



**Remote Legislative Committee
Meeting
June 22, 2020**

AGENDA

I. Connecting via Zoom

- a. The Legislative Committee will hold a remote meeting on Monday, June 22, 2020 at 9:00 AM. This meeting will take place remotely using Zoom. Virtual meetings are allowed using emergency legislation approved by LD 2167; 1 M.R.S. §403-A, that authorizes cities and towns to conduct meetings online.

Allow your computer to install the free Zoom app to get the best meeting experience. If you are not able to attend live, a recording will be uploaded to portlandmaine.gov/livestream the next day.

For public comment, you will need to use the "raise your hand" feature. To raise your hand via the telephone, please hit *9. You will be un-muted by the host when it is time for public comment. Please click the link below to join the webinar:

<https://us02web.zoom.us/j/83877359905>

Or iPhone one-tap :

US: +19292056099,,83877359905# or +13017158592,,83877359905#

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Webinar ID: 838 7735 9905

II. Call to Order

III. Approval of Meeting minutes

- a. Minutes for June 8, 2020 Meeting
- b. Minutes for June 8, 2020 Workshop

IV. Signature Gathering Update & Discussion

- a. Update to be provided by Corporation Counsel, City Clerk

V. Revenue Sharing Discussion with Legislative Delegation to Augusta

VI. Meeting Schedule

VII. Adjournment

MEMORANDUM

TO: Chair Ali and Members of the City of Portland Legislative Committee
FROM: Danielle P. West-Chuhta, Corporation Counsel
DATE: June 17, 2020
RE: Collection of Voter Signatures on Nomination, Initiative or Referenda Petitions

At the last Legislative Committee meeting, you asked me to research whether or not the Maine Constitution, Portland City Charter, and/or Portland City Code permit electronic voter signatures on nomination, initiative, or referenda petitions. You have also asked me to evaluate whether or not there are any potential solutions that would help decrease barriers to collecting voter signatures during the COVID-19 health crisis.

BACKGROUND

Four primary sources of law are implicated in this issue: (1) the Maine Constitution; (2) State statutes, (3) the Portland City Charter, and (4) the Portland City Code.

I. Background & Summary of Applicable State Statutes and Constitution

The Maine Constitution permits citizens to initiate legislation through a written petition directly. The Constitution defines "written petition" as one where the original signatures are attached, the circulator has made an oath attesting that all signatures "were made in the presence of the circulator," and that the circulator believes to the best of his or ability that the "signature is the signature of the person whose name it purports to be."

The Constitution additionally grants municipalities control over direct voter initiatives and people's vetoes concerning municipal issues. However, the State constitution does require that "the ordinance establishing and providing the method of exercising such direct initiative and people's veto shall not take effect until ratified by a vote of a majority of the electors of the city, voting thereon at a municipal election." The Constitution also provides that the Legislature may at any time provide a uniform method for the exercise of the initiative or referendum in municipal affairs."

In addition to the Maine Constitution, the Maine Legislature has codified elements of these constitutional requirements into state statutes for both state ballot questions and nomination requirements for candidates. Specific to ballot questions, a "circulator of a petition solicits signatures for the petition by presenting the petition to the voter, asking the voter to sign the petition and personally witnessing the voter affixing the voter's signature to the petition." 21-A M.R.S. § 903-A (2019).

II. Background & Summary of Relevant City of Portland Code and Charter Provisions

Under the Portland Charter and City Code, voter signatures are required for two primary purposes: (1) petitions gathering signatures for nomination petitions, and (2) petitions gathering signatures for initiative and referenda petitions. The requirements governing nomination petitions are outlined in the City Charter, while Chapter 9 of the Portland City Code governs initiative and referenda petition requirements.

A. Nomination Petitions

For a candidate to appear on the ballot, he or she must receive a set number of signatures, as outlined in the City Charter. A candidate for an at large city council seat or an at large school board seat must have between 300-500 signatures from registered voters. City Charter Art. IV § 4. A candidate for a district school board or city council seat must receive 75-150 signatures from registered voters. *Id.*

B. Initiatives & Referenda

Chapter 9 of the Portland City Code sets forth procedural steps for initiative and referenda petitions, as well as certain form and signature requirements.

a. Procedural Steps for Initiative and Referenda Petitions

For an initiative or referenda to appear on the ballot, the following steps must occur:

- (1) A petitioners' committee comprised of 10 registered voters files an affidavit with the city clerk. Ch. 9, § 9-36(c)(1-4).
- (2) After the affidavit is filed, the city clerk has seven days to prepare the petition forms. *Id.* § 9-36(c)(4).
- (3) Members of the committee and other registered city voters circulate the petition for signatures by registered voters. *Id.* The City Code requires at least 1,500 signatures from registered voters. *Id.* § 9-36(a).
- (4) The petition may be circulated for up to 80 calendar days from the date of issuance. The petition must be returned to the city clerk by the close of business on the 80th calendar day. *Id.* § 9-36(d).
- (5) The city clerk has 15 days in which to verify the petition.
- (6) After verifying that there are 1,500 valid signatures on the petition, the clerk forwards a report to the City Council, which sets a date for a public hearing. The Council must set a hearing within 30 days of receiving the report of a sufficient petition. *Id.* § 9-36(f).
- (7) At the next city council meeting following the public hearing, the City Council must set a date for a special election. The city council must set the election date for between 50-150 days after the city council meeting. *Id.* § 9-39.

b. Number of Required Signatures

In addition to the above-stated procedural steps, the City Code additionally sets forth certain requirements for the number of signatures that must be received. First, section 9-36 makes clear that a petition is only valid if at least 1,500 signatures from registered voters have been received. Ch. 9, § 9-36. A petition is only sufficient and will advance to the city council for a public hearing if the city clerk verifies that there are at least 1,500 valid signatures from registered voters. *Id.* § 9-36(f).

c. Required Petition Form

Finally, the City Code makes clear that the petition must adhere to specific form requirements. *See id.* § 9-37(a).

- (1) The petition must be on paper of uniform size and identify the signature, printed name, residence, and date of each signatory. *Id.*
- (2) "Each signature must be in ink or other indelible instrument." *Id.*
- (3) The person who circulated the petition must attest that the circulator personally circulated the form; the signatures on the form were signed in the circulator's presence; and that the circulator believes each signature was signed by the person the signatory purports to be and believes that each signature is genuine. *Id.*

CASE LAW

I. Maine Case Law

In addition to the above statutes, several cases have been decided by the Law Court and Superior Court that provide some helpful guidance.

A. **Maine Case Law on the meaning of “presence” in the State Constitution and City Code**

The Maine Constitution, State statutes, and Portland City Code reference the signing of petitions "in the presence" of the circulator. This phrasing raises the central question of whether "presence" can be interpreted into include electronic "presence" through, for example, Zoom. The Law Court has provided some guidance on how this term should be interpreted, although Maine courts have not squarely answered this question.

In *Knutson v. Dep't of Sec'y of State*, the Law Court upheld the Secretary of State's interpretation of "presence," as meaning that the "circulator must be personally involved and observe the signatures." *Knutson v. Dep't of Sec'y of State*, 2008 ME 14, ¶ 2, 954 A.2d 1054 (2008). In rejecting the petitioner's argument that "presence" means "proximity," the Law Court agreed with the Secretary's interpretation that "'presence' requires both proximity and awareness." The Court deferred to the Secretary of State's interpretation that "presence means" "under the direct observation of that circulator" based on the requirement that each circulator takes an oath. *Id.* ¶ 12. Because each circulator must attest that "each signature is the signature of

the person whose name it purports to be” being in the same general area as the signatory is not sufficient. *Id.* If the circulator is too far away, the circulator will not be able to verify that the signature of the person signing, which would inhibit the circulator’s ability to take the oath. *Id.*

In addition to upholding the Secretary of State's interpretation of "in the presence of," the Law Court also evaluated the validity of the petitioner's motion for a stay to allow the petitioner to seek review of the opinion by the United States Supreme Court. ¶ 1. The Law Court held that there was little success on the merits because the requirement of the circulator's "presence" does not "significantly inhibit communication with voters about proposed political change." *Id.* ¶ 6 (quoting *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 192 (1999)).

In summary this case demonstrates that the Law Court not only defers to the Secretary of State’s interpretation of Maine election laws, but supports a more conservative definition of in the “presence.”

B. Maine Courts’ Approach to “Electronic” Submission and Certification of Petitions

Maine courts have not explicitly addressed electronic signatures, but have directly addressed electronic submissions and certifications of petitions. In *Hammer v. Sec’y of State* the Law Court upheld the Secretary of State’s interpretation that section 354 (addressing nomination petitions) “require[s] the presentation of original signatures, and therefore [] preclude[s] the submission of petition for municipal certification by electronic means.” *Hammer v. Sec’y of State*, 2010 ME 109, ¶ 2, 8 A.3d 700 (2010). In this particular case, the petitioner submitted scanned copies of signed petitions to town registrars for certification through an internet file-sharing program. *Id.* at *703. The Secretary of State rejected these signatures as “invalid” because they had not been properly delivered per the requirements of 21-A M.R.S. § 354(&)(B)-C). This statutes specifically require that voters “must personally sign the petition” and that “petitions must be delivered to the registrar or the clerk” and that the clerk “may not certify any names that do not satisfy [these requirements].” *Id.* at *704, 706.

The Court deferred to the Secretary of State’s interpretation of the relevant statutes and the determination that “all methods of delivery are not equivalent.” *Id.* at *706. Moreover, the Court determined that Section 354(7)(B) “contemplates the delivery of physical documents not electronic delivered” and that the requirement that petitions delivered to the clerk be “original” is not equivalent to scanned electronic submission. *Id.* at *707. Additionally, the Court looked to other provisions where the Legislature expressly contemplated the use of electronic copies as evidence that if the legislature had intended to allow other methods of delivery, it would have explicitly included this in the statute. *Id.* Moreover, not allowing copies prevents forged signatures or “material alterations to a petition.” *Id.* at *707 n.7.

Overall, this case demonstrates that the Law Court is not willing to allow electronic alternatives to petitions, unless the Legislature has expressly allowed this.

II. Federal Court Cases

Maine is not the only state grappling with the issue of how to ensure that voters are still able to collect signatures during a pandemic. Several federal courts have analyzed the constitutionality of existing petition requirements in the context of the pandemic.¹

On May 26, 2020, the Sixth Circuit granted Ohio's motion to stay the district court's injunction against the enforcement of the State's ink signature requirements, witness requirements, and submission deadlines. *Thompson v. Dewine*, 959 F.3d 804, ____ (2020) (*per curiam*). In this case, plaintiffs alleged that the enforcement of the Ohio Constitutional and statutory requirements for the initiative process violated the First Amendment. In evaluating the framework, the Court applied the *Anderson-Burdick* framework weighing "the burden imposed by the State's regulation against the precise interest put forward by the State as justifications for the burden imposed by its rule." *Id.* While the Sixth Circuit stated that courts regularly uphold regulations that set forth initiative requirements, the central question is whether those regulations restrict First Amendment rights in light of the COVID-19 pandemic. *Id.*

A. The severity of the Burden

The court looked first to the severity of the burden placed on electors to provide witnessed, ink signatures. *Id.* In this particular case, the court found that the burden was not unduly severe. *Id.* First, Ohio had exempted from the stay-at-home order both "petition and referendum circulators" and gatherings to express protected speech.

Additionally, the court also reasoned that circulators could use social media to contact electors and that the circulator could then bring the petition to the elector's home for a signature. *Id.*

Alternatively, the circulators could collect signatures in-person using specific safety measures. *Id.* The court ultimately stated that "just because procuring signatures is now harder . . . doesn't mean that the Plaintiffs are *excluded* from the ballot. . . . [the court] cannot hold private citizens' decisions to stay home for their own safety against the State." *Id.* (emphasis in original).

B. Legitimate State Interest

The Court also held that the State had a compelling interest. *Id.* First, witness and ink requirements prevent fraud and ensured authenticity. *Id.*; see also *Fair Maps Nevada v. Cegavske*, 3:20-cv-00271-MMD-WGC, 2020 WL 2798018, at *15 (D. Nev. May 29, 2020) (stating that "in-person requirements survive strict scrutiny because they are narrowly tailored to achieve their compelling government interest of preventing fraud." Second, the deadlines ensure the signatures are collected in a timely manner that allows the State to verify the signature. *Dewine*, 959 F.3d at ___. But see *Fair Maps Nevada*, 2020 WL 2798018, at *15 (granting an injunction against enforcement of the petition deadline because the administrative convenience of having more time does not outweigh the burden on First Amendment rights). Ultimately, these

¹ The opinions discussed in this section were released in the last two weeks and therefore have not yet been formatted with page numbers.

compelling interests outweighed the intermediate burden placed on electors. *Dewine*, 959 F.3d at _____.

ANALYSIS OF STATUTES, CITY CODE, AND CASE LAW

I. Plain Language

Based on a plain language reading of Chapter 9 of the Portland City Code, there is nothing to indicate that the City Council has the flexibility to alter the required number of signatures or the form of the petition. Section 9-36(f) clarifies that meeting the minimum of 1,500 signatures is a requirement for the petition to be deemed valid by the city clerk. This determination of validity is, in turn, a requirement for the Council to receive the report from the City Clerk. Similarly, there is nothing in Chapter 9 to indicate that the Council has the flexibility to change or alter the form of the petition. As such, Chapter 9 would indicate that if the Council hopes to alter the minimum number of required signatures, change the form of the petition, or allow electronic signatures, they must follow the proper channels for amending the Code and Charter with approval from voters.

This interpretation is also supported by the Maine Constitution, which expressly states that cities can only establish direct initiative petition procedures if voted on by electors in a municipal election. This provision would indicate that any changes to the municipal initiative or referendum petition process similarly must be approved by the voters.

III. Guidance from Case Law

Based solely on the Maine case law prior to the COVID-19 pandemic, precedent would seemingly support the plain language interpretation. While the Law Court has provided some guidance on what “in the presence of” means, the Law Court’s interpretation is still ambiguous. Awareness and “direct observation” could theoretically be achieved through electronic observation such as through Zoom.² However, the requirement of “proximity” suggests that the circulator and voter must share the same physical space. This narrower interpretation would preclude the use of any electronic methods of signing a petition.

Additionally, the Law Court’s skepticism of using electronic means to submit copies of petitions indicates that the Court would similarly differentiate between a physical ink signature and an electronic signature. The Court upheld the Secretary of State’s statement that “all methods of deliver are not equivalent,” which could seemingly be extend to a statement that “all methods of signatures are not equivalent.” Additionally, the Court viewed concerns over fraudulent and forged signatures to be a legitimate concern.

Finally, while the case law emerging on this issue from the federal courts is extremely new, several themes are emerging: (1) courts, which would normally uphold state initiative requirements, are more likely to hold that these requirements are overly burdensome during a

² A Signature through Zoom would be similar to the temporary modification of in-person notarization requirements. *See* Executive Order 37 FY 19/20. However, even in this case, the Executive Order “authorizes remote, not electronic, notarization.”

pandemic; (2) an express exemption of petitions from stay-at-home orders supports a finding that the requirements are not burdensome; (3) where there is no express exemptions from the stay-at-home order, there needs to be an adequate period of time for collecting signatures between when the order is rescinded and when the petitions are due; (4) timing requirements are more likely to be unconstitutional restrictions of First Amendment rights because administrative convenience is not a compelling interest; (5) in-person requirements are likely to be upheld because states have a legitimate interest in preventing fraud and in-person requirements are a tailored means of achieving this goal; (6) courts are concerned that altering or changing state initiative requirements is an impermissible extension of the courts into the legislative arena; and (7) states need more time to set up a safe and secure electronic petition platform.

While there was no express exemption for signature collection or First Amendment gatherings in Maine's stay-at-home order, the state began phase 1 of its reopening plan on May 1. As such, individuals collecting signatures will have over two (2) months between the end of the stay-at-home order and the new date of the election. According to the logic applied by the federal courts, this is likely enough time for circulators to collect signatures and would be upheld even though signature collection was not expressly exempted from the Governor's Executive Order.

POTENTIAL SOLUTIONS

You have also asked me to evaluate whether there are any potential solutions to the issues that have arisen regarding collecting of signatures.³ Assuming, as discussed above, that the City Council cannot alter the petition requirements without submitting the changes to voters for approval, there are two primary avenues available for remedying this issue: (1) an executive order; or (2) legislative action. However, both options are likely limited by the fact that the central requirements for referenda and initiative petitions are written into the Maine Constitution. This limits the ability of the Governor to issue an Executive Order or for the Legislature to pass legislation allowing for alternations to the initiative process. As a result, any change would likely require an amendment to the Maine Constitution.

While the Governor has relaxed other requirements, such as in-person government meetings, this requirement is not established in the Maine Constitution. It is solely based on a statutory provision. Therefore, the Governor had the authority to issue an Executive Order temporarily changing the requirements. In this particular case, even though there are statutes governing these petitions, the statutes themselves are grounded in the Constitution, which, for good reason, requires a process to change/amend.

Theoretically, the Legislature could regain control over the initiative and referenda process under the Constitution. However, this would not necessarily solve the problem at issue since any legislative solution would still be limited by the State Constitution.

CONCLUSION

³ Please note that based on what I can find online, the Maine Democratic Party is currently using virtual petitions for the nomination of State Delegates and State Alternates. They are using a specific online system for the submission of these signatures. However, this seems to be an individual choice that the party has made. I could not find any rules or requirements that would limit the party's ability to do this.

Ultimately, there is likely no easy or quick solution that would allow voters to sign petitions electronically. Not only does the Maine Constitution, statutes and Portland City Charter and Code make this difficult, but courts are likely to uphold in-person requirements as legitimate means of preventing fraud. Additionally, courts are seemingly wary to become heavily involved in petition requirements that should be left to the legislature.

With the above said, after speaking with the City Clerk, if the City Council was willing to have a special meeting on August 31, 2020, the petitioners would be able to collect signatures at the polling places on July 14, 2020. The petitions would then need (in order to meet the Clerk's various statutory and Secretary of State deadline's for ordering of ballots and absentee voting) to be turned into the Clerk's office on or before Friday, July 17, 2020 by 4:30 PM. This would allow the setting of a public hearing and a first reading of the items/orders at the August 17th Council Meeting, and the actual hearing, final Council action/vote to occur on August 31, 2020.

Thank you for your time. If you have any questions, the City Clerk and I will be present at the next Legislative Committee meeting.