SUPREME COURT OF THE UNITED STATES

No. 97–930

VICTORIA BUCKLEY, SECRETARY OF STATE OF COLORADO, PETITIONER *v.* AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January 12, 1999]

CHIEF JUSTICE REHNQUIST, dissenting.

The Court today invalidates a number of state laws designed to prevent fraud in the circulation of candidate petitions and to ensure that local issues of state law are decided by local voters, rather than by out-of-state interests. Because I believe that Colorado can constitutionally require that those who circulate initiative petitions *to* registered voters actually *be* registered voters themselves, and because I believe that the Court's contrary holding has wide-reaching implication for state regulation of elections generally, I dissent.

I

Ballot initiatives of the sort involved in this case were a central part of the Progressive movement's agenda for reform at the turn of the 20th century, and were advanced as a means of limiting the control of wealthy special interests and restoring electoral power to the voters. See, *e.g.*, H. Croly, Progressive Democracy 236–237, 248–249, 254–255 (Transaction ed. 1998); H. Steele Commager, The American Mind 338 (1950); Persily, The Peculiar Geography of Direct Democracy, 2 Mich. L. & Pol'y Rev. 11, 23 (1997). However, in recent years, the initiative and referendum process has come to be more and more influenced

by out-of-state interests which employ professional firms doing a nationwide business. See, *e.g.*, Lowenstein & Stern, The First Amendment and Paid Initiative Petition Circulators, 17 Hastings Const. L. Q. 175, 176 (1989); Broder, Ballot Battle, Washington Post, Apr. 12, 1998, pp. A1, A6; Slind-Flor, Election Result: Litigation over Propositions, National Law Journal, Nov. 16, 1998, pp. A1, A8. The state laws that the Court strikes down today would restore some of this initial purpose by limiting the influence that such out-of-state interests may have on the in-state initiative process. The ironic effect of today's opinion is that, in the name of the First Amendment, it strikes down the attempt of a State to allow its own voters (rather than out-of-state persons and political dropouts) to decide what issues should go on the ballot to be decided by the State's registered voters.

The basis of the Court's holding is that because the state laws in question both (1) decrease the pool of potential circulators and (2) reduce the chances that a measure would gather signatures sufficient to qualify for the ballot, the measure is unconstitutional under our decision in *Meyer* v. *Grant*, 486 U. S. 414 (1988). See *ante*, at 9–10. *Meyer*, which also dealt with Colorado's initiative regulations, struck down a criminal ban on *all* paid petition circulators. 486 U. S., at 428. But *Meyer* did not decide that a State cannot impose reasonable regulations on such circulation. Indeed, before today's decision, it appeared that under our case law a State could have imposed reasonable regulations on the circulation of initiative petitions, so that some order could be established over the inherently chaotic nature of democratic processes. Cf. *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U. S. 428, 433 (1992); *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). Today's opinion, however, calls into question the validity of *any* regulation of petition circulation which runs afoul of the highly

abstract and mechanical test of diminishing the pool of petition circulators or making a proposal less likely to appear on the ballot. See *ante*, at 9–10. It squarely holds that a State may not limit circulators to registered voters, and maintains a sphinx-like silence as to whether it may even limit circulators to state residents.

II

Section 1–40–112(1) of Colorado's initiative petition law provides that "[n]o section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated." Colo. Rev. Stat. §1–40–112(1) (1998). This requirement is obviously intended to ensure that the people involved in getting a measure placed on the ballot are the same people who will ultimately vote on that measure– the electors of the State. Indeed, it is difficult to envision why the State cannot do this, but for the unfortunate dicta in *Meyer*. The parties agree that for purposes of this appeal there are 1.9 million registered voters in Colorado, and that 400,000 persons eligible to vote are not registered. See *ante*, at 8. But registering to vote in Colorado is easy– the only requirements are that a person be 18 years of age or older on the date of the next election, a citizen of the United States, and a resident of the precinct in which the person will vote 30 days immediately prior to the election. See Colo. Rev. Stat. §1–2–101 (1998). The elector requirement mirrors Colorado's regulation of candidate elections, for which all delegates to county and state assemblies must be registered electors, §1–4–602(5), and where candidates cannot be nominated for a primary election unless they are registered electors, §1–4–601(4)(a).

The Court, however, reasons that the restriction of circulation to electors fails to pass scrutiny under the First Amendment because the decision not to register to vote

"implicates political thought and expression." *Ante*, at 11. Surely this can be true of only a very few of the many residents who don't register to vote, but even in the case of the few it should not invalidate the Colorado requirement. Refusing to read current newspapers or to watch television may have "First Amendment implications," but this does not mean that a state university might not refuse to hire such a person to teach a course in "today's media." The examples of unregistered people who wish to circulate initiative petitions presented by the respondents (and relied upon by the Court) are twofold[1]— people who refuse to participate in the political process as a means of protest, and convicted drug felons who have been denied the franchise as part of their punishment. For example, respondent Bill Orr, apparently the mastermind of this litigation, argued before the District Court that "It's my form of . . . private and public protest. I don't believe that representative organs of Government are doing what they're supposed to be doing." 1 Tr. 223. And respondent Jon Baraga, a person affiliated with the "Colorado Hemp Initiative," which seeks to legalize marijuana in Colorado, testified that "there are a great many folks who are refused to participate as registered voters in the political process who would like to see our measure gain ballot status and would like to help us do that." *Id.*, at 57.

Thus, the Court today holds that a State cannot require that those who circulate the petitions to get initiatives on

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[1] The respondents also presented the example of children who wished to circulate petitions. Indeed, one of the respondents in this case— William David Orr— was a minor when this suit was filed and was apparently included in the action to give it standing to challenge the age restriction element of Colo. Rev. Stat. §1–40–112(1) (1998). Because the Court of Appeals held that the age restriction on petition circulation was constitutional, it is unnecessary to point out the absurdity of the respondents' minority argument.

the ballot be electors, and that a State is constitutionally required to instead allow those who make no effort to register to vote– political dropouts– and convicted drug dealers to engage in this electoral activity. Although the Court argues that only those eligible to vote may now circulate candidate petitions, there is no Colorado law to this effect. Such a law would also be even harder to administer than one which limited circulation to residents, because eligible Colorado voters are that subset of Colorado residents who have fulfilled the requirements for registration, and have not committed a felony or been otherwise disqualified from the franchise. A State would thus have to perform a background check on circulators to determine if they are not felons. And one of the reasons the State wished to limit petition circulation to electors in the first place was that it is far easier to determine who is an elector from who is a resident, much less who is "voter eligible."[2]

In addition, the Court does not adequately explain what "voter eligible" means. If it means "eligible to vote in the State for which the petitions are circulating" (Colorado, in this case), then it necessarily follows from today's holding that a State may limit petition circulation to its own residents. I would not quarrel with this holding. On the other hand, "voter eligible" could mean "any person eligible to vote in any of the United States or its territories." In this case, a State would not merely have to run a background check on out of state circulators, but would also have to

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[2]The Court dismisses this state interest as "diminished," by noting that the affidavit requirement identifies residents. *Ante*, at 12. Yet even if the interest is diminished, it surely is not eliminated, and it is curious that the Court relies on the affidavit requirement to strike down the elector requirement, but does not use it to preserve that part of the disclosure requirements that also contain information duplicated by the affidavits. Cf., Part V, *ante*.

examine whether the unregistered circulator had satisfied whatever are the criteria for voter eligibility in his place of residence, be it Georgia or Guam, Peoria or Puerto Rico.

State ballot initiatives are a matter of state concern, and a State should be able to limit the ability to circulate initiative petitions to those people who can ultimately vote on those initiatives at the polls. If eligible voters make the conscious decision not to register to vote on the grounds that they reject the democratic process, they should have no right to complain that they cannot circulate initiative petitions to people who *are* registered voters. And the idea that convicted drug felons who have lost the right to vote under state law nonetheless have a constitutional right to circulate initiative petitions scarcely passes the "laugh test."

But the implications of today's holding are even more stark than its immediate effect. Under the Court's interpretation of *Meyer*, any ballot initiative regulation is unconstitutional if it either diminishes the pool of people who can circulate petitions or makes it more difficult for a given issue to ultimately appear on the ballot. See *ante*, at 9–10. Thus, while today's judgment is ostensibly circumscribed in scope, it threatens to invalidate a whole host of historically established state regulations of the electoral process in general. Indeed, while the Court is silent with respect to whether a State can limit initiative petition circulation to state residents, the implication of its reading of *Meyer*— that being unable to hire out-of-state circulators would "limi[t] the number of voices who will convey [the initiative proponents'] message" *ante*, at 10 (bracketing in original)— is that under today's decision, a State cannot limit the ability to circulate issues of local concern to its own residents.

May a State prohibit children or foreigners from circulating petitions, where such restrictions would also limit the number of voices who could carry the proponents'

message and thus cut down on the size of the audience the initiative proponents could reach? Cf. *Meyer*, 486 U. S., at 422–423. And if initiative petition circulation cannot be limited to electors, it would seem that a State can no longer impose an elector or residency requirement on those who circulate petitions to place candidates on ballots, either. At least 19 States plus the District of Columbia explicitly require that candidate petition circulators be electors,[3] and at least one other State requires that its petition circulators be state residents.[4] Today's decision appears to place each of these laws in serious constitutional jeopardy.

III

As to the other two laws struck down by the Court, I agree that the badge requirement for petition circulators is unconstitutional. *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995). I also find instructive, as the Court notes, *ante*, at 12, n. 15, that Colorado does not require such badges for those who circulate candidate petitions. See generally Colo. Rev. Stat. §1–4–905 (1998).

I disagree, however, that the First Amendment renders the disclosure requirements unconstitutional. The Court

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[3] See Ariz. Rev. Stat. Ann. §16–315 (1996); Cal. Elec. Code Ann. §8106(b)(4) (West 1996); Colo. Rev. Stat. §1–4–905 (1998); Conn. Gen. Stat. §9–410 (Supp. 1998); D. C. Code Ann. §1–1312(b)(2) (1992); Idaho Code §§34–626, 34–1807 (Supp. 1998); Ill. Comp. Stat., ch. 10, §§5/7–10, 5/8–8, 5/10–4 (Supp. 1998); Kan. Stat. Ann. §25–205(d) (1993); Mich. Comp. Laws §168.544c(3) (Supp. 1998); Mo. Rev. Stat. §115.325(2) (1997); Neb. Rev. Stat. §32–630 (Supp. 1997); N. Y. Elec. Law §§6–132, 6–140, 6–204, 6–206 (McKinney 1998); Ohio Rev. Code Ann. §3503.06 (1996); 25 Pa. Cons. Stat. §2869 (1994); R. I. Gen. Laws §17–23–12 (1996); S. D. Comp. Laws Ann. §12–1–3 (1995); Va. Code Ann. §24.2–521 (Supp. 1998); W. Va. Code §3–5–23 (1994); Wis. Stat. §8.40 (1996); Wyo. Stat. §22–5–304 (1992).

[4] See Ga. Code Ann. §§21–2–132(g)(3)(A), 21–2–170(d)(1) (1993 and Supp. 1997).

affirms the Court of Appeals' invalidation of only the portion of the law that requires final reports to disclose information specific to each paid circulator– the name, address, and amount paid to each. Important to the Court's decision is the idea that there is no risk of *"quid pro quo"* corruption when money is paid to ballot initiative circulators, and that paid circulators should not have to surrender the anonymity enjoyed by their volunteer counterparts. I disagree with this analysis because, under Colorado law, *all* petition circulators must surrender their anonymity under the affidavit requirement. Colorado law requires that each circulator must submit an affidavit which must include the circulator's "name, the address at which he or she resides, including the street name and number, the city or town, [and] the county." Colo. Rev. Stat. §1–40–111(2) (1998). This affidavit requirement was upheld by the Tenth Circuit as not significantly burdening political expression, *American Constitutional Law Foundation* v. *Meyer,* 120 F. 3d 1092, 1099 (1997), and is relied upon by the Court in holding that the registered voter requirement is unconstitutional. See *ante,* at 11. The only additional piece of information for which the disclosure requirement asks is thus the amount paid to each circulator. Since even after today's decision the identity of the circulators as well as the total amount of money paid to circulators will be a matter of public record, see *ante,* at 16, I do not believe that this additional requirement is sufficient to invalidate the disclosure requirements as a whole. They serve substantial interests and are sufficiently narrowly tailored to satisfy the First Amendment.

IV

Because the Court's holding invalidates what I believe to be legitimate restrictions placed by Colorado on the petition circulation process, and because its reasoning calls into question a host of other regulations of both the

candidate nomination and petition circulation process, I dissent.