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State Regulation of the Initiative Process: *Buckley v. American Constitutional Law Foundation, Inc., et al.*

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Summary

While the authority to regulate political expression is sharply circumscribed by the Constitution, states traditionally have been granted significant leeway in regulating the electoral process for the sake of efficiency and veracity. Due to an increase in state attempts to regulate petition initiatives, these two divergent bodies of law have given rise to a great deal of confusion as to the point at which state regulation of the electoral process becomes violative of First Amendment freedoms. The Supreme Court addressed this conflict recently in *Buckley v. American Constitutional Law Foundation, Inc., et al.*,clarifying the debate by analyzing various provisions of Colorado laws regulating initiative petitions.

It is a well established proposition that "the First Amendment affords the broadest protection to political expression, in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[1] At the same time, however, it is widely accepted that states possess the needed authority to enact reasonable regulations of the electoral process in order to avoid campaign related disorder.[2] These two lines of legal thought have come into increasing conflict due to state attempts to regulate the electoral process, and petition-initiatives in particular. While the Supreme Court has always protected First Amendment rights regarding political expression staunchly, prior decisions related mainly to areas of pure speech, offering little certainty as to how these rights would be interpreted in light of a state's interest in preserving the integrity of its electoral processes.

[1] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

[2] *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Supreme Court recently dealt with this conflict in *Buckley v. American Constitutional Law Foundation, Inc., et al.*, a case from the Tenth Circuit dealing with the constitutionality of various provisions enacted by the State of Colorado to regulate the petition initiative process.[3] While the Supreme Court had handed down previous rulings pertaining to state regulation of the electoral process and associated First Amendment free speech considerations, it had not spoken directly on the applicability of such rulings to the initiative process.[4] The Court's decision extends First Amendment rights acknowledged in prior cases, and elaborates upon permissible state regulation in the initiative and referendum process.

Respondents, collectively referred to as ACLF in the Court's opinion, originally brought suit against the Secretary of State of Colorado in 1993 in the United States District Court for the District of Colorado pursuant to 42 U.S.C. §1983, challenging portions of the state's statutory scheme regulating the initiative-petition process.[5] In alleging that various initiative regulations violated the right to freedom of speech under the First Amendment, ACLF contested specifically: (1) Colo. Rev. Stat. §1-40-112(1) (1998), requiring that all petition circulators be registered voters and at least 18 years of age; (2) §1-40-108, limiting circulation of a particular petition to six months; (3) §1-40-112(2), requiring that petition circulators wear identification badges giving their names and disclosing their status as a paid or volunteer circulator; (4) §1-40-111(2), requiring that circulators attach to each petition an affidavit containing the circulator's name and address and a statement averring familiarity with state laws regarding petitioning; (5) §1-40-121, requiring that initiative proponents disclose (a) at the time of filing the petition, the name, address, and county of voter registration of all paid circulators, the amount of money paid per signature, and the total amount paid to each circulator, and (b) to disclose the names of the proponents, names and addresses of paid circulators, the name of the proposed ballot measure, and the amount of money paid to each circulator on a monthly basis.[6]

In the first part of its analysis, the Supreme Court summarily affirmed the Tenth Circuit's determination that the age restriction, six-month circulation limit, and affidavit requirement were all constitutionally valid.[7] The Court pointed to these rulings as an acknowledgment of the strong regulatory interests a state possesses in preserving the integrity of its electoral system.[8] This proposition was discussed at length by the appellate court which noted that, in light of the need for active governmental structuring of the

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[3] *Buckley v. American Constitutional Law Foundation, Inc., et al.*, 1997 WL 7723.

[4] *See Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

[5] *See Buckley v. American Constitutional Law Foundation, Inc., et al.*, 1997 WL 7723 at 1-2. Plaintiffs at the district court level consisted of American Constitutional Law Foundation, Inc., which operates as a nonprofit public interest group that advocates direct democracy, and several private citizens participating in Colorado's petition process. *Id.*

[6] *Id.* at 1.

[7] *Id.* at 5.

[8] *Id.* at 5. *See also, Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

electoral process, the aforementioned regulations did not significantly burden political expression.[9]

The Court then considered the requirement that all petition circulators be registered voters. The State of Colorado asserted that this requirement was necessary in that it demonstrated a circulator's commitment to the law-making process in Colorado and allowed for more efficient verification of a circulator's residential address. Competing with Colorado's assertion was the proposition that the requirement had the unconstitutional effect of reducing the number of circulators, paid or volunteer, available to circulate petitions. Statistical evidence adduced at the district court level established that roughly 400,000 eligible voters were not registered, and further testimony indicated that a significant number of circulators fell into this category.[10] Despite this evidence, the district court determined that since the registration requirement had been established through a referendum approved by the citizens of Colorado, the provision was not subject to judicial review. The Tenth Circuit disagreed with this position, ruling that laws passed by ballot stood on the same constitutional ground as those passed by traditional legislation. Subsequently, the court held that the registration requirement was unconstitutional, in that it excluded non-registered individuals from participating in core political speech.[11]

The Supreme Court agreed with the Tenth Circuit's holding, stating that by limiting the number of individuals capable of communicating a proponent's message, the regulation restricted speech in much the same fashion as was the case in *Meyer v. Grant.*[12] One prong of Colorado's argument centered on the assertion that, due to the ease of registering, the regulation's limitations on speech should be tolerated. The Court rejected this argument, noting that the choice to remain unregistered served as a form of political thought and expression for some individuals.[13] Colorado next argued that the regulation should be permitted due to the state's interest in assuring that all circulators are subject to the subpoena power of the Secretary of State. The Court also found this argument unpersuasive, noting that Colo. Rev. Stat. §1-40-111(2), requiring that each circulator disclose his or her name and address, satisfied this interest.[14] In light of these factors, the Court ruled that none of Colorado's asserted interests were sufficient to justify the ensuing limits on speech caused by the regulation.

The next point of contention between the parties was the requirement that circulators wear identification badges while collecting signatures. Colorado argued that the badge requirement was justified in that it was necessary to combat instances of fraud and libel in the petitioning process and to enable citizens to identify circulators engaging in such improper behavior. ACLF, on the other hand, pointed to evidence showing that the badge

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[9]*American Constitutional Law Foundation, Inc., et al., v. Meyer*, 120 F.3d 1092, 1099-1100 (1997) (discussing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

[10]*Id.* at 1100.

[11]*Id.* at 1100.

[12]1997 WL 7723 at 6-7. *See also Meyer v. Grant*, 486 U.S. 414, 422-423 (1988).

[13]1997 WL 7723 at 6-7.

[14]*Id.*

requirement discouraged circulators from participating in the initiative process due to fears of persecution stemming from the advocacy of controversial causes.[15]

In dealing with this issue, the Supreme Court was faced with a conflict between a state's regulatory interest in the electoral process on one hand, and the First Amendment right to anonymous political expression on the other. The Court previously had decided cases which established a strong right to anonymous political speech, such as *Talley v. California,* which dictated that a ban on all anonymous leafleting was violative of the First Amendment.[16] This ruling had been extended to encompass anonymous speech in the electoral context in *McIntyre v. Ohio Elections Comm'n*.[17] However, the Court had established a general rule recognizing state power to regulate elections and ballot access, and noted in *McIntyre* that a "limited identification requirement" might be permissible in a given instance.[18]

At the appellate level, the Tenth Circuit gave great weight to prior cases dealing with the right to anonymous political speech, ultimately concluding that the badge requirement was unconstitutional.[19] Specifically, the Tenth Circuit found that by requiring circulators to reveal their identities at the exact moment of speech, the regulation stripped them of their right to anonymous political expression at a time when reaction to the message is at its most immediate and unreasoned. Such a severe infringement was deemed untenable, particularly in light of the affidavit requirement of §1-40-111(2), which the Tenth Circuit deemed sufficient to serve Colorado's asserted regulatory interests.[20]

The Supreme Court agreed with this determination, focusing its analysis on the similarities between the case at hand and *McIntyre v. Ohio Elections Comm'n*. In *McIntyre,* the Court had previously ruled that a prohibition on the distribution of anonymous campaign literature was violative of the First Amendment.[21] In comparing *McIntyre* to the present case, the Supreme Court agreed with the Tenth Circuit's determination that the circulation of a petition was similar to handbill distribution, stressing that both activities involve direct communication. However, the Supreme Court went even further, stating that the restraint imposed by the badge requirement was even more severe, in that petition circulators engage in a more intensive interchange with citizens, thereby increasing the chances of conflict. This factor led in large part to the Court's conclusion that the "injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest."[22] As such, the Court ruled that the badge

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[15]*Id.* at 8.

[16]*Talley,* 362 U.S. 60 (1960).

[17]*McIntyre,* 514 U.S. 334 (1995).

[18]*See Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997); *McIntyre*, 514 U.S. at 353.

[19]*American Constitutional Law Foundation, Inc., et al., v. Meyer,* 120 F.3d at 1102.

[20]*Id.*

[21]*McIntyre,* 514 U.S. 334 (1995).

[22]1997 WL 7723 at 9.

provision could not be characterized as an acceptable limited identification requirement as contemplated in *McIntyre*.[23]

The next regulation addressed by the court was the requirement that monthly and final reports be submitted to the Secretary of State, disclosing the names and addresses of all paid circulators, the amount paid per signature, and the total amount paid to each circulator. Colorado argued that these disclosures were necessary to apprise the electorate of whether a particular initiative possessed grass roots support, and to discourage fraud. ACLF, on the other hand, maintained that these provisions had a chilling effect on free speech by denying paid circulators the anonymity afforded to volunteers.[24]

At the appellate level, the Tenth Circuit invalidated the final report provisions which required disclosure of personally specific information, leaving intact provisions calling for the disclosure of the amount paid per petition signature. Regarding the monthly disclosures, the Tenth Circuit invalidated provisions calling for the disclosure of the names and addresses of, and amounts disbursed and owed to, paid circulators.[25]

In its disposition of the issue, the Supreme Court discussed its decision in *Buckley v. Valeo*, dealing with compelled disclosure of campaign related expenditures. Specifically, the Court reiterated that disclosure of certain campaign related spending may be required, as it provides the electorate with information on the sources and targets of political campaign money. Furthermore, the Court also recognized that such disclosures deter corruption and the appearance of impropriety in the campaign context.[26] Applying these factors, however, the Court agreed with the Tenth Circuit's determination that the compelled disclosures of personal information were unconstitutional.[27]

Specifically, the Supreme Court affirmed the Tenth Circuit's holding that whereas *Buckley* provided for disclosure regarding the sources of campaign money meeting certain monetary thresholds, the provisions of 1-40-121 required disclosure of payments to payees, regardless of the amount involved. Furthermore, the Court ruled that many of the concerns deemed sufficient to justify the disclosure provisions in *Buckley* did not adhere in the present case. The Court found it dispositive, for instance, that 1-40-121 did not regulate candidate elections, and that the risk of corruption so prevalent in such elections was minimal in the initiative context.[28] The Court also stated that the disclosure provisions which remained in place more than satisfied the goals delineated in *Buckley* by informing voters of the source and amount of money spent by initiative proponents. Based on these factors, the Supreme Court determined that constitutional interests in fostering political debate on initiative issues outweighed Colorado's regulatory arguments.[29]

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[23]*Id.*

[24]*American Constitutional Law Foundation, Inc., et al., v. Meyer*, 120 F.3d at 1105.

[25]1997 WL 7723 at 10.

[26]*Id.* at 10.

[27]*Id.* at 11-12.

[28]*Id* at 11-12.

[29]*Id* at 12.

Upon completing its review of the regulations at issue, the Supreme Court identified other provisions of Colorado's initiative and referendum act which it concluded met the state's "substantial interests in regulating the ballot-initiative process."[30] Pertaining to the state's avowed interest in combating fraud and corruption, the Court referred to statutes criminalizing the forgery of initiative petition signatures and providing for the invalidation of any portion of an initiative-petition section tainted by circulator violation, as well as the state's ability to identify those paying circulators. Furthermore, the Court noted that Colorado's interest in ensuring grass roots support for any proposal would be met by the requirement that a petition contain valid signatures comprising five percent of the total votes cast for Secretary of State in the previous election. Finally, the Court explained that Colorado had established several measures to aid the efficiency, veracity, and clarity of the initiative-petition process.[31]

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[30] *Id.*

[31] *Id.*