

Can persons gather signatures for an initiative in Malls, Entrances, or Grocery Store Parking Lots?

Provided as a courtesy for those who wish to comply with present law but may not know it.

- 1) Your constitutional and Montana law right to gather signatures in various places may be limited.
- 2) **MCA 13-27-210 protects the right to gather signatures. It provides: Physical prevention of obtaining signatures or physical intimidation of signature gatherers prohibited.**
 - A person may not knowingly or purposefully physically prevent an individual from obtaining signatures or attempting to obtain signatures on a petition for a ballot issue or physically intimidate another individual when that individual is obtaining or attempting to obtain signatures on a petition for a ballot issue.
 - A person who violates this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$500, by imprisonment for not more than 90 days, or by both a fine and imprisonment.

A Lexis search indicates MCA § 13-27-210, a 2007 statute, has not been interpreted yet by the Montana Supreme Court. I know of no Montana state district court decisions. However, see *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858 (9th Cir., 2016) for a § 1983 case where students were retaliated against for, among other things, signature gathering.

- 3) **Attorney for Montana's Secretary of State opined** in April 2010 (thus the opinion is not current): There are no black and white provisions for the right to gather signatures. ... **Shopping centers** generally must open their property to solicitors.

The main shopping center [i.e., mall] case is *PruneYard Shopping Center v. Robins*, (1980) 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741. Its syllabus explains: "Soon after appellees had begun soliciting in appellant privately owned shopping center's central courtyard for signatures from passersby for petitions in opposition to a United Nations resolution, a security guard informed appellees that they would have to leave because their activity violated shopping center regulations prohibiting any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. Appellees immediately left the premises and later filed suit in a California state court to enjoin the shopping center and its owner (also an appellant) from denying appellees access to the center for the purpose of circulating their petitions. The trial court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property, and the California Court of Appeal affirmed. The **California Supreme Court reversed, holding that the California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned**, and that such result does not infringe appellants' property rights protected by the Federal Constitution."

Montana first addressed the *PruneYard* ruling in *City of Helena v. Krautter*, 852 P.2d 636, 258 Mont. 361 (Mont., 1993). The *Krautter* court opined *PruneYard* turned on the fact that state law in California guaranteed its citizens the right to collect signatures on a petition. But, Montana's Constitution, Article II, § 7 relating to free speech, did not provide that guarantee. *Krautter*, however, was decided 14 years prior to when MCA § 13-27-210, cited above, was enacted. Now, the Montana statute protects the right to solicit signatures. So, the *Krautter* ruling is no longer applicable.

In some states other than Montana, smaller stand-alone groceries (Raley's) do not have to allow persons to collect signatures in their parking lot. However, Montana business may wish to comply with the 9th Circuit's *Fred Meyer* case applicable in Montana, explained below. For example, **Home Depot apparently had a national policy (which may not be the current case)** of setting a designated signature gathering area in a space outside of and to one side of its entrance. Being relegated to stopping people to sign outside is not reasonable during cold or bad weather, or in the dark. So, depending on the facility, malls and stores having large indoor entrances where signature collecting will not substantially interfere with business has been required. Businesses might be willing to comply with *Fred Meyer* if signature gatherers display a sign reading:

The management/sponsors of this facility/event do not express a position on this I-187 initiative but allow you to exercise your 1st amendment right to petition our government.

If you have questions, please call Russ Doty, 406-696-2842

Additional Legal Discussion

4) **As to stand alone parking lots**, in the 9th Circuit's ruling (which governs Montana) in *Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1414 (9th Cir., 1995), the defendants solicited signatures on sidewalks outside the entrances of a Fred Meyer store in Portland. After refusing to obey the directive of Fred Meyer to leave its property, the defendants were arrested and later convicted of criminal trespass.

The Oregon Court of Appeals reversed defendants' convictions, holding that Article IV, section 1 of the Oregon Constitution ¹ "prohibits using a criminal prosecution to prevent the people from collecting signatures on initiative and referendum petitions in areas that have replaced traditional forums for the collection of signatures, so long as there is **no substantial interference** with the owner's use of the property for business or other purposes." Id. 786 P.2d at 215. The court stated that "[p]rosecuting defendants for criminal trespass for refusing to obey a direction [of Fred Meyer] to leave the entrance of the store under these circumstances would render inadequate the people's opportunity to function in their legislative role and would violate Article IV, section 1." Id. at 214-15. The court found that "[t]he Fred Meyer store at which defendants were arrested is a modern replacement for the town square or park. It is open to the public, and citizens are invited to come and congregate on the premises." Id. at 212. Significantly, the court concluded...:

Fred Meyer's invitation to the public was broad and for more than just commercial activity. Its premises, by reason of the owner's invitation, **became a forum** for assembly by the community. Notwithstanding the company's apparent policy against allowing petitioners on its property, there is no evidence that defendants' activities substantially interfered with Fred Meyer's commercial activity, had a serious economic impact on the company or interfered with its "reasonable investment ... expectations." "...[T]he Oregon Supreme Court accepted the principle that ... defendants' right to gather signatures in the common areas of [plaintiff's center] are subject to **reasonable** time, place, and manner restrictions' ... on any attempted possession (e.g., setting up card tables) by defendants of any part of plaintiff's premises and may also place reasonable restrictions on the time, place, and manner of seeking petition signatures in plaintiff's mall or on its walkways so as to reduce or eliminate interference and distraction, **short of confining signature solicitors to the least traveled byways and to times when few people are at the [mall]**. The number of petition signature-gatherers may also be limited. *Lloyd Corp., Ltd. v. Whiffen (Whiffen I)*, 307 Or. 674, 773 P.2d 1294, 1301 (1989). *Fred Meyer* at 1415-1416."

5) In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 580 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), "the proprietors were running 'a business establishment that is open to the public to come and go as they please,' that the solicitations would 'not likely be identified with those of the owner,' and that the proprietors could 'expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.'"

Posting a disclaimer disassociates a business from petition content. The US Supreme Court ruled that requiring groups to provide a forum for third-party speech does not required them to endorse that speech." [cites omitted] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018).

Hurley involved the exclusion of those who wished to participate in a parade as marchers, not those who witnessed or opposed the [gay] procession. Cf. *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C.Cir.1997) (refusing to extend *Hurley* to allow parade organizers to exclude people wishing to stand along parade route holding protest signs). As the district court has here [i.e., *Gathright*] observed, "[t]here is a distinction between participating in an event and being present at the same location. **Merely being present at a public event does not make one part of the organizer's message for First Amendment purposes.**" *Gathright v. City of Portland*, 315 F.Supp.2d 1099, 1103 (D.Or.2004). *Gathright v. City of Portland*, or., 439 F.3d 573, 577 (9th Cir., 2006); cert. denied, 549 U.S. 815, 127 S.Ct. 76, 166 L.Ed.2d 27 (2006). ...

We hold, however, that the **policy of allowing permittees unfettered discretion** to exclude private citizens on any (or no) basis is not narrowly tailored to the City's legitimate interest in protecting its permittees' right under *Hurley*. See *Ward*, 491 U.S. at 798-800, 109 S.Ct. 2746. Because the City's policy is not narrowly tailored, we do not reach whether it leaves open ample alternative channels of communication. Id., at 577. ...

6) "The City cannot ... claim that one's constitutionally protected rights disappear [where] a private party is hosting an event that remain[s] free and open to the public." *Parks*, 395 F.3d at 652. Id. at 579.

Supplement Memo Regarding Signature Collection in Government or Church Facilities.

7) Generally, **governments must allow petitioning in places that are usually public, i.e., public forums.** **Petitioners** should be OK in the **parking lot of a government facility** if you are not obstructing traffic or creating a hazard. See ¶ 11, re parking lots below.

8) Exceptions: Government may prevent collection if its rule doing that is content neutral. (Saying you can't collect signatures because someone might not like 1-187 is not content neutral.) Content-based regulations are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), e.g., **Military facility restrictions.**

9) Second, because traditional public forums are vital places for speech, even a content-neutral public-forum regulation is subjected to additional First Amendment scrutiny to determine whether it is a reasonable time, place, and manner restriction "narrowly tailored to serve a significant governmental interest" that "leave[s] open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

10) Petitioners generally are **ok in public parks, streets, and most sidewalks.** The Supreme Court said: "The public sidewalks forming the perimeter of the Supreme Court grounds, ... are public forums and should be treated as such for First Amendment purposes." (*United States v. Grace* (1983) 461 U.S. 171, 179, 103 S.Ct. 1702 1708, 75 L.Ed.2d 736, 745-746.

11) In *Carreras v. Anaheim* (9th Cir.1985) 768 F.2d 1039, pages 1045-47, the 9th Circuit stated: "[t]he test under California law is whether the communicative activity 'is basically incompatible with the normal activity of a particular place at a particular time.' [Citations.]" Applying that test, the court found the **exterior walkways and parking areas of the Anaheim Stadium and the Anaheim Convention Center are public forums.** And, it held the parking lot and walkways of the Cow Palace constituted a public forum. *Kuba v. 1-A Agricultural Association* (9th Cir.2004) 387 F.3d 850, 857. So, exterior walkways and parking areas adjacent to Montana football stadiums would likely be considered public forums.

12) However, if a **Post Office** decides to say you can't be on its internal sidewalk because you are interfering with postal business—something that does not bother some post offices if you are not interfering with postal business or accosting customers. Politely asking if they want to sign is not accosting. Courts have ruled **you have a right to be on external sidewalks outside a post office.** <http://aclu-nca.org/sites/default/files/docs/docket/IRI%20v%20USPS.pdf> <http://aclu-nca.org/docket/right-to-circulate-petitions-on-post-office-sidewalks> . US Supreme Court justices were equally divided on whether a sidewalk leading to a post office is a public forum (as differentiated from one outside the post office). Therefore the case of *United States v. Kokinda*, 497 U.S. 720, 737-38, 110 S.Ct. 3115, 3125, 111 L.Ed.2d 571 (1990) sometime cited in these analysis was not considered to be precedent (because of the tie vote) and was distinguished in *Prigmore v. City of Redding*, 211 Cal.App.4th 1322, 150 Cal.Rptr.3d 647 at 663 (2012).

13) **Governments create a designated public forum** when opening property for use by the public as a place for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Thus, if the **Museum of the Rockies** is a government facility and it holds a forum, you should have a right to collect signatures inside or at some other reasonable location. It could place some restrictions on where you collect, but they can't make you collect in the dark outside (as was done recently) or restrict you to fewer hours of signature gathering than the time taken by the public forum it hosted. See ¶ 14 below. Under a 2004, 6th Circuit case that may or may not apply in Montana, they could restrict you to areas of the building where a public forum is taking place and prevent you from accessing hallways or private areas adjacent to the forum if the restriction was content neutral.

14) **Fair grounds** often limit signature gathering to designated areas and that practice has been upheld. However, they cannot limit you to collecting signatures from the "nose-bleed" section or other area where you do not have access to fair attendees. In *Initiative 172 v. Western Washington Fair Assoc.*, 88 Wn. App. 579, 945 P.2d 761 (1997) a private fair was **not a public forum**, but it was unreasonable to limit signature gathering to 4 of the 17-day fair. The "free speech area" was reasonable because it "is 'very visible' and is situated near the entrance which historically admits more visitors to the fairgrounds than any of the other four gates."

15) **Some libraries** are allowing signature gathering inside entry points. They are complying with the law. Libraries can limit signature gathering to certain places to maintain silence, etc., but cannot shut you out completely. Please do not argue with them. You may give them this memo and hope that once they are aware of their duty to make space available, that may be enough to gain access. Small libraries may have difficulty

providing space that does not interfere with the requirement that quiet prevail in a library. Such restriction in larger libraries with entry foyers would not pass the "narrowly tailored to serve a significant governmental interest" test that "leave[s] open ample alternative channels for communication." *Deans v. Las Vegas Clark County Library District*, 220 F.Supp.3d 1058 (2016). In *Deans* the library leased premises from a college. At p. 1065 the court opined "The District's significant interest in protecting ingress and egress will not be significantly burdened by the injunction ... [because] the injunction leaves an ample buffer zone in front of the library doors." At p. 1065 **Dean also was allowed to enter the library to "escape from the elements."** The Court opined (p. 1064):

When Deans gathered signatures ... staff directed him to a small area ... 75 feet from the library entrance. This restriction likely fails the narrow tailoring requirement because the District could make the area larger and extend it closer to the entrance with little impact on patrons' access to the library.

16) Three (or four) classes of physical areas and their purpose govern your accessibility to public space. In traditional public forums you generally have access and restrictions must meet the narrowly tailored test explained above. And, "**The government has the burden of justifying its restriction on speech**" in those areas, the justification necessary differs in each case. (*Thalheimer v. City of San Diego* (9th Cir.2011) [645 F.3d 1109](#), 1116.) quoted [with emphasis added] at p. 664 in *Prigmore v. City of Redding*, 211 Cal.App.4th 1322, 150 Cal.Rptr.3d 647 (2012). *Prigmore* was another case involving a California library with a covered large outdoor entrance that was determined to be a public forum. Cold and inclement weather were not issues in warmer California under a covered entrance. However, enclosed entrances that exist in several Montana libraries are similar to entrances away from library quiet zones. Thus, space inside libraries is like public forum space outside of libraries.

17) **Use of tables.** You may encounter restrictions on the use of ironing boards or tables to gather signatures. In *American Civ. Lib. Union, Nv v. City of Las Vegas*, 333 F.3d 1092, 1108-9 (9th Cir., 2003) the Court remanded to determine whether the prohibition passed the strict standard of review, observing in footnote 15 "Tables facilitate these activities by enabling the display of multiple pamphlets or other items, as well as the distribution of a greater amount of material. Additionally, the use of a table may ... [give] an organization the appearance of greater stability and resources than that projected by a lone, roaming leafleteer." In *Prigmore* the 2012 9th Circuit distinguished cases restricting such use. It held, "we see no showing by the City that its restriction of those people leafleting *without* using tables, ... is tailored to address the City's interest." Thus, restrictions must be tailored to address the City's interest, e.g., justified to limit blocking of access to the affected area, if they are to pass constitutional scrutiny.

18) Federal courts have held the **interior of a library is a limited public forum**, the second classification of public space considered in these analyses. In *Faith Ctr. Church Evangelistic Ministries v. Glover* (9th Cir.2007) [480 F.3d 891](#), 908, abrogated on other grounds by *Winter v. NRDC, Inc. (2008) 555 U.S. 7, 129 S.Ct. 365*, 172 L.Ed.2d 249]; *Kreimer v. Bureau of Police* (3d Cir.1992) [958 F.2d 1242](#), 1261, the Court ruled a room used for public purposes was a limited public forum but that restrictions prohibiting use for religious or public school type purposes was reasonable.

19) You may collect signatures at a **polling place** (do not slow down the process of allowing folks to vote. It would be best to talk with them after they vote unless they approach you first. If a church is a polling place, it would be proper to have a table to collect signatures at that church polling place unless space is limited and then outside would be where you may have to go. Check in advance with the county election administrator.

20) Some have attempted to prevent you from **initiating conversation** with those entering a building or waiting to be served by the government. That prevents you from giving out the green I-187 information sheet for folks to consider and then return to sign as they exit the building or complete their government business. I have not seen an articulation of the reason behind this restriction that is "narrowly tailored to serve a significant governmental interest" that "leave[s] open ample alternative channels for communication" at the time signatures are being solicited. If you engage persons in this situation, be careful to not slow or obstruct government business. In *Dean* at 1064 the Court observed about a designated free speech area in a library:

The area ... also likely fails the "ample alternatives" requirement, as it makes it difficult for petitioners to speak directly with passersby without shouting at them. See *McCullen*, 134 S.Ct. at 2535 (stating that a "buffer zone" restriction substantially burdened speech because the speaker was "often reduced to raising her voice at patients from outside the zone...."). "In the context of petition campaigns, ... one-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* at 2536 (internal citations omitted).

21) **Captive audience doctrine.** Billings has attempted to assert this doctrine as it relates to folks waiting in chairs outside the motor vehicle registration office in the courthouse. In *Synder v. Phelps* (2011) 562 U.S. 826, [131 S.Ct. 120](#), [179 L.Ed.2d 172](#), the United States Supreme Court declined to apply the captive audience doctrine to a military funeral. The court explained: “As a general matter, we have **applied** the captive audience doctrine only **sparingly** to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, [citation], and an ordinance prohibiting picketing ‘before or about’ any individual’s residence, [citation].” (*Id.* at p. —, [131 S.Ct. 1207](#) [1220](#), [179 L.Ed.2d 172](#), 185–186[.]

The *Prigmore* Court (at 1344) refused to apply the captive audience doctrine reasoning library patrons being “fully capable of saying ‘no’ to persons seeking their attention and then walking away, they are not members of a captive audience. **They have no general right to be free from being approached.** [Citations.]” [Emphasis added] (*Heffron, supra*, 452 U.S. at p. 657, fn. 1, 101 S.Ct. at p. 2569, 69 L.Ed.2d at p. 313, dis. opn. of Brennan, J.). Likewise, the folks waiting their turn to be served by the Billings vehicle registration department have no right to be free from approach by signature gatherers. They can merely indicate they do not wish to talk with a signature gatherer. The *Prigmore* Court noted:

The City provided declarations where people professed the understandable desire to not be approached by strangers. There was a complaint that the Library “should be free of solicitation and political oppression.” Such desires and complaints, while understandable, are not a legitimate basis for curtailing free speech. “Free speech inevitably encourages conflict Phlegmatic indeed is the individual who at some time has not recoiled at the exercise of free speech by others. Annoyance and inconvenience, however, are a small price to pay for preservation of our most cherished right.” (*Wirta v. Alameda–Contra Costa Transit Dist.* (1967) 68 Cal.2d 51, 62, 64 Cal.Rptr. 430, 434 P.2d 982.)

22) Some requirements that **advanced notice of signature gathering** be given, when applied to a nonpublic forum have been upheld, *University and Community College System of Nevada v. Nevadans for Sound Government*, 100 P.3d 179, 120 Nev. 712 (2004). But, the 2012 *Prigmore* Court when assessing a limited public forum ruled: Advance notice requirements and permitting schemes that apply to individuals and small groups routinely run afoul of the First Amendment as most are overbroad and not narrowly tailored. (See *Boardley v. United States DOI* (D.C.Cir.2010) [615 F.3d 508](#), 520–521 and cases cited.) A permitting requirement, even where ministerial and performed promptly at no cost, raises significant concerns, particularly the loss of anonymity and the ban on spontaneous speech. (*Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Vill. of Stratton* (2002) 536 U.S. 150, 166–168, [122 S.Ct. 2080](#), 2089–2091, [153 L.Ed.2d 205](#), 219–221 [holding ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand violated the First Amendment].)

As such, officials experimenting with such a requirement may wish to narrowly tailor restrictions and make sure they are reasonable even when dealing with nonpublic forum areas.

23) Likely a **church** does not have to allow signature collecting within a building unless it is acting as a polling place. Then it would only have to allow signature collecting on election day. And, if a church is not acting as a polling place, the rule allowing churches to restrict signature gathering may be different if the church is making space available to the public generally as a limited public forum--especially if it is charging for use of its space. Then it likely would be required to make space available without regard to the content of the petition.

In addition, if a church buys an area that was previously a public forum (like a street in front of its buildings, it cannot restrict free speech (petitioning) there. See *First Unitarian Church of Salt Lake v. Salt Lake*, 308 F.3d 1114 (10th Cir., 2002) which also discussed the nature of **publicly owned senior centers, airports and school board meetings** open to the public where restrictions would have to be narrowly constructed.

One approach may be to ask the church/venue whether you could collect signatures if you display a sign at the signature collection table reading, “The management and members of this facility do not express a position on this I-187 initiative, but allow you to express your position as a part of exercising your 1st amendment right to petition our government.” A copy of that sign is at <https://www.mtcares.org/wp-content/uploads/2019/07/SIGNS-for-I-187.pdf>

24) Attorney for Montana’s Secretary of State said in April, 2010 (and thus the opinion is not totally current):

... Although **schools** (in conjunction with the school as a polling place) are public property, the school district has a right to limit access if it is reasonable for maintaining the integrity of classes and does not interfere with the election process.