

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

SHARON B. SPIVAK
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith

CITY ATTORNEY

MEMORANDUM OF LAW

DATE: August 16, 2013

TO: City Council and City Clerk

FROM: City Attorney

SUBJECT: Unenforceability of Voter Registration and Residency Requirements for Circulators of Recall Petitions

INTRODUCTION

Several months ago, this Office committed to review the City's rarely used recall laws and provide guidance regarding provisions that might be unconstitutional.¹ This Memorandum of Law is our third recent opinion on the City's recall laws, and considers the requirement that one must be a registered voter and resident to circulate recall petitions. Similar requirements have been struck down by the U.S. Supreme Court and Ninth Circuit Court of Appeals, but nonetheless remain the law of the City and the State of California. In ordinances passed in 1999 and 2000, the City Council removed the requirements from local laws governing petition circulators for initiatives and referenda, but did not remove a remaining reference in the recall laws.²

This Memorandum confirms that state and local election officials will not enforce requirements that recall petition circulators be registered voters or residents of a given jurisdiction. The San Diego County Registrar of Voters thus will count valid signatures of registered voters on recall petitions, regardless of the circulator's status as a resident or registered voter. Although the requirements will not be enforced, this Office nonetheless recommends that the language be removed from the San Diego Municipal Code (SDMC), and that the City's recall

¹ This Office recently issued: (1) a July 26, 2013 Report to Council confirming the unconstitutionality of section 27.2726 of the San Diego Municipal Code, which prohibits counting certain recall votes if a voter does not vote on both parts of the recall ballot (City Att'y Report 2013-12); and (2) a July 31, 2013 Memorandum of Law regarding multiple recall efforts proceeding simultaneously (City Att'y MOL 2013-12).

² Although our Office already was reviewing this issue with election officials, we received an August 9, 2013 letter from attorneys for the "Recall Bob Filner" Committee, requesting "guidance" as to whether the City agreed the voter registration and residency requirements related to circulators of recall petitions are "unconstitutional and unenforceable."

laws be amended to include the petition circulator language now found in the initiative and referendum sections.

QUESTION PRESENTED

Are those who circulate petitions to gather signatures to recall a public official required to be registered voters or residents of the City of San Diego?

SHORT ANSWER

No. The U.S. Supreme Court has held it unconstitutional to require a person circulating a petition for voter signatures to be a registered voter of the jurisdiction. The Court recognized that the circulator's registration status should not affect the counting of valid signatures of voters, who by signing petitions are exercising their First Amendment rights. Other courts have held that one also cannot require a petition circulator to be a resident of a jurisdiction, because this also will affect the pool of persons who may gather signatures and thus diminish speech.

Election officials will count the valid signatures of registered voters on recall petitions regardless of the circulator's status as a resident or registered voter. Circulators, however, still must sign an affidavit under penalty of perjury that states they are U.S. citizens, at least 18 years old, and attest to certain information regarding the collection of signatures on petitions they submit.

ANALYSIS

I. CITY LAW REQUIRES PETITION CIRCULATORS TO BE RESIDENTS AND REGISTERED VOTERS TO CIRCULATE RECALL PETITIONS, BUT NOT TO CIRCULATE INITIATIVE AND REFERENDUM PETITIONS.

SDMC section 27.2712 requires each person who circulates recall petitions to sign an "Affidavit of Authenticity" for each petition under penalty of perjury. The section requires the following statement to be signed:

I, (printed name of circulator), declare: Under penalty of perjury I, (printed name of circulator), declare: *That I am a registered voter of (The City of San Diego) (San Diego Unified School District)* and that all the signatures on each petition section were made in my presence and were observed by me, and that all of the sheets constituting this petition section were fastened together at the time such signatures were made; and that to the best of my knowledge and belief such signatures are the genuine signatures of the persons who have signed the petition; and that the signatures were obtained between:

_____ and _____
 (Beginning date of circulation) (Final date of circulation)

(Circulator's Printed Name) (Circulator's Signature)

(Circulator's Residence) (Date Signed by Circulator)

SDMC § 27.2712 (emphasis added).

The phrase “*That I am a registered voter of (The City of San Diego)*” appears only in the City law governing circulators of recall petitions. On July 26, 1999, the Council adopted an ordinance removing the phrase from identical sections for circulators of petitions for initiatives and referenda. (See SDMC § 27.1014, Form of Circulator's Affidavit of Authenticity for Initiative Petition and SDMC § 27.1112, Form of Circulator's Affidavit of Authenticity for Referendary Petition.)

Although the Council removed the “registered voter” requirement from all other laws regarding petition circulators, it did not remove the remaining reference in the “Affidavit of Authenticity” section for circulators of recall petitions, SDMC section 27.2712. An April 29, 1999 Report to the Committee on Rules, Finance and Intergovernmental Relations from then-City Attorney Casey Gwinn references the “Affidavit of Authenticity” sections for initiatives and referenda, but does not address recall:

The Clerk's draft removes the existing requirement that petition circulators be registered voters. See new San Diego Municipal Code [SDMC] section 27.1014 (formerly section 27.2510) and 27.1112 (formerly section 27.2609). This change is keeping with the recent U.S. Supreme Court case of *Buckley v. American Constitutional Law Foundation, Inc.*, -- U.S. --, 119 S. Ct. 636 (1999), which held that a Colorado statute requiring that initiative petition circulators be registered voters violated First Amendment free speech guarantees.

See Proposed Amendments to the City's Elections Code, Report to the Committee on Rules, Finance and Intergovernmental Relations, 1999 City Att'y Report 164 (99-5; April 29, 1999).

In 2000, the Council further amended City initiative and referendum laws to state this even more clearly:

§ 27.1004 Initiative Petition Circulators

An initiative petition may be circulated for signatures by a paid signature gatherer or by a volunteer. A circulator must be a U.S. citizen and at least 18 years old.

§ 27.1102 Referendary Petition Circulators

A referendary petition may be circulated for signatures by a paid signature gatherer or by a volunteer. A circulator must be a U.S. citizen and at least 18 years old.

The Council did not add a similar provision to the recall laws, again leaving the remaining reference to the voter registration requirement intact in section 27.2712.

There is no separate requirement in the Municipal Code that a petition circulator also be a “resident,” but one cannot be a registered voter without also being a “resident” of a jurisdiction. There is, however, a line on each “Affidavit of Authenticity” form listed in the Municipal Code – for circulators of initiatives, referenda and recall petitions – that asks a circulator for the “Circulator’s Residence.” (*See, e.g.*, section 27.2712 above.) This signature line remained even after the Council amended the code in 1999 and 2000. There is no local law stating where the residence must be, only the required line in which a circulator is to provide the information under penalty of perjury. Significantly, even if the circulator does not provide an address, elections officials would still count the valid signatures on a petition. (*See* Section III below.)

II. THE U.S. SUPREME COURT HAS HELD IT UNCONSTITUTIONAL TO REQUIRE PETITION CIRCULATORS TO BE REGISTERED VOTERS OF A JURISDICTION.

In 1999, the U.S. Supreme Court struck down a requirement that Colorado petition circulators must be “registered electors” to circulate petitions, as an undue restriction on speech. The requirement necessarily required the petition circulator to reside in Colorado in order to be a registered voter. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Supreme Court held the requirement that the circulator be a “registered elector” diminished constitutional rights of free speech. As summarized by the Ninth Circuit Court of Appeals in *Nader v. Brewer*, the Supreme Court said in *Buckley*:

. . . [p]etition circulation . . . is “core political speech,” because it involves “interactive communication concerning political change,” and that First Amendment protection for such interaction is therefore “at its zenith.” . . . The Court then determined that the registration requirement imposed a severe burden on the speech rights of individuals involved with the initiative process because it significantly decreased the pool of potential circulators, which in turn limited the size of the audience that could hear the initiative proponents’ message.

Nader v. Brewer, 531 F.3d 1028, 1035 (9th Cir. 2008),³ citing *Buckley* at 186-87, 192 and n.12, 193-96. The *Buckley* Court held the requirement that a petition circulator be a registered voter “imposes a burden on political expression that the State has failed to justify.” *Buckley*, 525 U.S.

³ In *Nader*, the Ninth Circuit Court of Appeals overturned an Arizona law requiring those who circulated nomination petitions to reside in Arizona at least 29 days before an election and, therefore, be eligible to register to vote. The Court held that the state did not meet its burden of showing the residency requirement was narrowly tailored to further the state’s compelling interest in preventing fraud, and the requirement could not be sustained. *Nader*, 531 F.3d at 1037-38.

at 195, citing *Meyer v. Grant*, 486 U.S. 414, 428 (1988). The fact that registering to vote is “exceptionally easy” cannot “lift the burden on speech at petition circulation time.” *Buckley*, 525 U.S. at 195.

After the *Buckley* decision, the California Attorney General issued an opinion confirming that a similar California law “is unconstitutional in requiring circulators of petitions to declare that they are voters of the city.” 82 Op. Cal. Att’y. Gen. 250 at 1 (Dec. 22, 1999). The Attorney General also confirmed that “Circulators of a city initiative petition need not declare that they are city residents.” *Id.* The Attorney General wrote that there was no other law expressly requiring petition circulators to be residents of a “city” and no “particular or restricted geographical area” need be specified when declaring a residence address. Thus, residency requirements also could not be enforced. *Id.* at 3.

By letter dated January 20, 1999, the California Secretary of State also “instructed local elections officials that due to the *Buckley* decision, “[t]here is no longer any requirement that initiative circulators be registered voters.” See 82 Op. Cal. Att’y. Gen. 250 at n.4.

Given these authorities (along with many other cases following *Buckley* that are not cited here), there is no legal basis to require circulators of recall petitions to be registered voters or residents of the City in order to circulate petitions. If the remaining Municipal Code requirement were to be challenged in court, it would not be upheld.

III. VALID SIGNATURES OF REGISTERED VOTERS ON RECALL PETITIONS ARE COUNTED, REGARDLESS OF THE PETITION CIRCULATOR’S RESIDENCY OR VOTER REGISTRATION.

The California Association of Clerks and Elections Officials (CACEO) has “Petition Signature Verification Guidelines” (the Guidelines) that state and local election officials use to process and verify signatures on petitions for initiatives, referenda, recall and candidate nominations, and for petitions in which a candidate files signatures in lieu of paying a filing fee. The San Diego County Registrar of Voters (ROV) and City Clerk use the Guidelines to determine if signatures are to be deemed valid and counted. The Guidelines confirm, for example, whether signatures are to be counted when certain information is missing, such as a date or a valid address. Each Guideline is accompanied by citations to governing law that allows the procedure to be used. The following two Guidelines address the circulator issues detailed in this Memorandum and are quoted in relevant part:

- **#C13 Circulator is not a registered voter**

Circulator of a petition is not registered to vote, or is not registered in the jurisdiction in which the petition is circulated or filed

- Current Procedure/Practice
 - Raw count? Yes.
 - Sig (signature) valid? Yes.

- **#C14 Circulator is not a resident**

Circulator is not a resident of the state or political jurisdiction in which the petition is circulated.

- Current Procedure/Practice
 - Raw count? Yes.
 - Sig (signature) valid? Yes.

Election officials follow these two Guidelines when considering signatures on recall petitions. Thus, state and local elections officials agree that governing law requires them to count the valid signatures of registered voters on recall petitions regardless of whether the circulator is a registered voter or a resident of a jurisdiction. This practice will be followed regardless of the language remaining in the Municipal Code. To eliminate confusion and to protect against a constitutional challenge, however, this Office recommends that the remaining requirement be removed, and the section amended to add the circulator requirements found in the initiative and referendum sections.

CONCLUSION

Valid signatures on petitions for recall will be counted by elections officials, regardless of the petition circulator's status as a resident or registered voter. Although the City removed unconstitutional requirements from the Municipal Code sections dealing with petition circulators handling initiatives and referenda, the requirement remains in the recall laws. Although it will not be enforced, this Office recommends that the section be amended to remove that language and include the petition circulator language now found in the initiative and referenda sections.

JAN I. GOLDSMITH, City Attorney

By /s/ Sharon B. Spivak
Sharon B. Spivak
Deputy City Attorney

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