

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: VICTORIA BUCKLEY, SECRETARY OF STATE OF
COLORADO Petitioner v. AMERICAN
CONSTITUTIONAL LAW FOUNDATION, INC., ET AL

CASE NO: 97-930 c. 1

PLACE: Washington, D.C.

DATE: Wednesday, October 14, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VICTORIA BUCKLEY, SECRETARY OF :

4 STATE OF COLORADO :

5 Petitioner :

6 v. : No. 97-930

7 AMERICAN CONSTITUTIONAL LAW :

8 FOUNDATION, INC., ET AL :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, October 14, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:02 a.m.

15 APPEARANCES:

16 GENERAL GALE NORTON, ESQ., Attorney General of Colorado,
17 Denver, Colorado; on behalf of the Petitioner.

18 NEIL D. O'TOOLE, ESQ., Denver, Colorado; on behalf of the
19 Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-930, Victoria Buckley v.
5 The American Constitutional Law Foundation.

6 General Norton.

7 ORAL ARGUMENT OF GALE NORTON

8 ON BEHALF OF THE PETITIONER

9 GENERAL NORTON: Mr. Chief Justice, and may it
10 please the Court:

11 Colorado views the initiative process as an
12 essential part of our law-making function. The right of
13 initiative is the first section under the Colorado
14 constitution under the heading, Legislative Department.
15 Because this is an important process to State government
16 we have established a limited structure of regulation
17 intended to safeguard the people's right to democratic
18 self-government while ensuring the fairness of our
19 election process.

20 Beyond the two viewpoints represented in the
21 courtroom today, there are two other important interests
22 that are protected through our regulatory process. The
23 first is the interest of those who may oppose an
24 initiative, and the second is the interest of the signers
25 of the petition.

1 QUESTION: May I ask just one factual question?

2 GENERAL NORTON: Yes, sir.

3 QUESTION: I understand there's a final
4 reporting requirement, a disclosure requirement, and that
5 is not challenged here.

6 GENERAL NORTON: That is correct. It is the
7 reports that deal with the monthly reporting requirement
8 as to the individual petition circulators.

9 QUESTION: Well, does the financial disclosure
10 that's made at the end, and it's not challenged, separate
11 out the amount that's paid for solicitors, so if I read
12 the report I know that they spent X dollars for TV
13 advertising and Y dollars for -- to pay circulators? Do
14 I -- can I find that out from the final report?

15 GENERAL NORTON: The final report would list all
16 of the expenditures included among the expenditures of the
17 sponsoring campaign committee --

18 QUESTION: What I'm asking, is it a lump sum, or
19 is it separated out?

20 GENERAL NORTON: It is separated out in detail.

21 QUESTION: And when is that final report due?
22 Is that before the election or after?

23 GENERAL NORTON: I'm not sure, Your Honor.

24 QUESTION: It would also show the amounts that
25 went to the individual petition circulators?

1 GENERAL NORTON: That is correct.

2 QUESTION: -- that may be filed with the
3 petition when the petition is completed? Isn't that when
4 that report gets filed? I thought the monthly reports
5 were while the petition was in circulation.

6 GENERAL NORTON: The monthly reports are while
7 it is in circulation.

8 QUESTION: But when the completed petition is
9 there, and the sponsor says, we have enough votes, at that
10 time the so-called final report would go in?

11 GENERAL NORTON: Your Honor, I'm not sure what
12 the due date is for the final report.

13 QUESTION: Is there anything in the monthly
14 disclosure statements that break it down expenditure by
15 expenditure, so if I looked at the monthly disclosure
16 statement, could I see how much was paid just for
17 circulating?

18 GENERAL NORTON: The monthly disclosure
19 statement lists the amounts that are paid to each
20 individual circulator on a person-by-person basis.

21 QUESTION: That was struck down. Has anything
22 in the monthly disclosure statement been allowed to
23 stand --

24 GENERAL NORTON: The --

25 QUESTION: -- by the district court's opinion?

1 GENERAL NORTON: What has been struck down is
2 simply the amount that applies to individual circulators.

3 QUESTION: All right. In that monthly
4 disclosure statement, so far as the statute has been
5 allowed to stand --

6 GENERAL NORTON: Yes.

7 QUESTION: -- can I see how much is paid, lump
8 sum, for circulation?

9 GENERAL NORTON: You would have to add up the
10 amount that is paid to each individual circulator.

11 QUESTION: Well, except that's been struck down.
12 Okay.

13 GENERAL NORTON: Signature-gathering serves the
14 same function as a primary election in a candidate
15 selection process. By obtaining the requisite 54,242
16 signatures, an initiative's backers establish that it has
17 a significant modicum of support.

18 QUESTION: Well, there's this difference between
19 signature-gathering in a primary election. In a primary
20 election it is not somebody trying to persuade somebody
21 else.

22 Signature-gathering may perform that function,
23 but it is, in addition, and perhaps primarily, one citizen
24 trying to persuade another citizen about the merits of a
25 particular legislature proposal.

1 GENERAL NORTON: Here, there are three functions
2 that all occur simultaneously. That is the aspect of
3 persuasiveness, as you have described. There is also a
4 role that the circulator plays of an administrative
5 function akin to an election judge, and there is also the
6 function of acting as an agent or fiduciary for the signer
7 in fulfilling responsibilities as to the signer.

8 QUESTION: Well, do -- is there any way of
9 telling from this record whether the typical petitioner
10 circulator goes door to door, or sits in a shopping mall?
11 I suppose they do both.

12 GENERAL NORTON: They may do both. The practice
13 is ordinarily to go to a shopping mall or some place where
14 there are many people gathered. The --

15 QUESTION: And so --

16 GENERAL NORTON: -- record does not specifically
17 describe that in the trial court.

18 QUESTION: What is the interest of the State
19 that you say supports the requirement that the circulators
20 have to be registered voters?

21 GENERAL NORTON: That is two-part. First of
22 all, is because they are fulfilling a law-making function,
23 we as a State should be able to say that those who are
24 fulfilling that function should be people who are
25 committed to --

1 QUESTION: In light of Meyer, I would have
2 thought the State would have a hard time asserting that
3 its interest in having them be registered voters can
4 prevail.

5 No doubt there are people in the State who are
6 not registered voters, but who nonetheless would like to
7 serve as petition circulators and debate the merits of
8 given issues.

9 GENERAL NORTON: We are happy to have people
10 debate the merits and to enter into a persuasive function.
11 It is only when they perform the administrative election
12 judge type functions of ensuring that those who are
13 signing the petition are who they say they are, that a
14 husband is not signing for a wife --

15 QUESTION: Well --

16 QUESTION: Well, why can't somebody who is a
17 resident of Colorado, who's an adult resident, perform
18 that function just as well as somebody who's a registered
19 voter? I just don't understand.

20 GENERAL NORTON: The registration requirement is
21 different from a residency requirement in that it requires
22 a person to swear an oath that they are a resident of the
23 State before they begin the circulating process. There is
24 a requirement that they do so at the end of the
25 circulating process as part of the affidavit if

1 registration and residency are separated.

2 But here, we have an assurance all the way
3 through the process that they're going to be here.

4 It ties in with the second justification for
5 that, and that is in preventing fraud. We have had the
6 problem of people who come to the State simply to
7 circulate petitions. If those people are not going to be
8 around several months later when we actually go through
9 the process of having an administrative hearing to --

10 QUESTION: Yes, but you require an affidavit at
11 the end of the day, when the petition is filed, that the
12 circulator is, in fact, a resident.

13 GENERAL NORTON: That is ordinarily our
14 process --

15 QUESTION: And you have the normal criminal laws
16 that could enforce that, so it's very difficult for me to
17 understand, in the face of Meyer, what State justification
18 you can offer for also requiring that the circulator be a
19 registered voter.

20 GENERAL NORTON: This would ensure that they are
21 a resident throughout the entire time that they are
22 circulating the petition, rather than just at the moment
23 they submit --

24 QUESTION: Why isn't that --

25 QUESTION: Isn't there something in the record

1 that suggests that it's easier to determine whether
2 someone is a registered voter than it is to determine
3 whether they're a resident?

4 GENERAL NORTON: We have specific lists of
5 registered voters. We do not have lists of people who are
6 otherwise residents. It gives us a concrete place to
7 answer that question.

8 QUESTION: Is it any part of your rationale on
9 the registered voters that if you don't want to count
10 yourself in the political community by not voting, you
11 shouldn't take part in this, or is it simply a kind of way
12 of verifying that the person is, indeed, a resident?

13 GENERAL NORTON: It is a way of verifying that a
14 person is, indeed, a resident, and that is correct, but it
15 is also -- there's also two parts. To the extent that
16 someone is playing a formal role in the process, which
17 they are doing, we would require that they be registered
18 voters in a way as part of being committed to the Colorado
19 law-making process, just as we require our legislators to
20 be committed, just as we require election judges and those
21 who participate in nominating conventions to be registered
22 voters.

23 If they want to participate in the purely
24 advocacy function, to stand next to someone who is a
25 registered voter, they are perfectly free to do that and

1 to act as advocates.

2 QUESTION: How do you get around the fact that,
3 despite the complexity of function, and I will concede to
4 you that they are performing functions in the electoral
5 process, how do you get around the fact that Meyer says
6 they're also engaging in core speech, and if they're
7 engaging in core speech, they're going to be -- your
8 restrictions are going to be judged on a very restrictive
9 standard. How do you get around Meyer in that respect?

10 GENERAL NORTON: We believe that, even under a
11 strict scrutiny analysis, that our laws would satisfy that
12 strict scrutiny.

13 QUESTION: Why is that? Let's talk about -- why
14 is it easier to prevent fraud somehow when you're dealing
15 with a resident than with a nonresident? You think
16 Coloradans are more honest than non-Coloradans?

17 (Laughter.)

18 QUESTION: Is that the rationale?

19 GENERAL NORTON: Well, we would like to think
20 so. Our rationale is being able to find people. If
21 someone is a registered voter, they have taken an oath
22 saying that they are a resident. That gives us some
23 assurance that they may be around when questions arise.

24 Someone may seek a signature. It may be 6
25 months later, at the time an administrative hearing is

1 held to inquire into questions about the validity of that
2 signature, and if those people have left the State, we
3 cannot subpoena --

4 QUESTION: Well, do you think registered voters
5 are more apt to leave the State than people who haven't
6 registered? I mean, are less apt to leave the State than
7 people who haven't registered? Is there any statistic to
8 show which ones, which segment of the population is more
9 mobile than the other?

10 GENERAL NORTON: To the extent that we are
11 dealing with the problem of -- that is described in the
12 amicus briefs of the State and Local Legal Center and of
13 the States, we are seeing the development of bands of
14 people who go from State to State simply to circulate
15 petitions, and --

16 QUESTION: And don't they have to provide you
17 with their -- you could require them to provide you with
18 their name and address so that even though they're
19 itinerant you can still -- you know, you can find who they
20 were.

21 GENERAL NORTON: We may know that they live in
22 California, but we cannot subpoena them in California and
23 we cannot prosecute them for having engaged in fraud.

24 QUESTION: Have you ever prosecuted any
25 petition-gatherer?

1 GENERAL NORTON: Yes, we have. In the record it
2 shows the 1992 cycle, in which we successfully prosecuted
3 three people for forgery. We attempted to prosecute three
4 others, but were not able to serve the warrant because
5 they had left the State.

6 QUESTION: Were these gatherers or signers?

7 GENERAL NORTON: These were gatherers.

8 QUESTION: I'll grant you it would be easier if
9 you didn't have to go to California, but I mean, if the
10 fraud is serious you can start an extradition proceeding,
11 can't you?

12 GENERAL NORTON: We were not able to, as a
13 practical matter, do that in this situation.

14 QUESTION: Well, why, because it cost too much
15 money?

16 GENERAL NORTON: It would have -- we had a
17 problem with our -- because it is a misdemeanor in some
18 situations, we would not be able to do that. In other
19 situations it was trying to serve warrants. We were not
20 able to do that.

21 QUESTION: But the only justification for the
22 registration requirement you've given us is that it's
23 easier to find their address if they're registered.
24 Right?

25 GENERAL NORTON: No. It's twofold. It's also

1 our interest as a State in having people who participate
2 in our law-making process be citizens and registered
3 voters.

4 QUESTION: Well, you can require that they be
5 residents without requiring that they be registered
6 voters.

7 GENERAL NORTON: We could have a process that
8 would require them to swear an oath saying that they --

9 QUESTION: I'm a resident, and this is my
10 address.

11 GENERAL NORTON: -- residence when they begin
12 the --

13 QUESTION: Right.

14 GENERAL NORTON: -- initiative process --

15 QUESTION: Right.

16 GENERAL NORTON: -- and then when they end.

17 QUESTION: But you also --

18 GENERAL NORTON: It's a question of timing.

19 QUESTION: You also said, I think, it was much
20 easier for the State to determine whether someone was
21 actually a registered voter or not than to determine
22 whether they're actually a resident.

23 GENERAL NORTON: That is correct.

24 QUESTION: How many of these people are we
25 talking about? How much of a burden is that on the State

1 that you save by simply going to the registration book?
2 Does the State do that, go to the registration rolls and
3 check that all these people are actually registered?

4 GENERAL NORTON: Yes, we do, Your Honor.

5 QUESTION: And how many people are you
6 talking -- how many of these election gypsies are there
7 who wander around from State to State?

8 GENERAL NORTON: There can be several hundreds
9 in any --

10 QUESTION: Several hundreds?

11 GENERAL NORTON: In any given petition there may
12 be several hundred circulators.

13 QUESTION: It's not a whole lot of people.

14 QUESTION: May I ask on candidate petitions,
15 petitions circulated in order to enable someone to run as
16 a candidate in an election, they also use petition
17 circulators.

18 GENERAL NORTON: That is correct.

19 QUESTION: Does Colorado law require that those
20 circulators be registered voters?

21 GENERAL NORTON: Yes, it does.

22 QUESTION: So presumably the same argument made
23 here today with regard to the petition circulation would
24 apply to candidate petitions as well --

25 GENERAL NORTON: That is correct.

1 QUESTION: -- if the respondents are correct.

2 GENERAL NORTON: That is correct.

3 QUESTION: Suppose that it were shown that in
4 most cases in Colorado initiatives were circulated by paid
5 solicitors who didn't really care which side they were on,
6 they were just doing it to get the pay, they'd circulate a
7 petition on either side of any issue. Suppose that were
8 the fact most of the time.

9 Would that undermine the rationale of our recent
10 opinion in Meyers? It was unanimous opinion. It was
11 recent. I doubt that we would want to revisit it.

12 I noticed in your brief that you seem to be
13 questioning the rationale that core speech does take place
14 at the init -- at the signature-gathering stage.

15 GENERAL NORTON: The Burdick approach that we
16 would urge the Court to adopt recognizes that there is
17 both core speech aspect, where there would be a severe
18 burden on that speech, potentially, and the ability of the
19 States to have a regulatory process.

20 QUESTION: Burdick was in the context of a
21 primary election, with rules about parties and so forth,
22 and the assumption of Meyers was that a core speech
23 function, a very viable speech function in the initiative
24 process takes place at the signature-gathering stage, so
25 that it's not analogous to the candidate qualifying thing,

1 and I'm asking if you think that distinction holds.

2 GENERAL NORTON: Meyer, I believe, did not
3 adequately recognize the other aspects of the process. It
4 focused on the core speech part, which was truly at issue
5 in Meyer, and did not look at the other issues of the
6 State in --

7 QUESTION: Are you saying that core speech does
8 not take place routinely in the signature-gathering
9 process, and you're denying that as an empirical matter
10 that the Court is factually wrong?

11 GENERAL NORTON: No. Core speech --

12 QUESTION: Well, you can say we're wrong if you
13 think we're wrong.

14 GENERAL NORTON: In terms of advocacy, that is
15 one part of it, but there are several transactions taking
16 place simultaneously.

17 QUESTION: How much do we actually know about
18 this, or how much did we know about it in Meyer? You
19 know, if, in fact, someone sits at a shopping center and
20 waits for people to come up to them, and they're anxious
21 to get as many signatures as they can, one would suspect
22 that there's not much debate. If someone is going to say,
23 I don't like that proposition, the petition circulator
24 just says, okay, go on. I want someone who will sign.

25 GENERAL NORTON: We believe the State and Local

1 Government Center in its brief has presented a fairly
2 accurate view of what the transaction ordinarily looks
3 like. It is an attempt to get as many people through to
4 just sign, rather than going through an extensive process
5 of explaining the petition.

6 QUESTION: Why does the State insist that the
7 circulator have to have the circulator's name on a badge,
8 as opposed to just saying, volunteer, or paid circulator?

9 GENERAL NORTON: That is to address the problem
10 that we have of trying to maintain the integrity of the
11 process as it is going along.

12 If the Secretary of State's office receives a
13 phone call that says, I saw a petition circulator paying
14 people to sign petitions, which is clearly a violation of
15 State law, we get a call that says, it was a man with
16 brown hair standing at the corner of Sixth and Broadway,
17 at that point in time, we don't have any petitions. We
18 can't look at the signature on that.

19 QUESTION: Has this been a problem? Has this --

20 GENERAL NORTON: Yes, it has, and that is
21 reflected in the record.

22 QUESTION: How often, of paying people to sign
23 petitions?

24 GENERAL NORTON: That is -- that has been a
25 problem that has been prosecuted. That is an example --

1 QUESTION: How often? How many prosecutions
2 have there been of this sort?

3 GENERAL NORTON: There have not been recent
4 prosecutions on that.

5 QUESTION: Have there been any prosecutions,
6 recent or otherwise?

7 GENERAL NORTON: I believe that there are some
8 earlier cases on that. I've not seen any in the last --

9 QUESTION: General Norton, if you have the
10 petition with the person's name on it, and you have a
11 badge that says, paid solicitor, and the sponsor's name,
12 just not that person's name, then the burden that you have
13 been informing us of is substantially reduced, is it not?

14 I mean, you know from the petition who were the
15 signers of that particular petition. The person is
16 required to identify the sponsor, and that that person is
17 paid or volunteer. Why isn't that adequate? Why do you
18 need the name in addition?

19 GENERAL NORTON: We've had an example that is
20 reflected in the record where the opponent saw a petition
21 circulator misrepresenting the contents of the petition.
22 They took pictures of the circulator, but even with those
23 pictures at a subsequent hearing we were not able to
24 identify who those individuals --

25 QUESTION: But if you knew the sponsor, if the

1 sponsor had to be identified, if you had everything that
2 you now require on the badge, why -- and you have the
3 picture, well, the sponsor knows who's been hired, don't
4 they?

5 GENERAL NORTON: Even under those circumstances
6 it is an individual violation for the circulator to engage
7 in misconduct, and the sponsor may or may not be able to
8 identify who is standing on a particular street corner, or
9 who is in a picture.

10 QUESTION: Are you this careful in registering
11 voters, as opposed to collecting petitions that would undo
12 the work of the legislature?

13 You see, I come into this with the attitude that
14 legislatures don't like these things, because they're
15 usually collected in order to do something that the
16 legislature doesn't want it to, or to undo something that
17 the legislature has done.

18 Now, has your legislature been this concerned
19 about the slightest chance of fraud with respect to, let
20 us say, registering to vote?

21 GENERAL NORTON: That is something that has been
22 largely dictated by Federal legislation in recent years
23 that has caused us to make our laws less strict.

24 QUESTION: I see. But you used to be this
25 careful before the drive-through registration laws.

1 GENERAL NORTON: We used to be more careful than
2 we currently are. You are correct that we are not able to
3 be as careful in the voter registration process.

4 QUESTION: If -- I just have one question I'd
5 like to ask, which is that if -- I assume -- I'll assume
6 for argument's sake that you're right, that there's an
7 aspect in which this petition-gatherer is like a voting
8 official who sits in a booth, so the State can regulate,
9 but that petition-gatherer is also a person who's likely
10 to try to persuade someone to sign the petition, and to
11 that extent there's speech involved, persuasive political
12 speech, so if I think there's both, what standard do I
13 apply, and which case do you look to to give me the right
14 standard?

15 In other words, I think there's a lot of speech
16 involved, but I also think it's pretty important that the
17 State can regulate its process for making laws.

18 Now -- so I think both, and so since I think
19 both, what case do I look to?

20 GENERAL NORTON: I would urge you to look at the
21 Burdick standard.

22 QUESTION: Well, Burdick was just a question of
23 write-ins, wasn't it? That was pure process, or pretty
24 pure process, so I'm still looking. I've looked in the
25 labor area, like picketing, I've looked in -- there's --

1 but I want your opinion.

2 GENERAL NORTON: I believe that the Burdick
3 standard would allow you to take into account both the
4 pure speech aspects of it, when you look --

5 QUESTION: The Burdick standard being --

6 GENERAL NORTON: Having a flexible standard such
7 that a severe burden on speech would cause a strict
8 scrutiny standard to be applied.

9 QUESTION: What about Buckley, too?

10 GENERAL NORTON: Pardon?

11 QUESTION: Buckley. Have you looked at Buckley?

12 GENERAL NORTON: Yes. Buckley --

13 QUESTION: All right. So what -- now, thinking
14 of both those cases, what standard would you articulate
15 that we should use?

16 GENERAL NORTON: Buckley is a strict scrutiny
17 case, as is Meyer v. Grant.

18 QUESTION: I thought you would say Meyer v.
19 Grant immediately, because that also involves exactly the
20 same two things that are involved here. It involved the
21 persuasive function and the --

22 QUESTION: If I thought --

23 QUESTION: -- what we call the administrative
24 function.

25 QUESTION: If I thought that Meyer was not

1 dealing with the aspect in which the petition-gatherer is
2 an arm of the State's electoral process, which the State
3 could regulate from that point of view, just as it could
4 somebody in an election booth -- you know, the person who
5 sits there -- but both are involved, what standard should
6 I use?

7 GENERAL NORTON: I would urge the Burdick
8 standard as allowing the examination of both of those
9 aspects.

10 QUESTION: Why not the Timmons, which is the
11 more recent precedent?

12 GENERAL NORTON: Timmons, in my mind, applies
13 the same standard.

14 QUESTION: For you to win do you have -- do we
15 have to somehow modify Meyer?

16 GENERAL NORTON: Meyer --

17 QUESTION: Or clarify it, or restrict it, for
18 you to win on all these points?

19 GENERAL NORTON: I believe that if strict
20 scrutiny is applied we win on all of our points
21 nevertheless. However, I think for -- from the State
22 perspective, for our ability to regulate our process and
23 understand what the rules are going to be, it would be
24 better for us, it would make more sense to apply the
25 Burdick and to --

1 QUESTION: Well, General Norton, Justice
2 O'Connor asked you a question. She said, if you are to
3 prevail here, do we have to modify or clarify Meyer, and
4 you refer to Burdick. What's your answer to her question?

5 GENERAL NORTON: No, because I believe that
6 under strict scrutiny we can prevail under the Meyer
7 standard as well.

8 QUESTION: Despite the fact that the voter
9 registration requirement and the disclosure of the name
10 seem to fly squarely in the face of what the Court said in
11 Meyer.

12 GENERAL NORTON: Strict scrutiny was the
13 standard applied in Buckley v. Valeo, as well as in other
14 cases that have upheld regulation of the electoral --

15 QUESTION: Well, I don't think strict scrutiny
16 was applied across the board in Buckley, General Norton.
17 I mean, there were several different kinds of requirements
18 there, and I would -- perhaps you've read it more recently
19 than we have. I would not have said that strict scrutiny
20 was applied across the board.

21 GENERAL NORTON: I believe that that was the
22 standard that was applied to the disclosure requirements
23 and the other aspects that are parallel to this particular
24 case.

25 QUESTION: Let me put the -- Justice O'Connor's

1 question slightly differently. If you cannot prevail
2 under strict scrutiny, then you cannot prevail unless we
3 modify Meyer. Isn't that correct?

4 GENERAL NORTON: That is correct.

5 QUESTION: If I thought that this case turned on
6 whether or not there really was meaningful speech at the
7 signature-gathering process, if I thought that was
8 determinative, where would I go to find that out? Have
9 there been things written about it, or --

10 GENERAL NORTON: There are -- there are some --

11 QUESTION: -- this record is very sparse on all
12 of these points.

13 GENERAL NORTON: The briefs have been filed by
14 the amici, including the National Voter Outreach
15 Organization, which employs petition circulators.

16 QUESTION: Excuse me. What do you mean by
17 meaningful speech? Could you define this term?

18 If I come up to you and say, vote for Smith, or
19 I have a sign that says, vote for Smith, is that
20 meaningful speech, or do I have to tell you why?

21 GENERAL NORTON: I would say, vote for Smith is
22 meaningful speech --

23 QUESTION: Core political speech, isn't it?

24 GENERAL NORTON: Sign this petition is --

25 QUESTION: Would you sign this petition?

1 GENERAL NORTON: Sign this petition is --

2 QUESTION: Is not --

3 GENERAL NORTON: -- asking people to fulfill an
4 elective function.

5 QUESTION: Sign this petition to lower taxes,
6 meaningful speech again?

7 GENERAL NORTON: Meaningful speech with a
8 combination of the electoral function.

9 QUESTION: But isn't that passed in Meyer? I
10 mean, the question there was, could you have paid
11 solicitors for initiatives, and the Court said that the
12 job that's being done, asking people to sign the thing,
13 involves core speech, so I think in light of Justice
14 Kennedy's question that the answer's got to be yes.

15 If you're going to say that no, this really
16 isn't core speech, then you have to qualify Meyer, that
17 said it is.

18 GENERAL NORTON: Then the State is left with no
19 way to ensure that those 54,000 signatures are
20 collected --

21 QUESTION: But wasn't there first a good part of
22 this that the Tenth Circuit upheld? I mean, they didn't
23 just strike down this thing wholesale, and at least as I
24 read it, it comes -- it permits the identification of the
25 sponsor, the statement whether a person is paid or

1 volunteer.

2 What it doesn't permit is the name, insistence
3 that the name go on the badge, and that the amount spent
4 not only in gross for all petition solicitors but person
5 by person, but that's -- but that's really what's at
6 stake, the name, and do you have to not only tell how much
7 you spent on solicitors altogether, but how much you paid
8 each individual? As I understand it, that's all that's at
9 stake.

10 GENERAL NORTON: That's -- that is --

11 QUESTION: And identification as a paid
12 solicitor? Wasn't that stricken out? Do they have to
13 identify themselves as paid solicitors?

14 GENERAL NORTON: The requirement that by badge
15 they identify themselves as paid solicitors was stricken
16 by the Tenth Circuit.

17 QUESTION: It was also --

18 QUESTION: Yes, but as far as I understand, they
19 were doing that in connection with a name as well. Do we
20 know from this case whether, if all that the law required
21 was, paid by X sponsor, that that -- that the Tenth
22 Circuit would have found anything wrong with that?

23 GENERAL NORTON: But the Tenth Circuit did not
24 differentiate.

25 Thank you.

1 QUESTION: Very well, General Norton.

2 Mr. O'Toole.

3 ORAL ARGUMENT OF NEIL D. O'TOOLE

4 ON BEHALF OF THE RESPONDENTS

5 MR. O'TOOLE: Mr. Chief Justice, and may it
6 please the Court:

7 What the respondents ask this Court to do is to
8 fortify and reinforce the message that was given in Meyer
9 to assure that the activity of citizens peaceably
10 gathering together to change Government under a
11 constitutional system such as we have in the State of
12 Colorado is furthered by the First Amendment.

13 QUESTION: You think it takes fortification? We
14 couldn't just apply Meyer.

15 MR. O'TOOLE: I --

16 QUESTION: You think if we just applied Meyer,
17 you lose?

18 MR. O'TOOLE: The reason we ask you -- Your
19 Honor, I would say to you that unfortunately reviewing
20 decisions from other circuits it appears that there's some
21 question about what this Court meant in Meyer. I think
22 it's clear. I don't think there's any doubt. I think the
23 test that's laid out in Meyer, that talks about the burden
24 being well-nigh insurmountable, couldn't be clearer.

25 QUESTION: Well, Meyer was different factually

1 in a way. I think you can look at Meyer as an offspring,
2 kind of, of the Buckley case, that just as you can't tell
3 someone they can't spend their own money to finance their
4 campaign, you can't tell someone that they can't hire
5 petitioners to -- hire circulators to go around and
6 circulate something.

7 But this goes beyond whether or not you can hire
8 petitioners or not, or circulators.

9 MR. O'TOOLE: Mr. Chief Justice, I beg to differ
10 with you on that issue. I think --

11 QUESTION: You think the facts of this case are
12 the same as Meyer? That's -- I'm telling you the facts
13 are different. Now, you disagree?

14 MR. O'TOOLE: I --

15 QUESTION: I'm talking about the facts.

16 MR. O'TOOLE: I'd say that the facts because of
17 facts differ, that evidence that was presented in this
18 case was not necessarily the same evidence presented in
19 Meyer. The facts described in response to Justice Kennedy
20 are very close.

21 QUESTION: But Meyer was -- as I recall was paid
22 circulators, and here we're talking about different
23 requirements. We're not talking about --

24 MR. O'TOOLE: I understand.

25 QUESTION: -- really a prohibition against paid

1 circulators.

2 MR. O'TOOLE: Excuse me, Mr. Chief Justice.
3 We're not dealing with prohibition against paid
4 circulators. We are dealing with prohibition against the
5 circulation of petitions by residents or nonresidents who
6 do not deign, for one reason or another, to become a
7 registered voter. We're dealing with their ability to be
8 engaged in the same --

9 QUESTION: I didn't think we were dealing with
10 residents versus nonresidents. I thought we were dealing
11 with a requirement that the circulator be a registered
12 voter in Colorado. Is that what we're dealing with?

13 MR. O'TOOLE: Yes --

14 QUESTION: Thank you.

15 MR. O'TOOLE: Yes, Justice O'Connor. We're
16 dealing with that issue.

17 QUESTION: Now, at the same time, I guess
18 Colorado, like other States, requires a certain number of
19 signatures from registered voters.

20 MR. O'TOOLE: That is correct.

21 QUESTION: A certain percentage, in order to
22 gain access to the ballot for a petition.

23 MR. O'TOOLE: That is correct. It's 5 per --

24 QUESTION: Now, under your theory, I guess, that
25 also inhibits speech, because it deters the filing of

1 these initiative petitions.

2 MR. O'TOOLE: Your Honor --

3 QUESTION: What if Colorado tried to increase
4 the number of signatures required?

5 MR. O'TOOLE: Your Honor, in terms of how I'm
6 addressing this issue with regard to registered
7 circulators who are aggrieved in the speech process, I do
8 believe there might be a different analysis that would
9 attend whether or not or how the State assures that it has
10 a modicum of public support for the measure so it's on the
11 ballot.

12 QUESTION: Well, does strict scrutiny apply to
13 that requirement, in your view?

14 MR. O'TOOLE: In my opinion, yes.

15 QUESTION: Mm-hmm.

16 MR. O'TOOLE: Because I believe that --

17 QUESTION: So that's the next step we'll face.

18 MR. O'TOOLE: It's possible.

19 QUESTION: Why do you say --

20 MR. O'TOOLE: -- haven't even paid for that yet
21 or volunteered yet, Your Honor.

22 QUESTION: Why do you insist on making your case
23 harder?

24 (Laughter.)

25 MR. O'TOOLE: Because I'm asked the questions.

1 QUESTION: It seems to me it's quite a different
2 issue how many votes you need to get. That doesn't
3 involve core political speech. We're talking about
4 persuading people to sign, as opposed to how many people
5 need to sign, and you think the two questions have to be
6 equated.

7 MR. O'TOOLE: Oh, I -- no, Your Honor, I don't.
8 I was asked a question by the -- by Justice O'Connor, and
9 I felt, in light of the Court's --

10 QUESTION: That is very different. I would
11 think one goes to the procedure involved in making this
12 change, and the other goes to the question of one citizen
13 trying to get another one to sign up or to support a
14 particular proposition. You don't see a fundamental
15 difference between those two?

16 MR. O'TOOLE: I was asked that question. I'm
17 giving you an answer. My answer is no, but for purposes
18 of this case, that other issue is not before us. We are
19 dealing with core political speech, Justice Scalia, and I
20 believe that the process is adequately delineated in
21 footnote 4 of the Meyer decision.

22 QUESTION: But let me ask you --

23 QUESTION: What about the requirement in most
24 States that there's certain qualifications for circulating
25 nominating petitions. There's the person who goes door-

1 to-door, and you have to have so many signatures to get on
2 the ballot. Now, is that circulator engaging in core
3 political speech, in your view?

4 MR. O'TOOLE: Not to the same extent, because
5 he's proceeding with -- I think this Court has
6 consistently drawn a distinction between ballot
7 initiative, where there's a discussion of issues and a
8 discussion of candidates.

9 QUESTION: Well --

10 MR. O'TOOLE: But of course they are engaging --

11 QUESTION: You know -- so the person in the
12 shopping center collecting signatures says, vote for this
13 antitax referendum. The person coming to the door with a
14 signature sheet for nominations says, will you sign this
15 nominating petition for Joe Blow? Those are pretty much
16 the same, aren't they?

17 MR. O'TOOLE: Well, the State's interest
18 differs, because under the State -- in the State of
19 Colorado, Chief Justice, we have a situation where the
20 people reserve to themselves the right to petition or
21 circulate a citizen's initiative and, in fact, the State's
22 involvement does not occur until that petition itself is
23 submitted to the Secretary of State for approval of the
24 measure in terms of being placed on the ballot.

25 QUESTION: But I thought people reserved to

1 themselves the right to decide what candidates will get
2 enough signatures to have their names go on the ballot.
3 They reserve that to themselves. Why isn't that core
4 political speech?

5 MR. O'TOOLE: The cases on candidacy in my
6 review of them, and it may not have been as scholarly a
7 review as might be required under the circumstances, but I
8 will say to you that this discussion is not over a crowded
9 ballot. This is not over a question of who can be on the
10 ballot -- this candidacy is not a right -- but is over the
11 actions of people who gather --

12 QUESTION: Well, let's analyze the thing without
13 necess -- without any --

14 MR. O'TOOLE: Certainly.

15 QUESTION: -- more on a factual basis.

16 What is the difference factually in terms of
17 core political speech between a person who comes to the
18 door with a nominating petition and says, will you please
19 sign this nominating commission for Joe Blow -- petition,
20 and the person who sits in the shopping center and says,
21 will you please sign this referendum for antitax?

22 MR. O'TOOLE: Because the State -- Chief
23 Justice, the State's interest in curtailing debate and
24 consideration and discussion is significantly less in the
25 former than in the latter.

1 In the citizen's petition we have a system which
2 guarantees discussion and debate. We have a core
3 discussion of a political issue. The State has no power
4 to determine what issues --

5 QUESTION: Mr. O'Toole, may I ask you a factual
6 question about a --

7 MR. O'TOOLE: Yes, Justice.

8 QUESTION: -- Colorado law?

9 MR. O'TOOLE: Yes, Justice.

10 QUESTION: The provision being challenged here,
11 such as a requirement to wear a badge --

12 MR. O'TOOLE: Yes.

13 QUESTION: -- do they apply to candidate
14 solicitation? I mean, solicitation of signatures for a
15 candidate, and to get a candidate's name on the ballot?

16 MR. O'TOOLE: As a factual question it may, but
17 it doesn't. The --

18 QUESTION: What do you mean, it may but it
19 doesn't? Either it does or it doesn't.

20 MR. O'TOOLE: No, I'm sorry, you said it may.

21 QUESTION: No, no, no. I said, as a matter --
22 I'm asking you what the Colorado law is.

23 MR. O'TOOLE: In fact, it does not apply to
24 recall or candidate petition, the badge requirement, or
25 the paid circulator badge requirement, or the paid

1 circulator reporting requirements do not apply to either
2 the --

3 QUESTION: So the issue --

4 MR. O'TOOLE: -- candidate's petition or the
5 recall petition.

6 QUESTION: So if we uphold this -- the judgment
7 that we're reviewing, that will have no impact one way or
8 another on any existing Colorado law applying to the
9 solicitation of names to put a candidate's name on the
10 ballot.

11 MR. O'TOOLE: That's correct.

12 QUESTION: Could I ask --

13 QUESTION: It's hard to see that there's a
14 compelling State interest in having this information if
15 the State doesn't require it for these other matters,
16 isn't it?

17 MR. O'TOOLE: I -- we fail to see a compelling
18 State interest in --

19 QUESTION: But is it possible --

20 MR. O'TOOLE: -- in -- sorry.

21 QUESTION: -- that -- the compelling State
22 interest --

23 MR. O'TOOLE: Excuse me.

24 QUESTION: -- I take it that's being advanced is
25 that they're afraid that petition gatherers who are paid

1 will say to people in shopping centers, I'll give you a
2 dollar if you sign the petition. I'll give you 50 cents
3 if you sign the petition. That's at least what they're
4 saying, and it's not implausible.

5 Now, if that's a legitimate interest, and it
6 sounds like one, but I agree with you that this is
7 unconstitutional, would I also have to hold
8 unconstitutional an effort by a State to say, we want
9 disclosed how much money you give to a candidate?

10 In other words, I'm quite concerned about
11 deciding for you in this case and then finding the
12 campaign finance issue before me in another case and
13 suddenly, lo and behold, I've decided that issue here.

14 MR. O'TOOLE: The answer is no, Justice.

15 QUESTION: Why not?

16 MR. O'TOOLE: And the reason is that the State
17 interest in avoiding the possibility or view of corruption
18 simply isn't present in a balloting issue.

19 QUESTION: Mr. O'Toole --

20 QUESTION: No, I said what their issue -- what
21 their justification is, is that we're afraid that Arco or
22 some big company, and maybe it's not true in Colorado, but
23 it's certainly true in California, that very often large
24 companies want measures on the ballot, and they'll pay
25 people to gather signatures.

1 And what they're worried about, I take it, in
2 Colorado is a paid petition gatherer will say, I'll pay
3 you 50 cents if you write your name down, which I take it
4 is illegal, and they want a ready method to see if that's
5 happened, and this is their ready method, and that
6 justification's --

7 QUESTION: Mr. O'Toole, may I just intervene at
8 that point, because they're -- we're talking as though
9 there were no measures in California, and I think it ought
10 to be taken out of this case that how much the sponsor
11 paid must indeed be disclosed, and the Tenth Circuit
12 upheld that final report without any ifs, ands, or buts,
13 so the sponsor must tell how much it is paying to get this
14 measure on the ballot.

15 MR. O'TOOLE: That is correct, how much has been
16 expended, Justice Ginsburg.

17 QUESTION: In addition, there must be the name
18 of the collector of signatures on each one of these
19 petition collection sheets that he hands the --

20 MR. O'TOOLE: On every individual petition
21 section, the name of the circulator appears.

22 QUESTION: And that would be plus the sponsor,
23 so we're not talking about a void of information. We're
24 talking about Colorado has some information requirement
25 which the Tenth Circuit has upheld. The question is,

1 isn't Colorado entitled, despite First Amendment concerns,
2 to more than that?

3 MR. O'TOOLE: Our answer is no. We believe that
4 the process that is employed by the State of Colorado is
5 intended to do one thing, and that is to hinder the
6 process of collecting signatures and for individuals to
7 engage in political speech.

8 QUESTION: Well, in a sense any regulations may
9 hinder the process. Probably the least hindering would be
10 no regulation at all, but you don't contend that the State
11 can't regulate it at all.

12 MR. O'TOOLE: Chief -- Chief Justice, of course
13 they can regulate it, and they do. They have criminal
14 sanctions for the violation of the act. They have
15 extensive criminal --

16 QUESTION: But I'm trying to get this -- this is
17 what I'm thinking. Suppose I think in this case that
18 their justification is trying to catch petition gatherers
19 who will pay for signatures.

20 Now -- and I agree with you, suppose I agree
21 with you that despite that justification this is
22 unconstitutional. Then, in the next case, someone says,
23 remember that case you just decided? Now, the State here
24 is requiring various kinds of disclosure of contributions
25 to candidates or other forms of finance disclosure.

1 At that point you want to say, that's totally
2 different, and I all I want you is to explain why.

3 MR. O'TOOLE: What is sought in Colorado,
4 Justice, is a prophylactic measure to assist the
5 efficiency of the State at the cost of the First
6 Amendment.

7 Now, efficiency never does take a back seat, and
8 in this particular case the efficiency of identifying
9 these individuals with a badge -- and, by the way, this
10 goes to volunteer as well as non, or paid circulators, and
11 certain reporting requirements only go to paid circulators
12 but not to voluntary circulators. Those requirements
13 essentially chill the process involved in core political
14 speech which is described --

15 QUESTION: I thought you had no objection to
16 applying to your situation what Justice Breyer is worried
17 about applying to contributors. You have no objection --

18 MR. O'TOOLE: I have no objection to that

19 QUESTION: -- to disclosing --

20 MR. O'TOOLE: None.

21 QUESTION: -- who the circulators are and that
22 they're paid and how much money is paid, and all of that
23 is, indeed, disclosed, isn't it?

24 MR. O'TOOLE: Your Honor, it is disclosed on the
25 petition.

1 QUESTION: So what Justice Breyer should be
2 asking you is, what if we required contributors to
3 candidates to go around wearing a button that says,
4 contributor to candidate? That's the parallel, isn't it?

5 QUESTION: I know you're going to say yes, and I
6 know what --

7 (Laughter.)

8 QUESTION: Perhaps what I should be asking.

9 MR. O'TOOLE: I'm glad you know that.

10 QUESTION: Now -- maybe what I should be asking,
11 but what I actually am asking, is --

12 MR. O'TOOLE: Thank you, Justice Scalia.

13 QUESTION: Is why you made that concession? I'm
14 trying to get in my mind what the reason is that
15 distinguishes between those two things. I'm looking for
16 the rationale.

17 MR. O'TOOLE: Your Honor, in fact, as we tried
18 this case, and as we presented in our complaint, we did
19 not make that concession, and in fact we challenged the
20 affidavit requirement because we believed there were more
21 or less restrictive means in which to gather the ensuring
22 of a modicum of State support was there. However --

23 QUESTION: Well, that I don't understand based
24 on Buckley, because if -- let's just make it with a
25 volunteer contributor. If I am required to disclose how

1 much money I give, why isn't it equally constitutional for
2 me to say I didn't have the money but I gave personal
3 services instead? Why shouldn't the public know who is
4 contributing to this candidate, and some may contribute
5 money, and some may contribute personal services?

6 MR. O'TOOLE: The public does know, in Colorado,
7 who has contributed to a citizens' initiative. That is
8 reported. Contributions are not at stake here. What
9 we're talking about are reporting requirements for
10 individuals who are engaged in this very specific area of
11 protected speech with their names, their addresses, their
12 business addresses, and they are reported while --

13 QUESTION: But I thought you just said you
14 objected to the whole thing, including the report --

15 MR. O'TOOLE: No.

16 QUESTION: -- that the sponsor has to file,
17 which as I understand it says, I am the sponsor of the
18 initiative, here it is ready to go on the ballot, I spent
19 X amount for paid solicitation.

20 MR. O'TOOLE: In fact, Justice Ginsburg, I
21 apologize if I gave you that impression. We did oppose
22 the affidavit requirement because we thought it identified
23 individuals too closely with contentious issues.

24 We did not challenge the expenditure reporting
25 requirements as found under the Campaign Act. We never

1 challenged that, but we did challenge those parts of the
2 statute which singled out paid circulators, identified
3 them with issues, allowed them to be subjected to
4 potential --

5 QUESTION: But you're not appealing that here.

6 MR. O'TOOLE: That's correct, Your Honor.

7 QUESTION: So for present purposes --

8 MR. O'TOOLE: That's correct.

9 QUESTION: -- why don't you be magnanimous and
10 say, we accept all of that? You don't even mind having
11 the individual circulators identified in the affidavit
12 that's filed at the end, right?

13 MR. O'TOOLE: At this juncture, it is certainly
14 more than adequate information to allow the State to
15 proceed with any interest they have. The mention of fraud
16 is a talismanic incantation in these cases, and the long
17 and the short of it is, we don't see it.

18 QUESTION: Would you --

19 MR. O'TOOLE: Yes, Justice --

20 QUESTION: -- think it constitutional to require
21 in bold face type on the front, as a cover sheet for any
22 initiative that a voter signs, the statement, this
23 init -- this petition is being circulated by a paid
24 circulator, or an unpaid circulator, as the case may be?
25 Would you object to that?

1 MR. O'TOOLE: Yes, I would, and it would be the
2 same objection that we have to the badge, Justice Kennedy,
3 and the reason I'd object to it is that the protection
4 that's accorded to somebody that's paid in this sacred
5 area of political discussion is the same, and there is no
6 reason -- there are three -- I think we have -- you know,
7 basically this disclosure says that we have the -- forces
8 the individual to fear -- I mean, or have the risk of fear
9 of Government reprisal --

10 QUESTION: Now --

11 MR. O'TOOLE: All right. I'm sorry.

12 QUESTION: It seems to me that this promotes
13 free speech rather than retards it. It gives the voter
14 who's considering signing the petition added information.
15 Does it --

16 MR. O'TOOLE: It does not promote free speech of
17 the individual seeking to speech -- to speak. It --
18 Justice Kennedy, I believe it may promote some interest in
19 giving more information to the recipient of that speech,
20 which it is our opinion is not the purpose of the First
21 Amendment.

22 QUESTION: What's the evil that follows from my
23 hypothetical, because you know what's next, because I'm
24 going to say, well, what's wrong with, say, a badge --
25 forget the badge.

1 MR. O'TOOLE: Forget the badge.

2 QUESTION: Let's say that it's right on the
3 affidavit. This petition is being circulated by a paid or
4 unpaid volunteer.

5 MR. O'TOOLE: It is our position that that
6 prophylactic -- whatever -- for whatever -- first off, is
7 there a reason for that? Is the reason --

8 QUESTION: Oh, the State says this gives
9 information to the voter that the voter would need.

10 MR. O'TOOLE: That's not a compelling State
11 interest that overcomes the right of the individual to
12 participate in anonymous speech. That's my answer to
13 that.

14 QUESTION: It's not anonymous. You don't have
15 to give your name. All you have to say is whether you're
16 paid or not paid. You're still anonymous.

17 MR. O'TOOLE: That individual does not have to
18 speak. It's compelled speech. That individual is being
19 compelled to speak.

20 QUESTION: Well, but you allow it on the
21 disclosure report.

22 MR. O'TOOLE: Ah. Well, in the disclosure
23 report what is allowed is a generalized reporting that
24 says expenditures were made to National Voter Outreach.
25 Now -- or whatever paid circulation is taking place.

1 Remember, we still haven't gotten to the registered
2 circulators in a -- by the way, there is no empirical
3 evidence that it turns out that registered voters are less
4 likely to --

5 QUESTION: Could you --

6 MR. O'TOOLE: -- commit fraud than --

7 QUESTION: Could you require a statement on a
8 candidate petition that says at the top, circulated by
9 someone who expects a job --

10 (Laughter.)

11 QUESTION: -- from this candidate if he is
12 elected? Could you require that statement? That's very
13 important information for the voter to know.

14 MR. O'TOOLE: It certainly would be --

15 QUESTION: Why not require that?

16 MR. O'TOOLE: Could you require that. I -- Your
17 Honor --

18 QUESTION: That's a tough one.

19 MR. O'TOOLE: You could require that. If you
20 require that, that's what's going to be done.

21 But the answer to that I'd say is, to the extent
22 that it creates an impediment to discussion and compels
23 speech, which the speaker has a right to determine and
24 select, it is the nature of his conversation.

25 QUESTION: Then why do -- why can you then --

1 why could you then compel a company to state in the
2 newspaper that it is contributed \$1,000 to Joe Jones,
3 who's a candidate, in the form of promising to give him an
4 employment contract as soon as he's finished. I take it
5 you could compel the latter, or can you?

6 MR. O'TOOLE: I would say --

7 QUESTION: Then why couldn't you? How do you
8 reconcile those?

9 MR. O'TOOLE: You're -- the part of the speech
10 that you're compelling is not the contribution. You're
11 compelling the reason. You're compelling the inherent
12 basis of the conversation --

13 QUESTION: I suppose another --

14 MR. O'TOOLE: -- and the political purpose.

15 QUESTION: I suppose another answer to my
16 question is, if it's important to the voter, you can ask,
17 are you been paid or not. If the voter thinks it's
18 important --

19 MR. O'TOOLE: They can ask.

20 In terms of the process, Justice Kennedy, you
21 asked about that. I direct your attention to footnote 4
22 in the Meyer brief. Also there is adequate -- there is
23 discussion in the transcript of the -- of how the process
24 works, and it involves going door to door on occasion, but
25 also going to the malls.

1 QUESTION: Mr. O'Toole, may I ask you another
2 question about the state of the record? The State -- one
3 of the important State interests here is to catch the
4 people who are bribing people to sign petitions, and
5 there's sort of a presumption that paid circulators may do
6 that rather often.

7 Does the record contain any evidence indicating
8 how -- what percentage of paid circulators engage in this
9 kind of conduct and what percentage don't? I mean,
10 normally we presume people are innocent until they're
11 proved guilty, but here there's kind of a presumption that
12 paid circulators are guilty of this recurring crime.

13 MR. O'TOOLE: Justice Stevens --

14 QUESTION: Does the evidence support that?

15 MR. O'TOOLE: Justice Stevens, we argued in the
16 brief we think the evidence --

17 QUESTION: No, I'm not asking what you argued in
18 the brief.

19 MR. O'TOOLE: I'm sorry.

20 QUESTION: I'm asking you what's in the -- what
21 evidence was adduced in the trial court, and what
22 findings, if any, were made?

23 MR. O'TOOLE: The evidence is more indirect than
24 direct. The evidence substantiates that in 1992 there
25 were 12 -- 1,200,000 signatures submitted. The State

1 detected approximately 2,000 of those signatures obtained
2 by fraud. That's a fifth of a percent, or less than a
3 fifth percent. That is the evidence of fraud, and that
4 is --

5 QUESTION: Does that indicate how many people
6 were responsible for those fraudulent signatures?

7 MR. O'TOOLE: Looked like 15 -- 9 to 15. I
8 think they got three convictions.

9 They did have a -- and that's part of the
10 appellee's supplemental appendix, where they had a hearing
11 before the Secretary of State to determine whether certain
12 acts had violated 1-40-130, which is the criminal
13 execution statutes in the petition, and they were not able
14 to find any evidence of fraudulent dissemination of
15 information, and --

16 QUESTION: But does the evidence show how many
17 of those who did perpetrate fraud were paid and how many
18 were unpaid?

19 MR. O'TOOLE: The only evidence is that 9 to 15
20 individuals who were paid circulators may have engaged in
21 fraud, 3 of whom got convicted of forgery. What they
22 actually did, they violated the -- they made it a class 4
23 felony. They used -- they wrote in the identity of
24 individuals. The Secretary of State, who had the power to
25 check every signature --

1 QUESTION: They forged names, I guess --

2 MR. O'TOOLE: That's --

3 QUESTION: -- rather than writing in the
4 identity of individuals.

5 MR. O'TOOLE: They forged names. I mean, they
6 forged signatures, names, they went through a telephone
7 book.

8 QUESTION: Well, then you're saying there was
9 evidence that they had committed fraud.

10 MR. O'TOOLE: Absolutely.

11 QUESTION: Okay. Now, what evidence was there
12 that unpaid solicitors had committed comparable fraud?

13 MR. O'TOOLE: None.

14 QUESTION: Okay.

15 QUESTION: And is there any evidence in any
16 other State -- I mean, this occurred in a State which had
17 these requirements which they're trying to defend. Is
18 there any evidence from States that don't have these
19 requirements --

20 MR. O'TOOLE: There was evidence that in the
21 State of Washington, and that's a higher quantum of
22 signatures needed to show a modicum of support, that there
23 was likewise approximately 1,500 signatures.

24 It turned out in that particular case factually,
25 and it's part of the amicus brief from the States, that

1 the proponents, who are the first to worry about fraud and
2 being tainted with fraud, found that there had been fraud
3 by circulators, that they had been defrauded, and had
4 therefore turned that in.

5 There's evidence also in this case that in one
6 such incident the proponent had paid somebody
7 approximately for 6,000 more signatures than they actually
8 got, and they thought they defrauded --

9 QUESTION: Do these circulators get -- they get
10 paid by the name, is that --

11 MR. O'TOOLE: They get paid by the --

12 QUESTION: So when they forge a name they are
13 cheating not just the State, they're cheating the person
14 who hired them.

15 MR. O'TOOLE: Absolutely.

16 QUESTION: So I assume he would have an interest
17 in preventing their fraud as well.

18 MR. O'TOOLE: And in fact when I -- I was
19 involved in the Worker's Choice of Care Amendment. We set
20 up very stringent guidelines to check every single
21 signature.

22 QUESTION: Whatever you did, does the State of
23 Colorado have any laws that are aimed at the sponsor, the
24 one who pays, as distinguished from the person who
25 receives the payment?

1 MR. O'TOOLE: Well, to the extent that a sponsor
2 involves himself or herself in fraud, they are likewise
3 going to be -- could likewise be penalty -- penalized --

4 QUESTION: But there's no kind of respondeat
5 superior liability.

6 MR. O'TOOLE: No. As far as I -- no, there is
7 not a respondeat superior liability. I'm aware of no
8 instances in which the proponent has been charged and
9 convicted where -- in the absence of any overt act on the
10 proponent's part to -- or permit the fraud, or encourage
11 the fraud.

12 QUESTION: The -- what the sponsor must
13 disclose, in addition to the total amount spent on paid
14 petitions, do they -- they have to break that down into
15 the per-signature amount?

16 MR. O'TOOLE: No, they -- no, they don't. They
17 give a -- in the reporting requirement which was not
18 struck down, and which is not before this Court, they give
19 a general reporting of expenditures, the amount, and in
20 this particular instance the amount paid to circulate
21 petitions, there'll be another line item, the amount it
22 cost to buy petitions and have them --

23 QUESTION: But do you know the number of -- I
24 suppose if you knew the number of paid petitioners, and
25 you knew the total amount paid to them, you could figure

1 out the per-petition --

2 MR. O'TOOLE: You could if there was a breakdown
3 that the Secretary did, but they don't.

4 QUESTION: I thought there was a breakdown. I
5 asked that question earlier.

6 MR. O'TOOLE: I'm sorry.

7 QUESTION: I thought it did identify how much
8 was paid to each petition circulator, did it not?

9 MR. O'TOOLE: Your Honor, if you ask that
10 question of me --

11 QUESTION: No --

12 MR. O'TOOLE: -- I will tell you that the
13 reporting requirement as I understand it is an
14 expenditure, and it's a global expenditure requirement.

15 The requirement that was struck down was one
16 which required the distinct reporting of paid circulator's
17 names, addresses, and identifying information.

18 QUESTION: The monthly -- the monthly one was --

19 MR. O'TOOLE: Monthly, exactly right, whereas at
20 the end, the evidence, or the record of the paid
21 circulators is really no different from the record of non,
22 or voluntary circulators. What happens is, the petitions
23 get turned in. Those petitions contain the name of the
24 individual who circulated the petition.

25 QUESTION: Right.

1 MR. O'TOOLE: That information is what the
2 Secretary of State uses to first determine --

3 QUESTION: What is stated about the
4 expenditures, so much -- I expended so much for
5 television --

6 MR. O'TOOLE: So --

7 QUESTION: So much for radio --

8 MR. O'TOOLE: I paid J&J Printing Company \$5,000
9 to print my petition.

10 QUESTION: Okay.

11 MR. O'TOOLE: This is --

12 QUESTION: You have to show who the money was
13 paid to.

14 MR. O'TOOLE: That's correct.

15 QUESTION: But if it's paid to circulators,
16 don't you have to show the circulator and how much money
17 was paid to each circulator?

18 MR. O'TOOLE: It has been applied as a general
19 reporting requirement, where in 1992 we indicated we
20 paid -- I forget, whatever. I think it was \$40,000 to
21 National Voter Outreach for circulation of petitioners
22 without identifying line by line the identity of the --

23 QUESTION: I see. You pay the national company
24 that hires these circulators, is that it?

25 MR. O'TOOLE: Correct.

1 QUESTION: So you only have to show what company
2 you paid it to, and these are employees of that company.

3 MR. O'TOOLE: Employees -- they -- they're paid
4 on a per-signature basis under our law in the State of
5 Colorado. They'd be independent contractors. The answer
6 to that question is --

7 QUESTION: How soon before the election is that
8 final disclosure statement made? I'm over here.

9 MR. O'TOOLE: Oh, I'm sorry, Justice --

10 QUESTION: Or is it made after the election?

11 MR. O'TOOLE: The disclosure is made when the
12 petitions are filed with the Secretary of State.

13 QUESTION: The same day?

14 MR. O'TOOLE: The same day. There are further
15 disclosures that take place just prior to the election.

16 QUESTION: But this disclosure, this global
17 disclosure, with the lump sum amount paid for circulation,
18 is filed at the time the petitions are filed?

19 MR. O'TOOLE: That is correct.

20 QUESTION: The further disclosures near to the
21 time of the election are not before us.

22 MR. O'TOOLE: It's near the time of the
23 election, and I --

24 QUESTION: No, but is it -- is any issue about
25 those disclosures --

1 MR. O'TOOLE: No, Your Honor, there is not. The
2 only issue in that disclosure is the requirement that
3 while the petition is being circulated, while that
4 contentious issue is before the public, these individuals,
5 who by virtue of the sole fact that they are paid, have to
6 be identified.

7 Thank you, Mr. Chief Justice.

8 QUESTION: Thank you, Mr. O'Toole.

9 General Gale, you have 1 minute remaining.

10 REBUTTAL ARGUMENT OF GALE NORTON

11 ON BEHALF OF THE RESPONDENTS

12 GENERAL NORTON: May it please the Court, in
13 clarification to Justice Kennedy's question, the monthly
14 report was stricken by the Tenth Circuit in its entirety.
15 The final report was stricken to the extent it requires
16 individualized reporting regarding the circulators.

17 Mr. O'Toole is correct that the final report is
18 submitted at the time that the petition itself is
19 submitted. There are examples of both of those reports in
20 the joint appendix at pages 41 and 45.

21 The State has an interest in preventing fraud
22 and misconduct while a petition is being circulated, not
23 simply bribery, but also a husband signing for a wife,
24 something as commonplace as that. We have the
25 responsibility to the --

1 QUESTION: Well, the State doesn't care about
2 this, these things with candidate petitions?

3 GENERAL NORTON: Certainly the State does care
4 about these things.

5 QUESTION: But it doesn't have these
6 requirements.

7 GENERAL NORTON: It has some of these
8 requirements as --

9 QUESTION: Not the badge and the paid versus the
10 unpaid and the requirements we're talking about here.

11 GENERAL NORTON: That is correct. It does have
12 the registration requirement, but not the others.

13 The badge requirement fulfills the function of
14 providing information to the signer. That person is
15 essentially relying on the circulator as a fiduciary. The
16 person can -- the voter can only sign a petition once.
17 Once they have signed a petition, they cannot sign that
18 same petition again, and so once they have given over
19 their signature to that person, they have given them a
20 trust responsibility.

21 CHIEF JUSTICE REHNQUIST: Thank you, General
22 Norton.

23 GENERAL NORTON: Thank you.

24 CHIEF JUSTICE REHNQUIST: The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1 above-entitled matter was submitted.)
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

VICTORIA BUCKLEY, SECRETARY OF STATE OF COLORADO Petitioner v.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL
CASE NO: 97-930

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Federico

(REPORTER)