

To: CFEWG

From: Geoff Wilson

Re: *Use of random sample to check for sufficiency of signatures on petitions in Colorado*

Date: March 12, 2018

The group asked that I look into the use of random sampling for determining the sufficiency of petitions at the State and local level in Colorado elections.

Municipal petitions

As we have discussed in the working group, there are a number of municipal petition processes provided for in the Colorado constitution and statutes. These include initiative, referendum, recall, nomination of candidates and the amendment of home rule charters. I have been unable to locate use of a random sampling by *any* Colorado municipality, as to any form of petition. I consulted as well with Colorado municipal election law expert Karen Goldman (former Lakewood and Aurora clerk, now a CML consultant, with whom I have worked for decades on elections legislation), who confirmed that the reason for this was simply that, with the relatively small number of signatures required on a local petition, a random sampling regime just makes no sense. It's not worth the aggravation. Like Lynnette, every clerk just checks *every* signature.

State Initiative and referendum petitions

Colorado statutes direct the Secretary of State to use random sampling to review the sufficiency of signatures on statewide initiative petitions. C.R.S. 1-40-116(4) (attached). A state initiative petition must presently have in excess of 98,400 valid signatures (5% of number who voted for Secretary of State in last election). A random sample of 5% of the signatures, but in no event less than 4000 signatures is examined. For an initiated statute, if the sample indicates that 90% or less of the number of signature required for the petition to be sufficient are valid, the petition will be found insufficient. If the sample shows 110% or more of the number for sufficiency, the petition is approved. If the number comes in at more than 90% but less than 110%, *all* signatures are examined. The statute prescribes a similar regime for initiated constitutional amendments.

Following review of signatures, the Secretary issues a statement of sufficiency or insufficiency, and a 15-day cure period is provided. C.R.S. 1-40-117

The statute authorizes the Secretary to make rules relating to random sampling. Secretary of State Rule 15.5 provides some additional details on the mechanics of such petition verification.

Options: Use of random sampling, *signature verification* to verify petitions in Boulder

- (1) **Status quo.** The small number of total signatures required on City petition allows Lynnette's current, very thorough examination of signature lines for patent defects and against the registered elector list (as we have previously discussed). It is questionable whether signature verification, whether through a sample regime, or applied to every signature, would achieve an increased level of petition integrity commensurate with the effort involved. Insofar as the initiative power is a reserved power of the people, requirements with only a tenuous justification as serving to protect the integrity of the election process can be suspect. See, e.g.: *Am. Const. Law Found. v. Meyer*, 525 U.S. 182 (1999).
- (2) **Provide for signature verification of a set percentage of signatures**, modeled after the State random sample statute. The percentage should consider (1) the statistical validity of sample, and that (2) unlike the petition signature lines randomly reviewed by the State, the signatures reviewed in Boulder will be on signature lines that have already been found sufficient in every *other* respect (this could diminish the "election integrity" rationale for this intrusion into the initiative process). As with the State scheme, if the municipal sample showed validity above or below certain thresholds, the petition would be accepted, rejected or subjected to further examination.

The municipal election code process for signature verification on mail ballots is detailed at C.R.S. 31-10-910.3 (attached). This statute provides a good overview of the sort of process presently utilized for signature verification in Colorado municipal elections. Should Boulder decide to utilize signature verification on local petitions, an ordinance similar to this statute would doubtless be required.

- (3) **Provide for signature verification of every signature on a petition.** Current signature verification requirements apply to *all* mail in ballots, C.R.S. 1-7.5-204(1)(b)(III); 31-10-910(3) and *all* signatures on nominating petitions for various state offices, C.R.S. 1-4-908(1.5).

Colorado Statutes

Title 1. ELECTIONS

INITIATIVE AND REFERENDUM

Article 40. Initiative and Referendum

Current through Chapter 3 of the 2018 Legislative Session

§ 1-40-116. Validation - ballot issues - random sampling - rules

(1)

For ballot issues, each section of a petition to which there is attached an affidavit of the registered elector who circulated the petition that each signature thereon is the signature of the person whose name it purports to be and that to the best of the knowledge and belief of the affiant each of the persons signing the petition was at the time of signing a registered elector shall be prima facie evidence that the signatures are genuine and true, that the petitions were circulated in accordance with the provisions of this article, and that the form of the petition is in accordance with this article.

(2)

Upon submission of the petition, the secretary of state shall examine each name and signature on the petition. The petition shall not be available to the public for a period of no more than thirty calendar days for the examination. The secretary shall assure that the information required by sections 1-40-110 and 1-40-111 is complete, that the information on each signature line was written by the person making the signature, and that no signatures have been added to any sections of the petition after the affidavit required by section 1-40-111(2) has been executed.

(3)

No signature shall be counted unless the signer is a registered elector and eligible to vote on the measure. A person shall be deemed a registered elector if the person's name and address appear on the master voting list kept by the secretary of state at the time of signing the section of the petition. In addition, the secretary of state shall not count the signature of any person whose information is not complete or was not completed by the elector or a person qualified to assist the elector. The secretary of state may adopt rules consistent with this subsection (3) for the examination and verification of signatures.

(4)

(a)

The secretary of state shall examine the signatures on the petition by use of random sampling. The random sample of signatures to be examined must be drawn so that every signature filed with the secretary of state is given an equal opportunity to be included in the sample. The secretary of state is authorized to engage in rule-making to establish the appropriate methodology for conducting such random sample.

(b)

(I)

The random sampling to validate signatures on a petition proposing an initiated law must include an examination of no less than five percent of the signatures, but in no event fewer than four thousand signatures. If the random sample examination establishes that the number of valid signatures is ninety percent or less of the number of registered eligible electors needed to find the petition sufficient, the secretary of state shall deem the petition to be not sufficient. If the random sample establishes that the number of valid signatures totals one hundred ten percent or more of the number of required signatures of registered eligible electors, the secretary of state shall deem the petition sufficient. If the random sample shows the number of valid signatures to be more than ninety percent but less than one hundred ten percent of the number of signatures of registered eligible electors needed to declare the petition sufficient, the secretary of state shall order the examination and validation of each signature filed.

(II)

The random sampling to validate signatures on a petition proposing an amendment to the state constitution must include an examination of no fewer than five percent of the signatures, but in no event less than four thousand signatures. If the random sample establishes that the number of valid signatures is ninety percent or less of the number of registered electors required by section 1 (2) of article V of the state constitution to find the petition sufficient, the secretary of state shall deem the petition to be not sufficient. If the random sample shows the number of valid signatures to be more than ninety percent of the number of registered electors required by section 1 (2) of article V of the state constitution to declare the petition sufficient, the secretary of state shall order the examination of each signature filed.

Cite as C.R.S. § 1-40-116

History. Amended by 2017 Ch. 169, §5, eff. 8/9/2017.

L. 93: Entire article amended with relocations, p. 686, § 1, effective May 4. L. 95: (1) amended, p. 435, § 12, effective May 8.

Editor's Note:

This section is similar to former § 1-40-109 as it existed prior to 1993, and the former § 1-40-116 was relocated.

Case Notes:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment, "Buckley v. American Constitutional Law Foundation, Inc.: The Struggle to Establish a Consistent Standard of Review in Ballot Access Cases Continues", see 77 Den. U. L. Rev. 197 (1999).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Subsection (1) is not unconstitutionally vague. The general reference to circulator affidavits in this section is controlled by the specific affidavit requirements in § 1-40-111(2). *Am. Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995 (D. Colo. 1994), *aff'd* in part and *rev'd* in part on other grounds, 120 F.3d 1092 (10th Cir. 1997), *aff'd* on other grounds, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

The secretary of state is deemed to have complied with the 30-day requirement for verifying signatures when he or she conducts the random sampling and issues a statement determining the petition to be either sufficient or insufficient, even though the sampling is later found to be erroneous. The petition is not automatically deemed sufficient even though final determination of the sufficiency of the petition occurs outside of the thirty-day time frame. *Buckley v. Chilcutt*, 968 P.2d 112 (Colo. 1998).

If, based on a random sample, the secretary of state issues a good faith determination of insufficiency and a timely protest establishes that the petition contains more than 90% but less than 110% of the required signatures, the secretary of state is required to conduct a line-by-line examination of each signature. The results of the line-by-line count are subject to the protest and appeal process provided in § 1-40-118. *Buckley v. Chilcutt*, 968 P.2d 112 (Colo. 1998).

II. PRIMA FACIE EVIDENCE SIGNATURES

GENUINE.

The statement in an affidavit attached to a petition for the initiation of a measure, that the signer "is a qualified elector", is prima facie evidence that the signatures thereon are genuine and that the persons signing are electors. *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

And the filing of a protest to the petition does not nullify this prima facie status nor relieve the protestants of the burden of establishing the insufficiency of the petition. *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

Moreover, payment to circulators for procuring signatures held not to constitute fraud. A protest filed to a petition to initiate a measure, alleging fraud in the procurement of signatures, is not supported by the fact that circulators were paid a certain sum for signatures procured, there being nothing in the constitution or statutes prohibiting such practice. *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

III. AMENDMENT AND WITHDRAWAL OF PETITION.

There is no provision permitting the amendment of a protest to a petition for the initiation of a measure after the expiration of the time allowed for filing the protest. *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

The provision that a rejected petition for the initiation of a measure may be refiled "as an original petition" after amendment is to be construed, not that it must be refiled within the statutory time fixed for the initial filing of such petitions, but after being refiled it is to be considered "as an original petition". *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

Former subsection (2), which provided that a rejected petition may be amended and refiled as an original, did not subject a cured petition to the deadline set forth in Colo. Const. art. V, § 11 (2). *Montero v. Meyer*, 795 P.2d 242 (Colo. 1990) (decided under law in effect prior to 1989 amendment).

But where a petition for the initiation of a constitutional amendment is filed within the time fixed by statute, in the event of protest and rejection, the sponsors, at their election, are entitled to refile the petition when amended within the 15 days allowed by this section. *Brownlow v. Wunch*, 103 Colo. 120, 83 P.2d 775 (1938).

This is true even though the refile date may fall beyond the six-month period fixed by § 1-40-104 for the filing of original petitions. *Brownlow v. Wunch*, 103 Colo.

120, 83 P.2d 775 (1938).

And there is no statutory authorization for a protest against the filing, or refiling after withdrawal, of a petition, to initiate a measure under the initiative and referendum. Brownlow v. Wunch, 102 Colo. 447, 80 P.2d 444 (1938).

Moreover, when a petition to initiate a measure under initiative and referendum is once withdrawn, it passes from official control and may be tampered with, amended, or destroyed. Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932); Brownlow v. Wunch, 102 Colo. 447, 80 P.2d 444 (1938).

If the petition is withdrawn, no review can thereafter be prosecuted because without the petition no court could adjudicate its sufficiency. Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932).

And an action to review an order of the secretary of state declaring a referendum petition insufficient cannot be left standing until the petition is amended and refiled, and later tried on an issue which did not exist when the cause was instituted. Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932).

An action for review cannot survive a withdrawal to be further prosecuted on amendment and refiling because if refiled it comes back "as an original petition". Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932).

Therefore, the withdrawal of such a petition is equivalent to the dismissal of an action to review. Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932).

And a demand for its withdrawal and a suit in mandamus to enforce that demand must necessarily have the same effect. Robinson v. Armstrong, 90 Colo. 363, 9 P.2d 481 (1932).

Rule of the secretary of state regarding the procedure to determine the total number of valid petition signatures after submittal of additional signatures by addendum was authorized and is consistent with subsection (4). The rule increases the accuracy of sufficiency determination, enhances the integrity of the petition process, and assures compliance with the constitutionally prescribed minimum number of votes necessary to qualify for placement of a measure on the statewide ballot. Fabec v. Beck, 922 P.2d 330 (Colo. 1996).

IV. SUPPLEMENTS TO THE PETITION.

Section 1 of art. V, Colo. Const., fixes the time within which a petition must be filed with the secretary of state. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

And requires a certain number of signatures of legal voters to be affixed thereto before a matter can be submitted to the voters at an election. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

Section 1 of art. V, Colo. Const., is a self-executing constitutional provision. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

So where there are insufficient signatures when a petition is originally presented, and too late filing when the supplements are presented, the petition for an initiated amendment to the constitution is not filed in compliance with § 1 of art. V, Colo. Const. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

Because permitting the filing of late supplements containing enough signatures to satisfy the mandate of the constitution would be a circumvention of this fundamental document. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

Moreover, § 1 of art. V, Colo. Const., mandatorily forecloses the acceptance of tardy supplements to a petition for an initiated amendment to the constitution. Christensen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958).

Colorado Statutes

Title 31. GOVERNMENT - MUNICIPAL

MUNICIPAL ELECTIONS

Article 10. Municipal Election Code

Part 9. PAPER BALLOTS

Current through Chapter 3 of the 2018 Legislative Session

§ 31-10-910.3. Verification of signatures - signature verification devices - procedures - training - definitions

(1)

(a)

In every mail ballot election conducted after March 30, 2018, an election judge shall, except as provided in paragraph (b) of this subsection (1), compare the signature on the self-affirmation on each return envelope with the signature of the eligible elector stored in the statewide voter registration system in accordance with this section.

(b)

A clerk may allow an election judge to use a signature verification device to compare the signature on the self-affirmation on a return envelope of an eligible elector's ballot with the signature of the elector stored in the statewide voter registration system in accordance with this section.

(2)

(a)

The election judges must compare the signature on the self-affirmation on each return envelope with the signature provided by the secretary of state pursuant to section 1-2-301, C.R.S. The election judges must research the signature further if there is:

(I)

An obvious change in the signature's slant;

(II)

A printed signature on one document and a cursive signature on the other document;

(III)

A difference in the signature's size or scale;

(IV)

A difference in the signature's individual characteristics, such as how the "t's" are crossed, "i's" are dotted, or loops are made on "y's" or "j's";

(V)

A difference in the elector's signature style, such as how the letters are connected at the top and bottom;

(VI)

Evidence that ballots or envelopes from the same household have been switched; or

(VII)

Any other noticeable discrepancy such as misspelled names.

(b)

(I)

If an election judge must conduct further research on an elector's signature, he or she must check the additional signatures provided by the secretary of state pursuant to section 1-2-301, C.R.S., if available.

(II)

An election judge may compare additional information written by the elector on the return envelope, such as the elector's address and date of signing. Any similarities noted when comparing other information may be used as part of the signature verification decision process.

(III)

If an election judge determines that an elector inadvertently returned his or her ballot in another household member's ballot return envelope, the election judge must process and prepare the ballot of the elector who signed the self-affirmation for counting if it is otherwise valid. The election judge need not send a signature verification discrepancy letter to the elector.

(c)

If the election judges dispute the signature, they must document the discrepancy and the research steps taken in a log that identifies the elector only by name and elector identification number, does not contain the elector's

signature, notes the final resolution and ballot disposition, and identifies the election judges responsible for the final resolution and ballot disposition.

(3)

(a)

If the election judge determines that the signature of an eligible elector on the self-affirmation matches the elector's signature stored in the statewide voter registration system, the election judge shall follow the procedures specified in section 31-10-910(5) concerning the qualification and counting of mail ballots.

(b)

If a signature verification device used pursuant to paragraph (b) of subsection (1) of this section determines that the signature on the self-affirmation on a return envelope of an eligible elector's ballot matches the signature of the elector stored in the statewide voter registration system, the signature on the self-affirmation is deemed verified, and the election judge shall follow the procedures specified in section 31-10-910(5) concerning the qualification and counting of mail ballots.

(4)

If, upon comparing the signature of an eligible elector on the self-affirmation on the return envelope with the signature of the eligible elector stored in the statewide voter registration system, the election judge determines that the signatures do not match, or if a signature verification device used pursuant to paragraph (b) of subsection (1) of this section is unable to determine that the signatures match, two other election judges shall simultaneously compare the signatures and proceed according to subsection (5) of this section.

(5)

(a)

If the two other election judges specified in subsection (4) of this section agree that the signature of an eligible elector on the self-affirmation matches the elector's signature stored in the statewide voter registration system, the initial election judge shall follow the procedures specified in section 31-10-910(5) concerning the qualification and counting of mail ballots.

(b)

In the case of a disagreement between the two other election judges as to whether the signature of an eligible elector on the self-affirmation on the return envelope

matches the signature of the eligible elector stored in the statewide voter registration system pursuant to the procedures specified in subsection (4) of this section, the signatures are deemed to match, and the initial election judge shall follow the procedures specified in section 31-10-910(5) concerning the qualification and counting of mail ballots.

(c)

(I)

If both other election judges agree that the signatures do not match, the clerk shall, within three days after the signature deficiency has been confirmed, but in no event later than two days after election day, send to the eligible elector at the address indicated in the registration records a letter explaining the discrepancy in signatures and a form for the eligible elector to confirm that the elector returned a ballot to the clerk.

(II)

(A)

If the clerk receives the form within eight days after election day confirming that the elector returned a ballot to the clerk, and if the ballot is otherwise valid, the ballot must be counted.

(B)

If the eligible elector returns the form indicating that the elector did not return a ballot to the clerk, or if the eligible elector does not return the form within eight days after election day, the self-affirmation on the return envelope must be categorized as incorrect, and the ballot shall not be counted. An original return envelope with an enclosed secrecy envelope containing a voted ballot that is not counted in accordance with this sub-subparagraph (B) must be stored in the office of the clerk in a secure location separate from valid return envelopes and may be removed only by order of a court having jurisdiction.

(6)

An election judge shall not determine that the signature of an eligible elector on the self-affirmation does not match the signature of that eligible elector stored in the statewide voter registration system solely on the basis of substitution of initials or use of a common nickname.

(7)

The clerk shall provide training in the techniques and standards of signature comparison to election judges who

compare signatures pursuant to this section.

(8)

As used in this section, "statewide voter registration system" means the statewide voter registration system created pursuant to section 1-2-301, C.R.S.

Cite as C.R.S. § 31-10-910.3

History. Added by 2016 Ch. 130, §1, eff. 8/10/2016.