Washington Research Council

Policy Brief

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I-517: Infringing Property Rights and Enshrining a New Protected Class

Briefly

I-517 would significantly impact property rights; make signature gatherers a special class not to be interfered with; and require that every initiative with enough signatures go to the ballot, while also expanding the local initiative power.

Initiative 517 would expand the rights of initiative signature gatherers far beyond the current balance of rights state courts have established. The new tilt weighs against the public interest.

I-517 would make several changes to the initiative process:

- It would broadly expand the places in which a campaign may gather signatures, including on private property without owners' consent;
- It would elevate interference of signature gathering above other types of harassment, putting signature gatherers and signers above everyone else;
- It would require every initiative with sufficient signatures to go to the ballot, regardless of whether the subject matter is within the initiative power; and
- It would extend the time to gather signatures by six months.

I-517 would make life much easier for signature gatherers, but much harder for property owners, employees, and the general public.

Infringement on Property Rights

Washingtonians' rights to initiative and referendum have been part of our state constitution for over 100 years. Article II, Section 1 states,

> The legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the legislature.

Whether property owners may prevent signature gathering on their private property is a matter that has been decided by state courts on a case-by-case basis. An informal opinion from the state attorney general's office (AGO) explains:

> Under Washington case law, a right of access to private property for political purposes extends only to the circulation of petitions seeking to qualify initiatives or referendums to the ballot and does not extend to other political activities. This right of access extends only to certain shopping centers and not to all shopping centers or other commercial properties. The question of whether the right extends to a particular property is determined by balancing three factors, which consist of (1) the nature and use of the property; (2) the impact of the decision upon the effectiveness of the initiative or referendum process; and (3) the scope of the invitation that the owner of the property has extended to the public. Washington courts have eschewed firm rules on the subject, preferring development of the law through a case-by-case process based on the facts and circumstances of each case. (Even 2007)

Essentially, as the AGO notes, the courts have found that people have a right under Article II, Section 1 of the constitution to circulate initiative and referendum petitions in large regional shopping malls. A number of court cases contrib-

uted to this, including *Alderwood Assocs. v. Envtl. Council* (1981), *Initiative 172 v. Fair Ass'n* (1997), and *Waremart v. Progressive Campaigns* (1999). In *Waremart*, the state Supreme Court wrote,

> In reaching our decision, we wish to emphasize that we are firm in our view that an owner of private property should generally have the right to determine what lawful activities take place on the privately owned premises. We have . . . recognized a narrow exception to the property owner's sovereignty over the property in favor of the activities of initiative petitioners in cases where the private property on which they seek to gather signatures is a shopping center that bears the earmarks of a town square or public forum.

Under I-517, signature gathering and signing would be a "legally protected activity" on

- "Public sidewalks and walkways,"
- "All sidewalks and walkways that carry pedestrian traffic, including those in front of the entrances and exits of any store," and
- "Inside or outside public buildings such as public sports stadiums, convention/exhibition centers, and public fairs."

This means that signature gatherers would have free reign of ballparks and fairs, without regard to owner preference or what event is taking place. Moreover, the initiative doesn't define "public buildings" or "stores," nor does it specify whether signature gatherers would be required to follow any time and location rules set by the owner. In the absence of such details, the courts will surely have to address them (and I-517 requires that its provisions be "liberally construed to effectuate the intent, policies and purposes of this act"). A property owner's control over his property would be greatly reduced, and his ability to provide good customer service would be constrained.

A New Protected Class

In conjunction with the expansion of legal signature gathering locations, I-517 would essentially make signature gatherers a special class.

Under I-517, interfering with, retaliating against, or stalking people gathering signatures or signing petitions would be "subject to the anti-harassment procedures in chapter 10.14 RCW and civil penalties and shall be guilty of disorderly conduct under RCW 9A.84.030." RCW 10.14 allows for protection orders, which if disobeyed could become criminal penalties and a gross misdemeanor. (It's unclear what civil penalties I-517 refers to.)

The initiative does not attempt to amend RCW 10.14 to specifically include signature gathering. But it would amend RCW 9A.84.030 (disorderly conduct) to include interference with or retaliation against signature gatherers and signers.

Under I-517, a person would be guilty of disorderly conduct if he

> Interferes with or retaliates against a person collecting signatures or signing any initiative or referendum petition by pushing, shoving, touching, spitting, throwing objects, yelling, screaming, being verbally abusive, blocking or intimidating, or other tumultuous conduct or maintaining an intimidating presence within twenty-five feet of any person trying to sign any initiative or referendum petition.

RCW 9A.84.030 results in a misdemeanor. The maximum penalty for a misdemeanor is 90 days imprisonment or a $1,000 fine; for a gross misdemeanor it is 364 days imprisonment or a $5,000 fine. I-517 specifies, "Maximum penalties must be imposed against persons who interfere with the constitutionally protected right to initiative and referendum."

Assault and harassment are already illegal for everyone. A 1995 letter from then-Secretary of State Ralph Munro notes that there is already "a criminal statute designed to protect the rights of the peo-

ple to participate in the initiative process without intimidation" (Munro 1995). That statute is RCW 29A.84.250; under the law, a person is guilty of a gross misdemeanor if he "interferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum petition or with the right to vote for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice."

Further, under RCW 29A.72.110 and RCW 29A.72.120, criminal harassment penalties (RCW 9A.46.020) already apply "to any conduct constituting harassment against a petition signature gatherer." (This is also a gross misdemeanor.)

I-517 would elevate the rights of signature gatherers and signers over those who do not want to sign and feel hounded to do so. (As noted in the Voters' Guide, "Former Secretary of State Sam Reed said that most complaints received in his office were from citizens and businesses who were being harassed by signature gatherers" (McKenna et al. 2013).)

I-517 would also make it harder for a property owner or employee to object to the presence of signature gatherers or ask them to respect their customers. An opinion editorial by former Secretary of State Sam Reed and former Auditor Brian Sonntag notes, "If you make any attempt to ask a solicitor to move if they are blocking your way, to leave you alone if they are harassing you or to change their actions if they are exhibiting aggressive behavior toward you, you are in violation of the law" (Reed and Sonntag 2013).

Together with the expansion of places in which people may gather signatures unconstrained, these criminal provisions tip the scales in the signature gatherers' favor by automatically painting the owner or customer as the aggressor in any confrontation. This is very unlike the current procedure, in which law enforcement must consider whether the activity amounts to assault or harassment based on the context of the situation.

All Qualified Initiatives to the Ballot

In addition to the initiative power at the state level, some cities and towns in Washington allow initiative and referenda. Whether or not a city has these powers depends primarily on the type of city it is (first class, second class, commission, or code). First class cities and code cities may adopt initiative and referendum powers; commission cities have them; second class cities and towns do not have them. Of the 281 municipalities in Washington, 59 allow initiatives and referenda.

Even if a city has initiative and referendum powers, they may only be used in certain situations. As we explained in our 2011 policy brief, "Initiatives and Referenda at the Local Level,"

> Courts have ruled that there are limits to the use of initiatives and referenda. In order for these powers to be used, the action involved must first be legislative—not administrative. Then, for legislative actions, if the state legislature has not given the power to act on a particular matter directly to the legislative authority of a city or county (but has instead given it to the electorate), then initiative and referendum powers are applicable. (WRC 2011)

I-517 states that "any state or local initiative for which sufficient valid voter signatures are submitted within the time period required must be submitted to a vote of the people at the next election date." Currently, the sufficiency of the signatures and whether the subject matter is beyond the initiative power may be challenged prior to the election. The constitutionality of the subject matter may only be challenged after the election.

In *Futurewise v. Reed* (2007), the state Supreme Court ruled (regarding a statewide initiative),

> Preelection review of initiative measures is highly disfavored. The fundamental reason is that 'the right of initiative is nearly as old as our consti-

> tution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on other branches of government.' Given the preeminence of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed. . . . Thus, preelection substantive challenges are not justiciable. (Citations omitted.)

Some pre-election challenges are deemed to be valid, though:

> We will therefore consider only two types of challenges to an initiative prior to an election: that the initiative does not meet the procedural requirements for placement on the ballot . . . and that the subject matter of the initiative is beyond the people's initiative power. If an initiative otherwise meets procedural requirements, is legislative in nature, and its 'fundamental and overriding purpose' is within the State's broad power to enact, it is not subject to preelection review. That the law enacted by an initiative might be unconstitutional does not mean that it is beyond the power of the State to enact. Therefore, a claim that an initiative would be unconstitutional if enacted is not subject to preelection review. (*Futurewise v. Reed*, citations omitted.)

This second type of challenge is rarely successful at the state level: According to *Futurewise*, the Washington Supreme Court has only once "struck down a statewide initiative prior to election on the ground that its subject was beyond the initiative power."

Success happens more often at the local level. For example, in 2012, the state Supreme Court ruled on a pre-election challenge to a local initiative in Mukilteo. It ruled that the subject matter was not within the initiative power "because the legislature expressly granted authority to the governing body of the city of Mukilteo to enact ordinances on the use of automated traffic safety cameras" (*Mukilteo Citizens for Simple Gov't v. City of Mukilteo*).

In 2012, a local initiative in Bellingham was removed from the ballot by Superior Court Judge Charles Snyder, after the City Council filed a lawsuit. According to *Cascadia Weekly*, city attorneys argued that the proposed initiative "exceeded citizens' right to direct legislation in key respects. The legislation must be within the scope of the powers, function and duties of the city . . . . It must relate to matters under the control of the legislative branch" (Johnson 2012).

In 2013, Spokane County and three Spokane City Council members were plaintiffs (among others) in a challenge to a ballot measure that had garnered enough signatures to go on the November ballot. A Superior Court judge sided with the plaintiffs on the grounds that the provisions "either conflicted with state and federal law or infringed on the powers of local government to set policy" (Deshais 2013).

Under I-517, state and local initiatives with sufficient valid signatures must be submitted to a vote at the next election, regardless of whether the subject matter is within the initiative power.

Additionally, government officials would not be able to obstruct the processing of any initiative petition or the public vote of any initiative. This means that city council members (as in the above examples) would not be able to sue to keep an initiative off the ballot even if it would be illegal for them to implement. As noted in the Bellingham case,

> [Superior Court Judge Charles] Snyder said he believed it was appropriate for the city to seek legal guidance from the courts on the validity of what it is the ordinance proposes to do.
>
> "The city has no right to act illegally," Snyder said. "The city has the legal right to come to court and say, 'Don't make us do something that is against the law.'" (Johnson 2012)

I-517 also states that

> For local initiatives, government offi-

> cials must, in all circumstances, strictly comply with the requirements of this act for any initiative regardless of its subject matter. The term 'local legislative authority' must be construed to include the people via local initiative regardless of the subject matter of the ballot measure.

As stated in our 2011 report, initiative and referendum powers are currently applicable only "if the state legislature has not given the power to act on a particular matter directly to the legislative authority of a city or county (but has instead given it to the electorate)" (WRC 2011).

Thus, I-517 would dispense with pre-election review of subject matter and it would expand the cases in which the initiative power may be used. Should more initiatives go to the ballot, local governments would face increased election costs. They could also have increased legal costs: The *Pacific Northwest Inlander* quoted County Commissioner Todd Mielke as saying that the Spokane challenge was an effort "to minimize exposure of taxpayer dollars [to] potential litigation" (Groover 2013).

Additional Time to Collect Signatures

I-517 would extend the amount of time in which the requisite number of signatures must be gathered and filed from ten months to 16 months prior to the election (or prior to the next regular session of the Legislature, in the case of an initiative to the Legislature). Even with this change, compared to other states that allow initiatives, Washington would still be in the middle of the pack in terms of circulation times. According to the National Conference of State Legislatures (NCSL), the limits range from three months to two years (and some states have no time limits at all). But, as NCSL notes,

> Interestingly, longer circulation periods do not necessarily lead to an increased number of initiatives on the ballot. Some of the states with the longest circulation periods—such as Florida and Illinois—have very few measures on the ballot. Some states with the shortest circulation periods—such as California, Colorado and Washington—are among the states with the highest number of initiatives that reach the ballot. Providing more time for gathering signatures, therefore, should not lead to a flood of initiatives on the ballot. (NCSL 2013)

While the length of time for signature gathering does not necessarily correlate with more initiative activity, I-517 would extend the time that signature gatherers would be practicing their craft in public and private spaces.

Comment

Initiative 517 is called the "Protect the Initiative Act." One could wonder why exactly it needs extra protection—Washington's initiative scene is remarkably vibrant as it is.

In effect, the initiative would significantly impact property rights; make signature gatherers a special class not to be interfered with; and require that every initiative with enough signatures go to the ballot, while also expanding the local initiative power. For decades, the courts have balanced property rights with the right to petition government through initiative and referenda. Washingtonians have been well served by the process. I-517 negatively disrupts the finely honed balance. If approved, it will surely be challenged in court.

References

Alderwood Assocs. v. Envtl. Council, 96 Wn.2d 230, 635 P.2d 108 (1981).

Deshais, Nicholas. 2013. "Judge orders 2 initiatives to be blocked from ballot." *Spokesman-Review*, August 24. Accessed October 3, 2013.

Even, Jeffrey T. 2007. Jeffrey T. Even to Representative Skip Priest, May 2.

Futurewise v. Reed, 161 Wn.2d 407 (2007).

Groover, Heidi. 2013. "County, three city council members sign on to initiative challenge." *Pacific Northwest Inlander*, June 21. Accessed October 3, 2013.

Initiatve 172 v. Fair Ass'n, 88 Wn. App. 579, 945 P.2d 761 (1997).

Johnson, Tim. 2012. "Initiative struck from ballot; supporters appeal decision." *Cascadia Weekly*, August 8. Accessed October 3, 2013.

McKenna, Rob, Brian Sonntag, Jan Gee, Frank Ordway, and Andrew Villeneuve. 2013. "Rebuttal of Argument For." 2013 Voters' Guide.

Mukilteo Citizens for Simple Gov't v. City of Mukilteo, 174 Wn.2d 41 (2012).

Munro, Ralph. 1995. Ralph Munro to Norm Maleng, May 26.

National Conference of State Legislatures (NCSL). 2013. "Petition Circulation Periods." Accessed October 4, 2013.

Reed, Sam, and Brian Sonntag. 2013. "I-517 is flawed measure on initiatives and should be defeated." *Seattle Times*, October 5. Accessed October 8, 2013.

Waremart v. Progressive Campaigns, 139 Wn.2d 623 (1999).

Washington Research Council (WRC). 2011. "Initiatives and Referenda at the Local Level." PB 11-15. August 22.

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