

STATE OF MAINE
KENNEBEC, SS.

RECORDED & FILED
MAY 15 1998

SUPERIOR COURT
Docket No. AP-98-30

STEPHANIE HART and MAINERS)
FOR MEDICAL RIGHTS,)
Petitioners,)
CLERK OF COURTS
KENNEBEC COUNTY

v.)

ORDER

SECRETARY OF STATE)
DAN A. GWADOSKY,)
Respondent.)

This matter is before the Court on Petitioners' M.R. Civ. P. 80C appeal from Respondent's finding that they had failed to gather a sufficient number of valid signatures to place initiated legislation permitting the medical use of marijuana on the ballot in 1998. This appeal is brought pursuant to 21-A M.R.S.A. § 905(2).

Petitioners challenge on federal grounds the constitutionality of Maine's constitutional requirements that circulators of citizens' initiative petitions be residents and registered voters of this State. They also contend that the Secretary of State erred factually in finding five of the circulators to be nonresidents. A total of 5,380 signatures were invalidated on the basis that the circulators were not residents and/or registered voters. Of that number 4,347 signatures were invalidated either because the circulators collected signatures prior to becoming registered to vote in the State of Maine or because the circulators were not registered to vote at all in the State of Maine. The remaining 1,033 contested signatures were invalidated because the circulators were not residents of the

State of Maine. Petitioners need to regain validation of these signatures in order to have their question placed on the ballot in November 1998.

I. RESIDENCY REQUIREMENT

This Court will first consider the issue of whether Maine's residency requirement is constitutional under the free speech guarantees of the First and Fourteenth Amendments of the U.S. Constitution.

Several U.S. Supreme Court and federal court cases have dealt with issues concerning eligibility restrictions on circulators of citizens' initiative petitions. The U.S. Supreme Court has held that the communication engaged in by circulators is "core political speech," and that the importance of First Amendment protections is "at its zenith" with regard to this speech. Meyer v. Grant, 486 U.S. 414, 421, 425 (1988). Because core political speech was implicated in Meyer, the Court held that the statutory limitation on circulators in that case was subject to strict scrutiny. Id. at 420. Under a strict scrutiny analysis, this Court must determine whether or not the burden placed on Petitioners' speech is narrowly tailored to a compelling state interest.¹

¹ The constitutional analysis employed in the various cases concerning free speech challenges to restrictions on circulators and/or on election regulations appears to this Court to be inconsistent. As Petitioners have relied on cases utilizing different methods of analysis, this Court has found it difficult to discern a step-by-step process to follow and feels compelled to point out the discrepancies in the case law.

The Meyer Court did not address whether or not the extent to which a restriction burdens core political speech affects the level of scrutiny to be

In Meyer, authority heavily relied upon by Petitioners, the state of Colorado statutorily prohibited the use of paid circulators. The Court found that the prohibition limited political speech in two ways:

[f]irst it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees 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.

Id. at 422. As is the present case, Colorado also required that circulators be registered voters. Id. at 417. No separate residency requirement was mentioned. The Meyer Court never reached the issues of voter registration or residency. Thus, the holding in Meyer provides no direct guidance with regard to the residency restriction being challenged in this case and whether such a requirement for circulators is narrowly tailored to a compelling state interest.

In addition, Respondents correctly point out that Petitioners have not cited any case law which holds that a residency

applied. The Court simply stated that the limitation in that case required strict scrutiny. This Court notes that, deriving a guideline from the facts in Meyer, limiting potential circulators to volunteers by prohibiting the payment of circulators translates into a substantial limitation on the ability of proponents of a measure to find circulators.

As will be pointed out later in this opinion, other courts have first measured the burden on speech in order to determine if strict or less exacting scrutiny applies.

However, this Court would assume for purposes of comparing a residency requirement to no residency requirement as advocated by Petitioners, that the burden placed on speech by a residency requirement is at least as substantial as the burden in Meyer. Therefore, this Court will apply strict scrutiny in that it will require that Respondents prove that a compelling state interest exists.

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requirement unconstitutionally restricts protected speech. In fact, one case relied on by Petitioners strongly suggests that a residency requirement would be constitutional. American Constitutional Law Foundation v. Meyer, 120 F.3d 1092, 1100 (10th Cir. 1997) (finding that the state's interest in ensuring that circulators are residents could be more precisely achieved by imposing a residency requirement instead of a voter-registration requirement).

By definition a residency requirement restricts the number of potential circulators to the number of residents within the State. Cases which have rejected restrictions on circulators have consistently done so on the theory that the number of voices conveying the message would be limited and it would be less likely that the requisite number of signatures would be garnered. In essence, the only way a residency requirement can violate Petitioners' freedom of speech is if the potential group of circulators is the entire population of the planet. Then the number of voices conveying the message would be limited and it may be marginally less likely that the requisite number of signatures would be garnered. However, if the state has a compelling interest in limiting participation in the referendum process to residents, then obviously a residency requirement places no unconstitutional burden on speech. Thus, the issue becomes whether residency for circulators is a compelling state interest sufficient to justify the imposition of a residency requirement in a State's constitution.

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The Maine Constitution provides that, "the electors may propose to the Legislature for its consideration any bill...[and] any measure thus proposed by electors...shall be submitted to the electors." Art. 4, pt. 3, § 18. "Electors" means the electors of the State qualified to vote for governor. Id. at § 20.

"Circulator" means a person who solicits signatures for written petitions, and who must be a resident of this State and whose name must appear on the voting list of his town. Id. The Maine Constitution clearly intended to ensure that the direct initiative process was reserved for Maine residents. No other case offered by either party deals with a state's constitutionally mandated residency requirement.

Maine is not obligated to afford its citizens an initiative procedure. See Meyer, 486 U.S. at 420. Surely, by choosing to do so in our Constitution, the State is free to constitutionally limit participation in that process to its own citizens, thus "citizens' initiative." In the general area of election law the U.S. Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activit{ies} at the polls." Burdick v. Takushi, 504 U.S. 428, 119 L.Ed.2d 245, 112 S.Ct. 2059 (1992). It is incomprehensible to imagine that states can be afforded wide latitude in regulating the election of their legislators and statewide officers, but they cannot impose a constitutional requirement that participants in "citizens' initiative" procedure be citizens of the state.

The 10th Circuit American Constitutional Law Foundation case,

also relied upon heavily by Petitioners, noted that the "petition process is a ballot access vehicle, as well as an avenue for political expression." 120 F.3d at 1097. The Circuit Court further noted that to read Meyer as prohibiting any regulated access to the ballot would conflict with the general rule that states have the power to regulate their elections. As previously stated, in Meyer the potential pool of circulators was limited to Colorado residents only by virtue of having a voter-registration requirement. In American Constitutional Law Foundation, the court stated, "[e]ven if we assume the state's potentially compelling interest in preserving the integrity of its elections requires all circulators to be residents, a question we need not decide, the registration requirement is not narrowly tailored." 120 F.3d at 1100. The court acknowledged a potential compelling interest in residency based merely on Colorado's registration requirement. A much stronger argument supporting a compelling interest in residency is present in this case where a separate, constitutional, residency requirement exists.

Furthermore, the case at hand can be distinguished from Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997) (finding a voter-registration requirement was not narrowly tailored and was unconstitutional), in which the court noted, "the Nebraska Constitution gives the right to circulate petitions to the 'people,' without any limitation on whether they are registered to vote or residents of Nebraska..." The court then acknowledged, as had the court in American Const., that even assuming that

residency was a compelling interest, the registration requirement was not narrowly tailored. Id. Nebraska, unlike Maine, did not choose to limit participation to its own citizens.

Any state has a strong, often compelling, interest in preserving the integrity of its electoral system. American Const., 120 F.3d at 1099 (citing Timmons v. Twin Cities Area New Party, 117 S.Ct. 1364, 1366 (1997)). By state constitutional provision the citizens' initiative has been made an integral part of Maine's electoral system. The State's interest in preserving the integrity of its provided process of direct democracy for its own citizens is a compelling and fundamental state interest. Accordingly, this Court finds that requiring circulators to be residents of the State of Maine does not impermissibly burden Petitioners' freedom of speech.

II. VOTER-REGISTRATION REQUIREMENT

This Court must separately review the constitutional requirement that circulators be registered voters. At first glance, the case law suggests that registration requirements do, impermissibly burden the protected speech at issue. However, the fact that residency has been determined above to be a compelling state interest, and the fact that the reason for the residency requirement is to ensure that Maine residents are responsible for bringing an issue directly to the ballot, distinguish this case from others which have struck down registration requirements.

The burden the registration requirement places on Petitioners' protected speech must be determined in order to apply

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the proper level of scrutiny. In determining the validity of an election regulation, the Court in Timmons held:

[r]egulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

117 S.Ct. at 1366. This standard of review was utilized in American Const. in reviewing the registration requirement for circulators.²

Petitioners' potential group of circulators is comprised of the residents of Maine according to the findings in Section I of this opinion. In American Const., the court relied on Colorado's acknowledgment that there were at least 400,000 qualified but unregistered voters in the state. Id. at 1100. Petitioners have not argued or presented any evidence that Maine's registration requirement severely limits or burdens the number of possible circulators by demonstrating that there are a substantial number of unregistered residents. On the other hand, the State asserts that the estimated voting population in Maine is 934,105 based on the 1990 census. In November, 1996, 953,368 persons were registered to vote. The State explains that the number of registered voters exceeds the number of eligible voters because

² This standard of review which was not articulated in Meyer, yet which was employed in American Const., demonstrates the perceived analytical difficulty referred to in footnote 1. This Court recognizes that Timmons deals with an election regulation and not a restriction on circulators. However, as this standard was employed by the Tenth Circuit in this context, and as Petitioners rely on the Tenth Circuit case, this Court finds that it is an applicable guideline for an analysis of this portion of the case.

there is a delay in removing people who move or pass away from the voting rolls. [Respondent's Memorandum, p. 23]. There has been no showing that the registration requirement discriminates against a significant portion of Maine residents nor has there been any showing that the Maine voter registration requirement was an impediment to Petitioners' ability to obtain qualified circulators.

Without some showing that the number of unregistered Maine residents is substantial compared to the number of residents eligible to vote, and without some showing that Petitioners have been limited in their ability to obtain registered residents for purposes of circulating their petitions, this Court must find that the voter-registration requirement does not severely burden protected speech. In this crucial respect the record in this case significantly differs from the American Const. record. It follows that the registration requirement is a reasonable regulatory measure and passes the "less exacting" standard of scrutiny.

However, even if it is determined that strict scrutiny applies, this Court finds that the requirement is narrowly tailored to Maine's compelling interest of ensuring that circulators are residents. The evidentiary portion of this case exemplifies the difficulty of determining one's residency based on a person's intent to remain in the state indefinitely. Registering to vote in the State of Maine is a very simple and inexpensive task that can be undertaken relatively quickly in the event that an unregistered resident desires to be a circulator.

Due to the ease of registering to vote, the registration requirement does not unreasonably burden Petitioners' core political speech. As a narrowly tailored regulatory device, it provides the State with a quick and uniform procedure by which it can ascertain circulators' residence.

A registration requirement is much less prohibitive than the ban on paid circulators in Meyer.³ In addition, the arguments put forth by states advocating restrictions, in Meyer and in other federal court cases cited herein, regarding fraud and the policing of the petition process are not the compelling interests of the State in this case. Those voter registration restrictions were found not to be narrowly tailored because other methods of policing, such as criminal prosecution, were available.

The compelling interest in this case is ensuring that Maine residents will be responsible for bringing an issue to a citizens' referendum. Ensuring that a circulator is a resident is most easily accomplished by requiring that the resident be a registered voter. This Court cannot imagine how a democratic government could fashion a more narrowly tailored nor less intrusive requirement for determining residency. It ensures that, in the absence of fraud, all parties, the State, the proponents of the measure, and the potential circulators, know at the start of the

³ Contrary to Petitioners' assertion that the Court in Meyer explicitly stated that any limitation on political expression is subject to strict scrutiny, the Court actually stated that "this case," referring to the ban on paid circulators, involved a limitation subject to strict scrutiny. 486 U.S. at 420.

process that the circulators have met the residency requirement.

III. FACTUAL DETERMINATIONS OF RESIDENCY

The Law Court has recently decided a question of first impression concerning the nature of the review in an action appealing the findings of the Secretary of State relating to the validity of petitions for the direct initiative of legislation. Palesky v. Secretary of State, 1998 ME 103 (May 8, 1998). As this decision was issued subsequent to the two hearings held in this case on April 15 and 24, 1998, this Court finds that it is bound by Palesky. Accordingly, the agreement between the parties and approved by this Court under which factual determinations on residency would be issued following a hearing allowing new evidence will not control these proceedings.

Instead, Palesky requires this Court to act only in an appellate capacity. Pursuant to M.R. Civ. P. 80C(e), Id. at ¶9, this Court is allowed to take additional evidence, which occurred at a hearing held on April 24, 1998. Although petitioners did not technically comply with M.R. Civ.P. 80C(e), the agreement of the parties and the Court's initial belief that petitioners were entitled to a "trial" pursuant to 21-A M.R.S.A. § 905(2) (1993) excuses the procedural defect and allows this Court to consider the evidence for the purposes enumerated in 5 M.R.S.A. § 11006(1)(B) (1993). This Court finds that the additional evidence adduced at the hearing is material to the issues presented in the petition for review, and that it could not have been presented or was erroneously disallowed in proceedings before the agency. 5

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M.R.S.A. § 11006(1)(B).

Separate from Petitioners' request to present additional evidence, they also urge this Court to review the Secretary of State's decision based on the agency record. The Secretary of State's decision was based primarily on information received by a detective with the Investigations Division of the Department of the Attorney General, Richard Fairfield, Jr. In light of the inaccuracies in Mr. Fairfield's findings which surfaced at the evidentiary hearing,⁴ this Court does not find it necessary to reach a decision on this issue. More appropriately, this matter

⁴ The procedural predicament of the factual portion of this case evidences the extreme difficulty that determining residency without a voter registration requirement would present to the Secretary of State if the requirement was struck down. For instance, the evidence presented by Petitioners at the hearing showed the inadequateness of the investigation relied on by the Secretary of State in uncovering the circulators' ties to Maine. Testimony of circulators and family members and/or friends of circulators is often necessary to make a fair and accurate determination of whether or not an individual intended to reside in Maine. Driver's licenses are not determinative of residency, and it would be discriminatory against non-licensed residents to determine residency by such means. Likewise, a state identification card is not indicative of residency because it can be obtained by an out-of-stater for purposes of purchasing alcohol. In addition, as the testimony of Rebecca Avrett demonstrated, the place where one receives mail is not always indicative of residency as people can have mail sent to another address. Ms. Avrett had most of her important papers sent to her father's address in another state for her convenience, yet she was not residing in that state.

In the absence of a voter registration requirement, having the details of one's life investigated and/or requiring proof of this nature to prove residency could be very burdensome to residents who desire to be circulators, to proponents of a measure who are trying to ensure that their circulators are qualified, as well as to the State of Maine. Registering to vote is a very simple process with no associated costs which simply entails that the resident complete a registration card. The card requires that the registrant provide the minimum amount of personal information identified in attached Exhibit A. Petitioners cannot legitimately contend that requiring residents to register to vote places the type of restrictions on obtaining circulators that the ban on paying circulators did in Meyer.

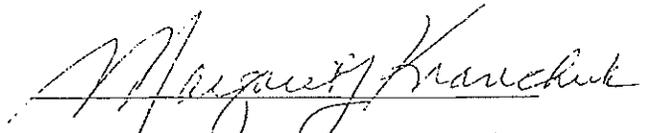
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is remanded for modifications of the Secretary of State's findings in accordance with the additional evidence presented.⁵

Based on the foregoing, entry will be:

The decision of the Secretary of State invalidating 4,347 signatures collected by unregistered voters is **AFFIRMED**. The decision of the Secretary of State invalidating 1,033 signatures because the circulators were not residents of the State of Maine is **VACATED** and the matter is remanded to the Secretary of State for further factual findings consistent with the evidence adduced at the "trial" before this Court and any additional evidence introduced in proceedings before the agency. As to the remaining counts of the complaint wherein petitioners ask this Court to declare Me. Con. Art, 4, Pt.3 § 20 unconstitutional, judgment is entered for the respondent.

Dated: Friday, May 15, 1998


Margaret J. Kravchuk, Justice
Superior Court

⁵ This Court notes that no evidence surfaced at the hearing that any of the five circulators came to Maine for the purpose of circulating petitions. Yet, Mr. Fairfield's affidavit purports this to be the case where it states that "at least five circulators had no ties to the State of Maine prior to coming to the State in order to circulate petitions in this initiative." (Fairfield Aff. ¶ 2). Where the Secretary had no evidence that the company hiring circulators encouraged these five individuals to come to Maine, and given the evidence which surfaced at the hearing regarding the individuals' ties to this State, this Court suggests that the Secretary's decision regarding residency was made without a thorough investigation.

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