

SB 5386, a bill to make major changes to people's initiative process

By Jason Mercier, Director, Center for Government Reform

January 2018

Introduction

Lawmakers are considering a bill that would add new hurdles for qualifying a statewide ballot measure. SB 5386 was heard by lawmakers last session but not acted on.¹ It is being reconsidered this session. Among the changes the bill would make to the people's initiative process are increasing the filing fee from \$5 to \$500 and allowing anyone to file a legal challenge before voters act on an initiative.

People's right of initiative

Before addressing the policy specifics of the bill, it is important to consider how difficult it is currently to get an initiative measure qualified for the ballot. In fact, last year no initiative proposals made it to the ballot.

What exactly is our right as citizens for initiatives? According to Article 1, Section 1 of the state constitution:²

“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”

It is because of this clear authority of power of the people over their government that before any legislative powers are granted, the people reserve for themselves basic lawmaking authority. This power is explained in Article 2, Section 1:³

“The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, 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. (a) Initiative: The first power reserved by the people is the initiative.”

This is why any proposed changes to the basic lawmaking power of the people needs serious scrutiny.

Changes proposed by SB 5386

According to the bill report for SB 5386, here are the changes proposed. The bill would:⁴

- Extend the time period in which initiative measures may be filed;
- Increase the filing fee for initiative measures from \$5 to \$500;
- Require a 45-day review of proposed initiative language by the state Code Reviser before it is submitted to the Secretary of State;
- Require a 28-day public notice and comment period on proposed initiative language before it is submitted to the Secretary of State;
- Provide a process for challenging the constitutionality of a proposed initiative

1 “SB 5386: Strengthening the initiative process by providing for more comprehensive review before initiatives receive ballot titles,” January 23, 2017, Washington State Legislature, at <http://app.leg.wa.gov/bills/summary?BillNumber=5386&Year=2017>.

2 “Washington State Constitution,” Washington State Legislature, at <http://leg.wa.gov/LAWSANDAGENCYRULES/Pages/constitution.aspx>.

3 Ibid.

4 “Senate Bill Report – SB 5386,” January 16, 2018, Washington State Legislature, at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/5386%20SBA%20SGTE%2018.pdf>.

measure in court before voters have a chance to vote on it.

Let's review each of these provisions.

First the bill would change the current filing deadline for measures proposed to the people from 10 months before an election to 18 months. It would also increase the time for measures proposed to the legislature from 10 months before a session to 15 months. This extra time would provide more opportunity for volunteer signature gathering.

Next the bill would increase the filing fee. While a case can be made for increasing the very low \$5 filing fee, requiring \$500 contradicts the stated intent of the bill "to reduce the burdens for ordinary citizens seeking to file initiatives." Increasing the filing fee by so much makes it look like bill sponsors are trying to make it harder for citizens to file initiatives, not easier.

Currently the Code Reviser has seven days to work with a ballot measure sponsor before the measure is submitted to the Secretary of State. SB 5386 would change that to up to 45 days, adding a significant time delay.

Though the proposed 28-day period for public review should be significantly shortened (perhaps to five days), the concept does have merit. Bills proposed by lawmakers are subject to public hearings before they are acted on to help perfect the proposals and address unforeseen problems.

Initiatives, however, do not get this type of public review before being finalized. Having some type of public comment period would be similar to holding a public hearing to correct any problems. Like with legislative bills, the sponsor of an initiative would not be required to make any changes to the proposal but would have the opportunity to do so.

Authorizing legal challenges before the people have a chance to vote

Perhaps the most controversial aspect of the bill is the provision allowing "any person [to] seek a declaratory judgment that a proposed initiative measure is unconstitutional on its face within thirty days

after a measure is submitted to the secretary of state for assignment of a serial number."

As noted by the bill report:⁵

"Washington courts have declined to consider the constitutionality of ballot measure language prior to voter approval of the measure at the polls."

Not only would this new authority for anyone to file pre-election lawsuits add delay, it would also expose bill sponsors to undue legal costs before the voters even act. It is important to note that bills proposed by lawmakers are not subject to pre-passage constitutional challenge – neither should ballot proposals sponsored directly by the people.

Permitting pre-election challenges would allow judges to deny the people their right to decide on ballot measure for themselves.

If a ballot measure is found to have legal flaws after adoption by the people, the legislature has two options: Cure the problem and implement the intent of the people or do nothing. There are several examples in recent years of lawmakers acting to honor the wishes of the people when the courts have invalidated an adopted initiative. These include:

- Initiative 695, on lowering the cost of car tabs;⁶
- Initiative 747, on limiting the yearly rise in property taxes,⁷ and;
- Initiative 1240, on state funding for charter public schools.⁸

5 Ibid.

6 "I-695 ruling saves \$30 tabs, sets off scramble in Olympia," By David Postman, Dionne Searcey, Jim Brunner, March 15, 2000, *Seattle Times*, at <http://community.seattletimes.nwsources.com/archive/?date=20000315&slug=4010166>.

7 "Lawmakers restore 1% property tax cap," by Chris McGann, November 29, 2007, *Seattle PI*, at <http://www.seattlepi.com/local/article/Lawmakers-restore-1-property-tax-cap-1257294.php>.

8 "Washington charter school fix becomes law without governor's signature," by Donna Gordon Blankinship, April 1, 2016, *Spokesman Review*, at <http://www.spokesman.com/stories/2016/apr/01/washington-charter-school-fix-become-law-without-g/>.

Conclusion

One way to potentially cut down on the number of initiatives filed in the first place would be to reform the legislature's abuse of the emergency clause which infringes on the second power reserved by the people in the constitution, the right of referendum.⁹

Sometimes ballot measures are filed immediately after session because lawmakers have pre-empted the right of referendum on controversial bills with an emergency clause.

If the goal of the sponsors of SB 5386 is truly "to reduce the burdens for ordinary citizens seeking to file initiatives" the proposal falls short.

Imposing a \$500 filing fee, additional time delays and authorizing pre-election court challenges would create undue burdens on the people's fundamental lawmaking power that the legislature would not be subject to. These changes would make it harder for the people of Washington state to propose, qualify and vote on initiative ballot measures.

*Jason Mercier is
Washington Policy Center's
Center for Government
Reform Director.*

*Nothing here should be
construed as an attempt to
aid or hinder the passage of
any legislation before any
legislative body.*

*Published by
Washington Policy Center
© 2018*

*Visit [washingtonpolicy.org](http://www.washingtonpolicy.org)
to learn more.*

⁹ "Emergency clause reform scheduled for public hearing," by Jason Mercier, January 24, 2013, Washington Policy Center blog, at <https://www.washingtonpolicy.org/publications/detail/emergency-clause-reform-scheduled-for-public-hearing>.