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November 20, 2015

REPORT TO CITY COUNCIL

REQUIRING PETITION CIRCULATORS TO PROVIDE DONOR DISCLOSURE INFORMATION TO VOTERS SIGNING REFERENDUM AND INITIATIVE PETITIONS

INTRODUCTION

As a Charter city, San Diego has legal authority to create procedural rules for its municipal elections and has an Election Code providing an "adequate and complete procedure to govern municipal elections." Cal. Const. art. XI, §§ 5(a), 5(b); San Diego Charter §§ 8, 23. The Council is now considering amendments to laws related to ballot measure petitions.

Councilmember Todd Gloria proposed an update of the City's referendum laws "to make the referendum process more transparent." (*See* Councilmember Gloria's memorandum, accompanying this Council item.) The City Attorney's Office has worked with the Councilmember and City Clerk on language presented to the Council in three ordinances, which extend beyond referendum reform to clarify laws and make the process more consistent among recall, referendum and initiative measures. The amendments follow last year's extensive revision of the City's recall laws.

After the Committee of the Whole discussed the proposals, Councilmember Gloria proposed an additional section requiring petition circulators to provide voters with certain donor disclosure information when they ask voters to sign a petition. The new section would appear in the referendum and initiative divisions of the Municipal Code. As proposed for the referendum division, the section states:

§27.1111 Information Provided to Voters by Circulators

(a) *Voters* have the right to ask *petition circulators* for information regarding the persons and entities financing the referendary *petition*. Such information shall be made available to *voters* when *voters* are asked to sign the *petition*.

(b) Information shown to *voters* by *circulators* shall include a list of donors to the referendary *petition*, which must be conspicuous and include the identities of at least the top

> two donors that contributed cumulative amounts of $1,000 or more, the amounts contributed, and the date the list was compiled. *Circulators* shall provide *voters* with the address of a website where *voters* can find current donor information. The disclosure statement shall be updated within 48 hours of any change to the list of the five largest contributors.

As the proposed section has not been discussed by a Council committee, this Report addresses the proposal and its potential vulnerabilities to legal challenge. At issue is whether the requirements are permissive or mandatory; a court would also consider whether they could be construed to implicate the First Amendment and unduly burden political speech and voters' constitutional power to circulate petitions. If the issue to be remedied – misinformed voters who sign measures without knowing who supports them – is construed to be a matter of statewide concern, the regulation may be one to address at the state level.

This Report is preliminary only, as the issue has not been discussed by the Council. This Office can provide additional legal analysis upon request.[1]

QUESTION PRESENTED

What are the legal issues raised by a proposal to require circulators of ballot measure petitions to:

- make donor disclosure information available to voters when voters are asked to sign the petition;
- provide a list of donors to the petition, which must be conspicuous and include the identities of at least the top two donors that contributed cumulative amounts of $1,000 or more, the amounts contributed, and the date the list was compiled;
- provide voters with the address of a website where voters can find current donor information; and
- require the donor disclosure statement to be updated within 48 hours of any change to the list of the five largest contributors?

SHORT ANSWER

Based on our initial research, the proposed amendment to require petition circulators to provide information regarding donor disclosures to voters when they seek signatures appears to be unique and untested. The potential issue is not the disclosures themselves, which must be made in campaign finance reports in compliance with campaign disclosure laws. Rather, it is the unique proposal to require *circulators* to provide certain information, and the related time, place and manner requirements, that may raise a legal challenge.

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[1] We have not had the benefit of seeing any legal analysis that may have accompanied an analogous proposal at the state level (Assembly Bill 400 (2013-2014 Reg. Sess.)) (AB 400), vetoed by Governor Brown last year and discussed below).

If the section were construed by a court not to unduly burden voters' power to circulate petitions or to implicate the First Amendment, it might be viewed as acceptable because campaigns already are required to disclose donors in written filings.

By contrast, if directing circulators to provide certain information is interpreted to *require certain speech by circulators*, the amendment could be construed to implicate the First Amendment and to impermissibly burden voters' power to circulate initiative and referendum petitions without "undue administrative burdens." *See California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1092, 1107 (9th Cir. 2003) (holding California may regulate express ballot-measure advocacy; state could argue it had a sufficiently compelling interest in requiring disclosures of expenditures and contributions, leaving the constitutional means of doing so to be determined by lower court). A legal challenge could ensue if disclosures are viewed as compulsory, or as a limitation on political speech. To the extent the proposal is interpreted as a First Amendment restriction and not narrowly tailored to serve a compelling government interest, it could be successfully challenged.

If the section is construed to implicate the First Amendment, a court would consider: (1) whether there is a compelling government interest sufficient to justify the requirement (requiring circulators to provide voters with donor disclosure information when they ask voters to sign petitions); and (2) whether the requirement is narrowly tailored to serve that interest. One argument justifying the rule is that providing donor disclosures when voters are asked to sign a petition could assist voters to make a better informed decision. This could limit later demands that their names be withdrawn from petitions they signed in error.[2] Allegations that petition drives are misleading are a basis of the proposed reform. A court would consider if the requirements are the least restrictive means to serve the purpose.

There also may be distinctions between elements of the proposal, some of which may not implicate First Amendment concerns: For example, providing a website address where voters may see donor disclosures, or publishing the City's donor website address on the top of a petition, may be analogous to other statements already required to be published on petitions.

ANALYSIS

I. Voters Have the Right to Information About Individuals and Entities Financing Ballot Measure Petitions, but Not Necessarily by Circulators at the Time Voters Sign Petitions

A. A Court Would Consider Whether the Proposal Implicates First Amendment Rights

If a law burdens political speech, it is subject to strict scrutiny for violating the First Amendment, and the government must prove the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. U.S. Const. Amend. 1; *Buckley v. American*

[2] There may also be instances in which providing only the top two donors could inadvertently be misleading of others on the donor list, who may represent different interest groups.

Constitutional Law Foundation, Inc., 525 U.S. 182, 192, n.12 (1999) (Colorado statute requiring petition circulators to wear ID badges violated First Amendment free speech guarantees; existing disclosure requirements sufficed to inform voters about who paid for petition circulation; badges could expose circulators to harassment). A court would also look to whether there are less restrictive means to achieve the interest.

The U.S. Supreme Court discussed the justification of infringing First Amendment rights through campaign disclosure requirements as: (1) informing the public as to the source of campaign money and its use by a candidate; (2) deterring actual corruption and avoiding the appearance of corruption by publicizing large contributions; and (3) providing data to be used to detect violations of contribution limitations. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976). The first of these three justifications clearly applies to ballot measure disclosures.

In one California case, an appellate court explained the legal basis for requiring campaign disclosures:

> Express ballot-measure advocacy is not constitutionally sacrosanct speech. California may regulate it, provided that California has a constitutionally sufficient interest in doing so. California may well have a compelling interest in informing its voters of the source and amount of funds expended on express ballot-measure advocacy. *Even if compelling, California's informational interest in required disclosure is not without limitation: unnecessary administrative and organizational requirements will not pass constitutional muster.* The district court shall determine on remand whether California in fact has a compelling informational interest justifying its disclosure laws. If so, the court must then determine whether the means chosen by California comport with the First Amendment.

California Pro-Life Council, 328 F.3d at 1107 (emphasis added).

Although the case is distinguishable and was not about requiring disclosures by petition circulators, the test expressed within it may be instructive. A court might consider whether the proposed requirements place an "unnecessary administrative" burden on a petition campaign. As the court stated, the City would need to provide a "compelling informational interest" and argue that the "means chosen comport with the First Amendment." *Id*.

B. The Proposal Follows an Analogous Assembly Bill that was Vetoed Last Year.

Councilmember Gloria initiallyproposed publishing the donor disclosure information directly on ballot measure petitions, with such information being updated regularly and new petitions published to reflect the new information. This Office expressed concern about different versions of petitions circulating; state and municipal laws do not contemplate more than one version of a petition being circulated, which could cause voter confusion.

Both the previous and the new proposal follow analogous legislation at the state level. AB 400 would have required a ballot measure petition to list the top five donors to the petition campaign, with information to be updated on petitions every seven days. AB 400 did not seek to require circulators to separately provide information to voters orally or in print. Rather, it sought publication of the donor list on the petition itself. Governor Jerry Brown vetoed AB 400 in September 2014. When AB 400 was proposed at the state level, one supporter explained the rationale, which applies here:

> . . . it still can be very difficult for the general public to analyze and interpret campaign finance disclosure reports. That's why identifying the top donors is so important – it makes it much easier for voters to quickly determine which interest groups are backing a particular measure if the top donors have already been officially identified. [The] bill takes the extra step of ensuring this crucial data is placed before voters at the very time they need it most – when they are asked to sign initiative petitions. Our initiative process is based on the belief that voters can and should make informed choices.
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> . . . if we are really committed to educating California voters and helping them make informed voting choices, then we must put that information under voters' noses, on initiative petitions and in the ballot pamphlet so it is readily available to voters when they are making crucial decisions such as signing a petition or voting on a proposed law.

June 25, 2013 letter to bill sponsor, Assemblyman Paul Fong, from Kim Alexander, president and founder of the California Voter Foundation.

The state measure would have required contributor information to be published on petitions and updated, which the Governor labeled in his veto message as not practical. Although this Office has not seen any related legal analysis, the Governor's veto message stated that voters can inspect the top 10 contributors on websites and through links in the ballot pamphlet. The veto message raises the question as to whether the least restrictive means is to provide voters with the website where they can seek the information at the time of signing, as opposed to requiring the circulator to provide the specific donor disclosures. We note that providing website information is a part of the Councilmember's proposal.

CONCLUSION

As set forth above, the proposal seeks to require petition circulators to provide donor disclosures to voters at the time they are asked to sign ballot measure petitions. A challenge could succeed if a court construes the section to compel speech by circulators, and to implicate First Amendment rights that burden the ability of a campaign to gather signatures. If there were a constitutional challenge, the City would need to prove there is a compelling government interest sufficient to justify the requirement, that the requirement is narrowly tailored to serve that interest, and there are no less restrictive means available to do so.

As the proposal appears to be unique and untested, this Office provides this preliminary Report for discussion but can supplement it upon request.

Respectfully submitted,

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SBS:jdf
RC-2015-7
Doc. No. 1172602