

FILED

Committee to Regulate and Control Marijuana et al., v. Lomax,

SEP 08 2004

No. 04-16626

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

PREGERSON, Circuit Judge, dissenting:

Appellants, through the petition process, sought to place an initiative on the Nevada state ballot for the November 2004 General Election. The Nevada Secretary of State applied three state regulations and disqualified thousands of signatures on the petitions. As a result of the Secretary's actions, the initiative failed to garner the requisite number of signatures and will not be placed on the November 2004 ballot.

Appellants sought injunctive relief against the Secretary in district court. They challenged the three regulations referred to as the "Geographic Distribution" rule, the "Dual Affidavit" rule, and the "Deemed Registered" rule. The district court held that the first two rules were unconstitutional and enjoined their enforcement.¹ But contrary to Appellants' position, the district court held that the "Deemed Registered" rule *was* constitutional. This ruling upheld the Secretary's decision invalidating 2,039 signatures and resulted in keeping Appellants'

¹ The validity of these two rules is not an issue presently before us.

initiative off the November 2004 General Election ballot.

I dissent because I believe that the “Deemed Registered” rule violates the First and Fourteenth Amendments.

A. Nevada’s “Deemed Registered” Rule.

Under the Nevada Constitution, only registered voters may sign an initiative petition. Nev. Const. art. XIX, § 2(2).² Recognizing that many individuals may not be registered when asked to support a particular initiative, Nevada allows its citizens to sign a petition on the same day that they are “deemed to be registered to vote.” Nev. Rev. Stat. § 293.12757 (a registered Nevada voter may sign a petition “on or after the date he is deemed to be registered to vote”).

To be “deemed to be registered to vote” on a particular day, however, it is not sufficient that a citizen has filled out, signed, and dated a voter registration form. Rather, a citizen is “deemed to be registered to vote” the day that their voter registration form “is postmarked or personally delivered” to election officials. Nev. Rev. Stat. § 293.5235(5). This statutory provision is commonly referred to as the “Deemed Registered” rule.

Appellants argue that the “Deemed Registered” rule is unconstitutional

² A registered voter is defined as a person eligible to vote in Nevada “who has completed the procedure prescribed by law for registration as a voter.” Nev. Rev. Stat. § 293.090.

because it burdens “core political speech” and has the practical effect of invalidating otherwise valid petition signatures. Specifically, problems arise when citizens register to vote at the *same time* they sign an initiative petition. If the voter registration form is mailed on the date it is signed but *after* the last postal pickup, the envelope containing the voter registration form will be postmarked with the date of the post offices’ *next* business day.³

For example, suppose on Memorial Day, Monday, May 31, 2004, Appellants gathered signatures for their initiative petition and that a Nevada citizen, who is not registered to vote, wishes to sign the petition.⁴ Appellants complete a voter registration form for the citizen to sign and date and then have the citizen sign and date the initiative petition. The date written on these two documents would be May 31, 2004. Appellants would then place the completed

³ See the “Frequently Asked Questions” in the Help section of United States Postal Service website at:
http://hdusps.esecurecare.net/cgi-bin/hdusps.cfg/php/enduser/std_adp.php?p_faqid=2936&p_created=1065552465&p_sid=TaxEzPkh&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9NzUmcF9wcm9kX2x2bDE9JnBfcHJvZF9sdmwyPSZwX3BhZ2U9MyZwX3NIYXJjaF90ZXh0PXBvc3RtYXJr&p_li=

⁴ This problem also arises when voter registration forms are completed and mailed on Sundays (and postmarked on Monday, the next business day), or for forms completed and mailed on week nights (and postmarked the next business day).

voter registration form in a mailbox. Because Memorial Day is a federal holiday, the registration form would not be postmarked until June 1, 2004, the next business day. Therefore, under the “Deemed Registered” rule, the citizen would be deemed registered on June 1 – not May 31. Thus, Nevada election officials would invalidate the citizen’s signature on the initiative petition because the citizen was deemed registered on June 1, even though both the voter registration form and the petition were signed a day earlier on May 31.

Thus the “Deemed Registered” rule is used to invalidate otherwise valid petition signatures and, in the instant case, has caused Appellants’ initiative to be left off the November 2004 state ballot. Accordingly, Appellants challenge the “Deemed Registered” rule as violating the First and Fourteenth Amendments.

B. Appellants’ Initiative and Results of the Initiative Petition Process.

Appellants sought to place an initiative on the Nevada state ballot for the November 2004 General Election. To qualify for the 2004 General Election ballot, Appellants needed to gather 51,337 valid signatures on petitions in support of the initiative.⁵ As explained above, for a signature on a petition to be valid, the

⁵ To qualify for the ballot, the number of petition signatures supporting an initiative must be at least “10 percent or more of the voters who voted in the entire state at the last preceding election.” Nev. Const. art. XIX, § 2(2). During the last general election in 2002, total voter turnout was 513,370; to qualify for the 2004

signatory must be a registered voter. Many Nevada citizens who wished to sign the initiative petition were not registered to vote. For these citizens, Appellants first completed a voter registration form which the Nevada citizen would sign and date. Next, the citizen would sign and date the initiative petition. After the voter registration form and the petition were signed, Appellants would mail or personally deliver the completed registration forms to various county clerks.

By the June 15, 2004 deadline, Appellants submitted 66,135 petition signatures in support of their initiative to various county clerks. The Secretary of State applied the three rules discussed above and invalidated 31,188 of the submitted signatures, reducing the number of valid signatures to 34,947 (well below the 51,337 required).

As previously noted, the district court held that the first two rules were unconstitutional and enjoined their enforcement. The district court's ruling added 15,120 additional signatures to the 34,947, raising the total number of valid signatures to 50,067 (still 1,290 signatures short of the required number). However, because the district court held that the "Deemed Registered" rule was valid, 2,039 signatures were not counted. If counted, these 2,039 signatures would have increased Appellants' total number of signatures to 52,106 (above the

General Election ballot, an initiative petition needs 51,337 signatures.

requisite threshold of 51,337) and the initiative would have qualified for the upcoming November ballot.

C. Standard of Review.

A district court's decision to grant or deny a preliminary injunction is reviewed for abuse of discretion and the underlying merits of the case are not reviewed. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (internal citations and quotations omitted). But the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law. *Id.*

D. The “Deemed Registered” Rule Violates the First Amendment Because it Unduly Burdens “Core Political Speech.”

The Supreme Court has held that petition circulation is “core political speech” because it involves “interactive communication concerning political change.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 187 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). Furthermore, initiative petition circulators seek to promote public support for a particular issue or position and also seek ballot access. *Id.* at 190-91.

The majority's disposition incorrectly concludes that *Buckley* and *Meyer* do

not apply to the current case. According to the Majority, *Buckley* and *Meyer* only “provide protection for *persons conducting a petition drive*, not for unregistered voters seeking to change the laws of the state in which they are not registered.”

Maj. Dispo. at 3 (emphasis added). The majority’s disposition fails to understand that because of the interactive nature of petition circulation, *both Nevada’s voters and the persons conducting the petition drive* are in fact being injured. Indeed, the “Deemed Registered” rule “impedes the [Appellants’] opportunity to disseminate their views to the public.” *Meyer*, 486 U.S. at 419. Moreover,

[t]he circulation of an initiative petition of necessity involves both the *expression* of a desire for political change and a *discussion* of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its *consideration by the whole electorate*. This will in almost every case involve an *explanation* of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of *interactive communication* concerning political change that is appropriately described as “core political speech.”

Id. at 421-22 (emphasis added).

I agree with the Majority that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Buckley*, 525 U.S. at 187 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). But the “Deemed

Registered” rule is not merely a procedural regulation. If this rule is applied, the circulators “conducting the petition drive” will be restricted from collecting signatures. More important, the “type of *interactive communication* concerning political change,” *Meyer*, 486 U.S. at 421-22 (emphasis added), carried out by the circulators is reduced considerably, and their ability to disseminate their views and interact with the public is curtailed.

Under the “Deemed Registered” rule, otherwise valid signatures – for example a registration form signed and dated on a Sunday but postmarked on a Monday – would be deemed invalid. In short, because of the “Deemed Registered” rule, the circulators are thwarted from effectively engaging eligible citizens who support the initiative (but who are not yet registered to vote) during evenings, on Sundays, or holidays because the envelope containing the voter registration form will not be postmarked (or personally delivered) on the date it was signed. I believe that the rule is unconstitutional because it severely hinders the ability of Appellants and other supporters of the initiative to effectively communicate their message and have the initiative become subject to statewide discussion. As Appellants correctly point out, “[d]iscussing a proposed initiative with someone who cannot sign a petition or with someone whose signature will be nullified, is an exercise in futility not free speech.” (Appellants’ Reply Br. at 5).

In the case at hand, as in other initiative petition drives, the registration of voters and signature gathering are most successful on the weekends, holidays, and during evening hours. The problem is that many signed voter registration forms will not be postmarked or hand delivered until the following business day. The current initiative petition process is hampered because the rule invalidates many otherwise valid signatures collected during weekends, holidays, and evening hours. Or in the Supreme Court's words, "shrinks the size of the audience that can be reached," *Meyer*, 486 U.S. at 419.

In addition to the severe burden on the right of circulators to communicate their "core political speech," the "Deemed Registered" rule severely hinders Appellants' ability to collect enough signatures to even place the initiative on the ballot. *See Meyer*, 486 U.S. at 423 (restricting political expression makes it less likely that initiative proponents "will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion"). Thus, I believe that the "Deemed Registered" rule unreasonably interferes with core political speech and therefore violates the First Amendment.

E. The "Deemed Registered" Rule Violates the Equal Protection Clause of the Fourteenth Amendment Because it Discriminates Between Similarly Situated Voters.

At least three of Nevada’s seventeen counties consider citizens registered the day that their voter registration forms were signed, notwithstanding the “Deemed Registered” rule’s requirement that they be deemed registered the day that the envelope containing their registration form is postmarked or delivered to an election official. *See Nev. Rev. Stat. § 293.5235(5)*. In these three counties, the petition signature of a non-registered Nevada citizen who first completed a voter registration form and then signed an initiative petition is deemed *valid* – regardless of when the two documents are postmarked or delivered. This is in stark contrast to how Nevada’s other fourteen counties apply the “Deemed Registered” rule and is, in my opinion, an Equal Protection violation. In *Bush v. Gore*, 531 U.S. 98, 108 (2000), the Supreme Court recognized that:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.

Bush, 531 U.S. at 108.

The right to vote is inextricably tied to the right to petition. “Because the [petition signatures] are analytically like votes, and are a substitute for them, legally they must be treated as votes.” *Green v. City of Tucson*, 340 F.3d 891, 893 (9th Cir. 2003) (alteration in original) (quoting *Hussey v. City of Portland*, 64 F.3d

1260, 1265 (9th Cir. 1995). Thus, I believe that the “Deemed Registered” rule violates Appellants’ Equal Protection rights.

F. The “Deemed Registered” Rule Is Not Narrowly Tailored to Serve a Compelling State Interest.

The State claims that the “Deemed Registered” rule serves the following state interests: (1) ascertaining a date certain by which a citizen is deemed registered to vote; (2) ascertaining sufficient support for an initiative proposal; and (3) providing administrative ease. But, in my view, none of these interests are furthered by the “Deemed Registered” rule.

The first interest may be necessary to restrict someone who is not yet registered to vote from signing a petition (or to restrict someone from signing a petition first and registering to vote later). But in this case, the Nevada citizens registered to vote *and* signed the initiative petition at the same time. As to the second interest, the “Deemed Registered” rule actually *reduces* the number of signatures supporting the initiative proposal and works against the State’s interest. Eliminating otherwise valid signatures does not serve the state’s interest in ensuring that sufficient voter support exists for an initiative proposal. Even though the third interest acts as a catch-all, the application or non-application of the “Deemed Registered” rule makes no difference to the amount of work that

election officials need to perform. Nevada’s election officials must determine whether the signatures are valid regardless of the fact that an eligible voter registers to vote and signs a petition on the same day, or an already registered voter signs a petition.

The First Amendment to the United States Constitution protects speech, which, as observed in *Buckley*, includes the circulation of initiative petitions. Therefore, regulations burdening initiative petition circulation must be narrowly tailored to serve a compelling state interest. *See Buckley*, 525 U.S. at 192 n.12. As discussed above, Nevada’s “Deemed Registered” rule imposes a severe burden on “core political speech.”

Moreover, qualified voters are discriminated against on a matter of fundamental importance – voting rights. “The ballot initiative, like the election of public officials, is a ‘basic instrument of democratic government,’ and is therefore subject to equal protection guarantees.” *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1076 (9th Cir. 2003) (internal citations omitted).

I believe that there is no compelling state interest to burden the circulators’ or the voters’ “core political speech” or to justify treating qualified voters differently. Therefore, I believe that the “Deemed Registered” Rule is an unconstitutional violation of both the First and the Fourteenth Amendments.

G. Granting a Preliminary Injunction Is Appropriate.

Appellants are currently faced with the possibility of irreparable injury if the initiative petition signatures are invalidated and their initiative is not placed on the November 2004 General Election ballot. As discussed above, I believe that the “Deemed Registered” rule is unconstitutional. I also believe that Appellants have demonstrated a likelihood of success on the merits and the possibility of irreparable injury. Moreover, the balance of hardships tips sharply in Appellants’ favor. Finally, in considering the public interest, I believe that the “Deemed Registered” rule negatively affects Nevada’s initiative petitioning scheme which is intertwined with the constitutionally protected right to engage in meaningful “core political speech.”

The majority’s disposition has authorized the disqualification of otherwise valid signatures in support of a ballot initiative. The interests in protecting meaningful political discourse on weekends, evenings, and holidays; in counting otherwise valid signatures; and in promoting the initiative petitioning process outweigh the hardship to the State in placing the initiative on the ballot.⁶

⁶ Placement on the ballot does not mean that Appellants’ initiative will become law. It must first pass by a majority vote. Then, pursuant to Nevada law, the question would be resubmitted for approval on the 2006 General Election because the initiative proposes an amendment to the Nevada State Constitution.

Therefore, under either of the tests articulated in *Southwest Voter Registration Educ. Project*, 344 F.3d at 917-18, I believe the Appellants have established that injunctive relief is proper.

“The origins of the right to petition go back as far as the Magna Carta, and are by any measure central to the very notion of a democratic society.” 2 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 16.3 (2004).

I respectfully dissent.