

The Honorable Betsey Bayless
Arizona Secretary of State

April 13, 1999
N^o 199-010 (R99-011)

Question Presented

In light of the recent United States Supreme Court decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636 (1999), you have asked (i) whether the Arizona Secretary of State has the duty or authority to modify the circulator affidavit on initiative petition forms required by Arizona Revised Statutes Annotated ("A.R.S.") § 19-112; (ii) if so, what changes should the Secretary of State make to the forms; and (iii) if not, whether the Secretary of State may nevertheless accept initiative petitions that the circulators themselves amended to try to comply with *Buckley*?

Summary Answer

The Secretary of State has neither the duty nor the authority to modify the circulator affidavit on petition forms required by A.R.S. § 19-112. Nevertheless, the Secretary of State should accept petitions altered by the circulators, but only if the changes are limited to removing the words "2. Circulator must be a qualified elector of this state" (from the Instructions for Circulator) and "qualified elector" (from the affidavit on petitions). In addition, the Secretary of State's Office should advise individuals who request petitions that the Office will accept petitions with the changes described above.

Background

In *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S.Ct. 636 (1999), the United States Supreme Court held that a Colorado statute that required that initiative petition circulators be registered to vote violated the First Amendment. The Colorado statute provided: "No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a *registered elector* and at least eighteen years of age at the time the section is circulated." Colo. Rev. Stat. § 1-40-112(1)(1998) (emphasis added). Arizona has a similar statute: "No . . . person other than a qualified elector shall circulate an initiative or referendum petition and all signatures verified by any such person shall be void and shall not be counted in determining the legal sufficiency of the petition." A.R.S. § 19-114(A).⁽¹⁾

Colorado law also required that the initiative petition be attached to a signed, notarized, and dated affidavit of the registered elector who circulated the petition "that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors" Colo. Rev. Stat. § 1-40-111(2)(1998). Similarly, Arizona law requires that petition forms contain the circulator's affidavit avowing that he or she is a qualified elector. A.R.S. § 19-112(D).

In evaluating the statutory mandate that circulators be registered voters, the Court noted that because petition circulation involves interactive communication about political change it is "core political speech." *Buckley*, 119 S.Ct. at 639-40 (citing *Meyer v. Grant*, 486 U.S. 414, 422-25 (1988)). As a result, First Amendment protection is "at its zenith." *Id.* Moreover, although

the Court recognized the States' authority to regulate their elections to ensure that they are "fair and honest," *Buckley*, 119 S.Ct. at 640 (quoting *Storer v. Brown*, 415 U.S. 724, 731 (1974)), it determined that a State's legitimate interest in policing violations could be achieved by means other than requiring petition circulators to be registered voters.⁽²⁾ *Buckley*, 119 S.Ct. at 644. As a consequence, the Court struck down Colorado's voter registration requirements for initiative petition circulators as unconstitutional, concluding that it was not narrowly tailored to advance a compelling interest. *Id.*

Analysis

A. The Secretary of State Has Neither the Duty Nor the Authority to Change the Wording of the Circulator's Affidavit.

The *Buckley* case presents a dilemma for the Secretary of State.⁽³⁾ Like the Colorado law held unconstitutional in *Buckley*, Arizona law requires that petition circulators be registered to vote. A.R.S. § 19-114. Although no court has considered the constitutionality of the Arizona statute, it is indistinguishable from the Colorado statute evaluated in *Buckley* and would likely fail to satisfy constitutional standards if challenged. In light of the apparent invalidity of the Arizona statute, you have asked whether you should amend the wording of the circulator's affidavit to comply with *Buckley*.

The powers and duties of the Secretary of State are prescribed by the Arizona Constitution and statutes. Ariz. Const. art. V §§ 1(C) and 9; *see also* A.R.S. §§ 41-121 (general powers of secretary of state); 16-142 (Secretary of State's responsibilities under National Voter Registration Act of 1993); and 16-151 (Secretary of State's duty to distribute voter registration forms). Neither the constitution nor the Secretary of State's enabling legislation authorizes her to amend, correct, or alter forms whose substance is specified in statute, as is the affidavit form required of initiative petition circulators. A.R.S. § 19-112(D). Only the Legislature has the power to amend statutory provisions. *See Murphy v. Board of Med. Examiners*, 190 Ariz. 441, 447-448, 949 P.2d 530, 536-537 (App. 1997) (citing *Coleman v. Industrial Comm'n*, 14 Ariz. App. 573, 575, 485 P.2d 296, 298 (1971)) (courts leave to the Legislature the consideration of consequences flowing from statutory standards and the resolution of policy conflicts). Despite the apparent unconstitutionality of the Arizona statute, neither the constitution nor the Secretary of State's enabling legislation empowers the Secretary of State to alter the circulator's affidavit. Accordingly, the Secretary of State should continue to use the affidavit language mandated by A.R.S. § 19-112 on petition forms until (and unless) the statute is revised to comply with *Buckley*.⁽⁴⁾

An answer to your second questions is unnecessary because the Secretary of State is without the duty or the power to amend the circulator affidavit on initiative petition forms required by A.R.S. § 19-112(D).

B. The Secretary of State Should Accept Initiative Petitions That Are Amended to Remove "2. Circulator Must Be a Qualified Elector of This State" (From the Instructions for Circulator), and "Qualified Elector" (from the Affidavit).

Your final question concerns how your Office should handle petitions circulated by unregistered voters. Currently, Arizona law requires that those petitions be disqualified and the signatures on those petitions not be counted. See A.R.S. §§ 19-121 through -121.02⁽⁵⁾ Such a result, however, would conflict with *Buckley*.

It is basic to our republican form of government that when a State's statute conflicts with the Federal Constitution, the State statute is invalid and cannot be enforced. U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding"); accord *McCulloch v. Maryland*, 17 U.S. 316, 399-400 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (state law that conflicts with federal law is "without effect"); see also Ariz. Const. art. 2, § 3 ("The Constitution of the United States is the supreme law of the land"). Thus, the U.S. Supreme Court's decision in *Buckley* controls, notwithstanding the State statute to the contrary. Based upon the Supremacy Clause, the Secretary of State may not continue to enforce the current statutory requirement that petition circulators be registered voters. Accordingly, if the Secretary of State is presented with petitions that circulators amend to remove the instruction that reads "2. Circulator must be a qualified elector of this state," and the avowal from the affidavit that the circulator is a "qualified elector," the Secretary of State should accept those petitions, notwithstanding Arizona law to the contrary.

Similarly, any consequences that would otherwise flow from failing to comply strictly with the requirement of petitions being circulated by registered voters should not be enforced. For example, after petitions are circulated, signed, and filed with the Secretary of State, the petitions are presumed to be valid and in compliance with the constitutional and statutory requirements. *Kromko v. Superior Court* 168 Ariz. 51, 58, 811 P.2d 12, 19 (1991). The presumption of validity of the signatures is destroyed if there is either not strict compliance with the legal standards for filing referendum petitions or not substantial compliance with the law for filing initiative petitions. *Id.*; see also *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991). It would be unreasonable to advise a state officer to ignore an unconstitutional statute, while simultaneously requiring petition filers to comply with the unconstitutional statute or lose the presumption that the signatures gathered are valid. *Cf. Arizona Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233, 928 P.2d 653, 657 (App. 1996) (laws must be given sensible construction that accomplishes legislative intent and which avoids absurd results).

The prudent course of action is for the Secretary of State's Office to follow *Buckley* and accept petitions amended to remove references that the circulator be a qualified elector until (and unless) the Legislature adopts corrective legislation. To the extent that a citizen seeks a writ of mandamus to force the Secretary of State to disqualify otherwise valid signatures because a petition was circulated by an unregistered voter, such an action should fail.⁽⁶⁾ "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Board*

of *Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973). Mandamus "does not lie if the public officer is not specifically required by law to perform the act." *Id.* Additionally, a public officer cannot be required to enforce an unconstitutional law. *See* Ariz. Att'y Gen. Op. I95-014; *cf. State ex rel. Woods v. Block*, 189 Ariz. 269, 278, 942 P.2d 428, 437 (1997) (a state agency was prohibited from exercising its purported powers because it was created by an unconstitutional statute). Conversely, if the Secretary of State attempted to disqualify petitions solely because they were circulated by unregistered voters, an aggrieved party would be entitled to injunctive relief preventing the Secretary of State from disqualifying those signatures. *Kerby v. Griffin*, 48 Ariz. 434, 62 P.2d 1131 (1936) (courts have authority to issue injunctions for failure to comply with initiative and referendum statutes). In view of *Buckley* and the legal consequences that derive from its application to Arizona law, you should accept initiative petitions that are amended to remove the references to "qualified elector" in the instructions for circulator and the affidavit.

Conclusion

The Secretary of State has neither the duty nor authority to modify the circulator affidavit on petition forms required by A.R.S. § 19-112(D) until corrective legislation is enacted to comply with *Buckley*. The Secretary of State nevertheless should accept petitions that remove the words "2. Circulator must be a qualified elector of this state" (from the Instructions for Circulator) and "qualified elector" (from the affidavit on petitions).

¹ A "qualified elector" is a person who is qualified to register to vote and is properly registered to vote. A.R.S. §§ 16-101 and -121. Although *Buckley* addressed the circulation of initiative petitions, its reasoning affects the circulation of referendum, nomination, and recall petitions, as well. *See, e.g.*, A.R.S. §§ 19-112 (signatures and verifications), -121.01 (removal of petition and ineligible signatures), -121.04 (disposition of petitions), -205 (signatures and verification), -205.02 (prohibition on circulating petitions), -212 (nomination petition), 16-315 (instructions for circulators), and -321 (signing and qualifying nomination petition).

² In reviewing challenges to state election laws, the Court applies a flexible standard of review depending on the severity of the restriction imposed. The Court recently described the standard of review for election cases as follows:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens [on plaintiffs' rights] 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. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)(citations omitted).

³ Actually, the same dilemma exists for county and local election officials in Arizona, and the analysis in this Opinion would apply to them as well when they perform their duties relating to election petitions. *See* A.R.S. §§ 19-141, -215.

⁴ House Bill 2656, which is presently before the Legislature, contains proposed legislative amendments to the statutes referenced herein.

⁵ Under A.R.S. § 19-121.01(A)(1)(d), within fifteen business days of filing initiative or referendum petitions with the Secretary of State, the Secretary must remove petition sheets with incomplete or unsigned affidavits. The signatures on those sheets are not counted toward the number necessary to place the measure on the ballot. *Id.* From a random sample of signatures chosen by the Secretary of State, the appropriate county recorder verifies the voter registration of the signors and disqualifies circulators who are not registered voters. A.R.S. § 19-121.02(A)(10). If the circulator is disqualified, then all signatures obtained by that circulator are disqualified in the county recorder's certification sent to the Secretary of State. A.R.S. § 19-121.02(B).

⁶ Likewise, if the Secretary of State ignores Arizona law and accepts the affidavit of a person who is not a qualified elector, any action to enjoin the certification and placement of the measure on the ballot (as required by A.R.S. § 19-122(C)) should also fail based on the *Buckley* opinion and the Constitution's supremacy clause.

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