where the criteria used to check signatures is less technical, has estimated that measures usually get on the ballot safely if sponsors collect 25 percent or more of the legally required number. See Kim Wyman, Washington Secretary of State, *Filing Initiatives and Referenda in Washington State* (February 2013). A study of signatures on initiative petitions gathered in Washington between 1990 and 2006 found an invalidation rate of slightly over 18 percent. See: Todd Donovan and Daniel A. Smith "[Identifying and Preventing Signature Fraud on Ballot Measure Petitions](#)," in Michael Alvarez, Thad E. Hall, and Susan D. Hyde, eds., *Election Fraud: Detecting and Deterring Electoral Manipulation*. Washington, DC: Brookings, 2008. Tabulations, official and unofficial, referred to in newspapers in Oregon have the typical invalidation between 30 and 35 percent. See, for example, Phillip Smith, "It's Nail-Biting Time for Oregon Marijuana Legalization Initiatives," *The Daily Chronic*, June 21, 2012 and "Invalid Initiative Signatures Reach Record, Paper Finds," *The Columbian* (Vancouver, WA), September 3, 2002. In Colorado, a recent estimate has about a third of all signatures typically being rejected. See: "School tax initiative makes ballot –barely- Almost 46 percent of signatures invalidated," *The Durango Herald*, September 4, 2013.

<sup>27</sup> The top reasons given by election officials for signature rejection in California are signees are not registered voters, address and signature mismatch, name changes, and duplicate signatures. See: "*The Initiative and Referendum in California: A Lost Legacy?*" League of Women Voters California,

[http://orangeoast.ca.lwvnet.org/files/initiative\\_and\\_referendum\\_in\\_california.pdf](http://orangeoast.ca.lwvnet.org/files/initiative_and_referendum_in_california.pdf)

In Washington, leading reasons for rejection are: signer not registered, no date of birth given, signature cannot be read, address different than that on voter registration card, signature on petition sheet does not match that on voter registration file, signer signed more than once. See: Washington Secretary of State, "2013 Initiatives FAQ," January 2013. Found at: <http://www.sos.wa.gov/elections/2012InitiativesFAQ.aspx> A similar list from Colorado is found at "Rejection of Signatures or Petition Sections," <http://sos.state.co.us/pubs/elections/Initiatives/training/7-Rejection.html>

<sup>28</sup> Needing 86,405 valid signatures, organizers took no chances and filed 146, 028 signatures in September 2013. The Secretary of State threw out 5,000 of these, about half of these (2,300) on 237 petition sheets, and county recorders tossed out another 26,440, Maricopa County again in the lead in terms of rate of rejection. This left 110,770 valid signatures and an approval rate of over 80 percent. See; Hank Stephenson, "Secretary of State knocks 2,300 signatures from Arizona HB2305 referendum effort," *Arizona Capitol Times*, October 8, 2013.

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Referendum backers conducted a well organized campaign – suggesting that while a referendum campaign may have more legal barriers than an initiative campaign in regard to signature verification, the job can be done.

<sup>29</sup> See: Donovan and Smith “[Identifying and Preventing Signature Fraud on Ballot Measure Petitions](#),” comments by University of Florida Professor Daniel Smith in Vincent Carroll, “Carroll: Heaping burdens on petitions.” *Denver Post*, May, 19, 2010; Ellis, *Democratic Delusions*, pages 70- 71; Sabato, et. Al, *Dangerous Democracy*, 116, 117; and Elizabeth Garrett, “Money, Agenda Setting, and Direct Democracy,” *Texas Law Review* Volume 77, (June, 1999): 1845-1890. The U.S. Supreme Court in 1988 concluded: “It cannot be assumed that a professional circulator -- whose qualifications for similar future assignments may well depend on a reputation for competence and integrity -- is any more likely to accept false signatures than a volunteer motivated entirely by an interest in having the proposition placed on the ballot.” See *Meyer v. Grant* 486 U.S. 414 (1988): 426. Here, though, the court assumed that political committees had a choice among circulator firms and were in a position to hold them accountable.

<sup>30</sup> See, for example, Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence, Kansas: University Press of Kansas, 2002): 47.

<sup>31</sup> David B. Magleby, “Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures,” *Journal of Law & Politics* (Volume 2, 1985): 287-311.

<sup>32</sup> Among those taking the more general view that “an error on the part of the circulator shall not be cause for disqualifying valid signatures on his petition section” is Laura Tallian, *Direct Democracy: An Historical Analysis of the Initiative, Referendum and Recall Process* (Los Angeles, CA: People’s Lobby, Inc., 1977): 168-171.

<sup>33</sup> Arizona’s signature requirements for the statutory initiative of 10 percent of the vote in the last gubernatorial election and of 15 percent for a constitutional amendment are relatively high. Oregon requires 6 percent of the most recent vote for governor for initiated statutes and 8 percent for initiated constitutional amendments. In California, it is 5 percent for statutes and 8 percent for constitutional amendments. Washington with a population comparable to Arizona’s requires 8 percent (the initiative applies only to statutes) Other states with a ten percent requirement for statutes such as Nevada and Utah have significantly smaller populations than Arizona. The 15 percent requirement for ballot access for constitutional amendments found in Arizona and Oklahoma is the highest in the nation. (See generally: National Conference of State Legislators, “Initiative Petition Signature Requirements,” updated September 20, 2012. Found at

<http://www.ncsl.org/legislatures-elections/elections/elections/signature-requirements.aspx>

<sup>34</sup> See generally, Cody Hoesly, “Reforming Direct Democracy: Lessons From Oregon,” *California Law Review* (93, July, 2005):1191; Alan M. Gloger, “Paid Petitioners After Prete,” *IRI Report* (May 2006) (Initiative and Referendum Institute, University of Southern California) <http://www.iandrinstitute.org/REPORT%202006-1%20Paid%20Petitioners.pdf>

<sup>35</sup> (Elizabeth Garrett, “Money, Agenda Setting, and Direct Democracy,” *Texas Law Review* Volume 77, (June, 1999): 1845-1890.

<sup>36</sup> There has been a widespread belief among informed observers, that paid circulators can get virtually anything on the ballot. See, for example, Elizabeth Garrett, “Money, Agenda Setting, and Direct Democracy,” *Texas Law Review* Volume 77, (June, 1999): 1845-1890; and Elisabeth R. Gerber, “The Logic of Reform: Assessing Initiative Reform Strategies,” in Larry J. Sabato, Howard R. Ernst, and Bruce A. Larson, eds. *Dangerous Democracy?* (Lanham: Roman& Littlefield Publishers, 2001): 143-172 at 151.

<sup>37</sup> Garrett, “Money, Agenda Setting, and Direct Democracy.”

## Appendix: Tables 1-4

**Table 1**  
**Signatures Lost Because of Petition Failures**

Year	Number of Props	Signatures Lost	Average Per Prop
2000	8	31,331	3,916
2002	4	12,476	3,119
2004	2	13,822	6,911
2006	10	53,485	5,349
2008	9	137,553	15,283
2010	1	4,394	4,394
2012	3	25,209	8,403
Total	37	278,270	7,520

*Based on data from Arizona Secretary of State's Office*

**Table 2**  
**Reasons for Petition Sheet Removal (percent of total)**

Year	Signatures Lost	Affidavit of Circulator Incomplete or Missing	Signatures Added After Petition Notarized	Notary Incomplete or Missing or Notary Expired
2002	12,476	4,4589 (37)	749 (6)	2962 (24)
2004*	7,256	2,081 (29)	292 (4)	3,464 (48)
2006	53,485	12,984 (24)	7,519 (14)	20,608 (39)
2008	137,553	40,654 (30)	48,139 (35)	16,123 (12)
2010	4,394	617 (14)	385 9 (9)	1526 (35)
2012	25,209	12,218 (48)	5,865 (23)	911 (36)
Total	240,373	73,143 (30)	62,949 (26)	45,594 (19)

*\* Information available on only one petition*

**Table 3**  
**County Invalidation Rate Averages, Per Proposition, 1998-2012**

Year	Number of Props	Average Rate of Signature Invalidation
1998	4	21%
2000	8	28%
2002	4	26%
2004	2	20%
2006	10	21%
2008	9	36%
2010	1	31%
2012	3	30%

Source: Arizona Secretary of State's Office

**Table 4**  
**Invalidation Rate Percents All Counties and Maricopa County Alone**

Year	Number	Description	All Counties %	Maricopa County %
2000	106	Redistricting Commission	27.28	31.31
2000	107	Taxpayers Protection Act	32.33	36.44
2000	108	Telecommunication rates	31.77	36.45
2000	200	Tobacco tax money/children	28.93	31.80
2000	201	Marijuana (did not qualify for ballot)	32.40	35.68
2000	202	Local Growth Boundaries	24.82	28.14
2000	203	Bilingual Education repeal	28.48	31.21
2000	204	Tobacco tax money/health programs	16.19	18.89
2002	200	Indian Gaming	26.88	29.10
2002	201	Racetrack Gaming	25.67	27.44
2002	202	Indian Gaming	24.32	26.06
2002	203	Drug Policy/medical marijuana	27.63	29.51
2004	106	Prohibit public funding of campaigns	21.49	22.02
2004	200	Illegal immigration	17.62	19.37
2006	106	Conserving Arizona's Future State Trust Land	19.88	22.72
2006	107	Protect Marriage Act	16.87	18.00
2006	200	Voter Reward Act	18.75	20.01
2006	201	Smoke-Free Act	19.64	21.76
2006	202	Raises Minimum Wage	21.35	23.26
2006	203	Tobacco Money Children	22.68	24.18
2006	204	Farm Animal Treatment	17.42	19.14
2006	205	Voting By Mail	21.47	22.68
2006	206	Non-Smoker Protection	28.17	30.54
2006	207	Eminent Domain	24.78	26.86
2008	100	Real-estate transfer tax	33.39	35.85
2008	101	Medical Choice	32.72	34.91
2008	103	State Trust Laws	37.33	40.82
2008	104	Ban on affirmative action	40.12	43.23
2008	105	Initiative posing new taxes / majority vote	38.53	41.31
2008	200	Payday loan	33.59	35.82
2008	201	Homeowners' Bill of Rights	34.54	36.47
2008	202	Stop Illegal Hiring	31.35	33.21
2008	203	Sales tax hike for transportation	42.04	45.11
2010	203	Medical Marijuana	31.36	34.76
2012	121	Top Two	29.51	32.99
2012	None	None	34.05	38.09
2012	204	Sales Tax Increase Permanent	26.71	30.45
Average			27.62	30.15

*Source: Calculations based on data from Arizona Secretary of State's Office, descriptions added.*